

**American Cyanamid Company and Elwood G. Edgar, James E. Gray, Brocklyn L. Collins, Gary R. Scadden, Randall Ray Atkinson, and Robert L. Burner.** Cases 9-CA-11592-1, 9-CA-11592-2, 9-CA-11592-3, 9-CA-11592-4, 9-CA-11592-5, and 9-CA-11592-6

October 15, 1979

## DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS  
AND PENELLO

On June 29, 1979, Administrative Law Judge Ivar H. Peterson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.<sup>1</sup>

The Board has recently reviewed and articulated its standard for determining when a broad no-strike clause in a collective-bargaining agreement constitutes a waiver of the protected right of employees to engage in sympathy strikes. *International Union of Operating Engineers, Local Union 18, AFL-CIO (Davis-McKee, Inc.)*, 238 NLRB 652 (1978). There we held that to find such a waiver, which under time-honored precedent must be clear and unequivocal, there must be, in the absence of an express inclusion of sympathy strikes within the no-strike clause, evidence at least "that the parties . . . have discussed the question."<sup>2</sup> To effect a waiver, such discussion must amount to "unequivocal bargaining history evidencing an intent to waive the right to engage in sympathy strikes."<sup>3</sup> See also *Daniel Construction Company, Inc.*, 239 NLRB 1335 (1979). Unlike the Administrative Law Judge, we find in the record before us convincing evidence of a waiver.

The International Union of Operating Engineers, Local 589, represents Respondent's power department employees at its Willow Island, West Virginia, plant. Its predecessor, Local 682 of the Operating Engineers, became the bargaining representative of

those employees in 1950. Negotiations for a first collective-bargaining agreement were held in that year.<sup>4</sup> Respondent then had a collective-bargaining agreement with the International Chemical Workers Union, which represented its production and maintenance employees and which had conducted a strike in 1948. The proposed collective-bargaining agreement between Respondent and the Operating Engineers had a different expiration date than the Chemical Workers agreement. The parties discussed the possibility of another strike by the Chemical Workers during the life of the Operating Engineers agreement, and whether the employees represented by the Operating Engineers would work during such a strike. The negotiators for the Operating Engineers stated unequivocally that their members would cross a Chemical Workers picket line and go to work.<sup>5</sup> At the conclusion of these negotiations, the following provisions were incorporated into the 1950 agreement between Respondent and the Operating Engineers. To the extent these provisions are quoted below they are identical with the corresponding provisions of the parties' 1975 agreement, which are the subject of the instant dispute:

### ARTICLE X<sup>6</sup>

#### GRIEVANCE PROCEDURE

Should differences arise between the Company and the employee or group of employees over any provision of the Agreement, or should any differences or local trouble of any kind arise in the plant, there shall be no suspension or slow down of operations on the part of any employee or group of employees, but an honest effort shall be made by both parties to settle such differences. . . . [through a grievance and arbitration procedure set forth thereafter.]

\* \* \* \* \*

### ARTICLE XXII<sup>7</sup>

#### Strikes and Lockouts

The Union agrees that during the term of this Agreement, it will not condone, sanction, or au-

<sup>1</sup> Respondent has requested oral argument. This request is hereby denied because the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

<sup>2</sup> *Id.* at 653.

<sup>3</sup> *Id.* at 1338.

<sup>4</sup> Our findings as to the pertinent bargaining history are based on undisputed documentary evidence and the uncontradicted testimony of Respondent's witnesses, Leach and Wagner, except where otherwise noted.

<sup>5</sup> It is noted that this discussion occurred 27 years prior to the hearing in this case. But witness Leach refreshed his recollection by talking to a member of the 1950 Operating Engineers negotiating committee about a week before the hearing. Leach named him and testified that both of them had the same recollection of this discussion.

<sup>6</sup> Art. IX in 1975 agreement.

<sup>7</sup> Art. XXI in 1975 agreement.

thorize strikes, walkouts, sitdowns, or slowdowns or other interferences with the plant operations

The Union further agrees that if an unauthorized strike occurs, the local and International Union officials will immediately meet with the Company and take appropriate action to end the strike, including, but not limited to, public renunciation of the strike, and instructions to employees to return to work. The Union further agrees that in the event of a strike, in violation of this Agreement, the Company may take disciplinary action against those workers who take part in the strike.

The Company on its part agrees that there shall be no lockout of the Union or its members during the life of this Agreement.

During the course of bargaining between Respondent and the Operating Engineers for subsequent contracts, the subject of the power department employees' obligation to work during a strike by the production and maintenance employees arose repeatedly. Respondent consistently told the Operating Engineers negotiators that their members were expected to work and the Union's negotiators consistently agreed that they would. The International Chemical Workers Union, which formerly represented the production and maintenance employees, subsequently merged with the Oil, Chemical and Atomic Workers Union (OCAW). In 1973 Respondent expected a strike by OCAW. During negotiations with the Operating Engineers, Respondent reasserted its position that the existing agreement required the power department employees to cross an OCAW picket line and go to work. The Operating Engineers negotiators responded that they interpreted the contract the same way and that they would live up to it.<sup>8</sup>

<sup>8</sup> The testimony of Respondent's witnesses Leach and Wagner on these matters was unequivocal. General Counsel's witness, James Gray, whose testimony the Administrative Law Judge noted without comment, testified that although the question was discussed, the Union never acquiesced in a waiver of sympathy strike activity. Gray had been a member of the Union's negotiating committee for many years. However, he did not specify the extent of his participation in negotiations over this long period of years. Moreover, he was so suggestible a witness as to make his testimony on this point internally inconsistent and nonprobative with regard to the crucial details of these discussions. When Gray was asked by counsel for the General Counsel whether he helped negotiate the no-strike clause, he answered affirmatively. When it was pointed out on cross-examination that the no-strike clause was in the contract before Gray was ever employed by Respondent, he readily agreed that he had been mistaken. He testified as follows regarding the later negotiating sessions that were the subject of Leach's and Wagner's testimony:

Q. (By counsel for the General Counsel) Now, during negotiating sessions that you attended involving contracts between the Local Union 589 of the Engineers, when you were talking about the no-strike provi-

The Operating Engineers 1975 contract with Respondent expired on May 15, 1977. Negotiations for a new contract began on April 19, 1977. On May 9 the OCAW contract expired and that union went on strike and set up a picket line. On the morning of May 10 the employees in the Operating Engineers unit approached the OCAW picket line at the main highway entrance to the plant. After some confusion as to whether they would be allowed to proceed, they walked past the picket line and approximately 400 feet into the plant premises to a gatehouse, where they signed in. Then they left and went home. The same evening, the Operating Engineers business manager, Norman Mahnke, informed the employees that their refusal to work during the OCAW strike was in violation of their still-existing contract.<sup>9</sup> Nevertheless, on May 11 the unit employees repeated their exercise of signing in and leaving.

On the afternoon of May 11 the Operating Engineers and Respondent held a negotiating meeting. Mahnke was the union spokesman.<sup>10</sup> Respondent asserted its position that the employees were required to work for the duration of the contract. Mahnke stated that Respondent's position was correct and that he had so informed the employees. He told Respondent's negotiators, however, that the employees were not on strike or honoring OCAW's picket line, but that they were afraid to go to work for fear of bodily injury.<sup>11</sup>

On May 12 and 13 the employees continued to sign in at the gatehouse and then leave. Another negotiat-

sions in the agreement, did you ever take the position that no-strike language included a sympathy strike?

A. I feel sure it did. It was discussed.

Q. It was discussed.

A. Back years ago.

Q. Years ago. But the union never agreed to it, did they?

A. No, sir.

On cross-examination, Gray was questioned about the 1973 negotiations in which the parties discussed the possibility of a sympathy strike. Gray testified:

A. And the committee took a vote on it at that time, on whether there would be a sympathy, what our action would be, if there would be a sympathy on this. No.

Q. And this was no. No, what?

A. They wouldn't recognize their line at that time.

Q. You voted you would live up to the contract and go to work, isn't that correct?

A. That's right.

Gray also testified that the subject arose a number of times in the context of agreements to extend the contract, and that the Union consistently assured Respondent it would live up to the extended contract and work through an OCAW strike.

<sup>9</sup> Apparently, Mahnke had given the same message to Union Steward Gary Scadden on May 9, before the OCAW strike began. Scadden was in the group of employees who signed in and left on May 10 and is one of the Charging Parties herein.

<sup>10</sup> Mahnke, although the principal negotiator during these events, was not called as a witness and was not shown to have been unavailable even though he was subpoenaed by the General Counsel. It appears that the General Counsel excused him from appearing.

<sup>11</sup> The Administrative Law Judge characterized the evidence regarding Mahnke as the testimony of Respondent's witness, Wagner. However, the General Counsel's witnesses substantially corroborated this testimony, and the evidence we rely on is undisputed.

ing session was held on May 13. All of the individual Charging Parties herein were present as members of the Union's negotiating committee. The parties discussed substantive provisions for a new contract, and discussion of the employees' refusal to work proceeded in a fashion similar to the May 11 meeting. A negotiator for Respondent asked employee Robert Burner, a member of the Union's negotiating committee and a Charging Party herein, why, since the employees had experienced no trouble in crossing the picket line to get to the gatehouse, they did not go to work. Burner said he was afraid. Respondent again asked the union committee whether the employees were on strike, and they answered that they were not. On May 14, however, the employees again signed in at the gatehouse and left.

At midnight on May 14 the 1975 contract expired and the Operating Engineers formally went on strike. On July 7, while the strike continued, Respondent notified the six negotiating committeemen who had attended the May 13 meeting, but who had continued to refuse to work, that they were discharged. Their terminations, effective May 10, were for engaging in an illegal strike in violation of the 1975 contract. On July 19 the strike was settled. As part of the strike settlement the discharges were changed to 30-day suspensions.<sup>12</sup>

#### Discussion and Conclusions

In the usual case in which the Board has been confronted, in recent years, with the issue of the intended scope of a no-strike clause, we have had little in the record to guide us but the text of the contract. There has been room for argument as to whether the language evinced a clear and unequivocal waiver of the statutory right to engage in a sympathy strike. But the very fact that interpretation of a contract had spawned litigation which reached the Board for decision was some indication that its meaning was not entirely free from doubt. In the absence of probative extrinsic evidence of the parties' intention, of course, the Board has had to do the best it could with the bare contractual language, viewed in light of the statutory setting in which such agreements were reached. In a case where the parties' actual intention can be gleaned, however, that intention must be given its rightful place as the primary guide to interpreting doubtful language.<sup>13</sup> Here we have such a case.

<sup>12</sup> Although all of the affected committeemen except Robert Burner signed the settlement agreement as representatives of the Union, the parties agreed orally that they would retain the right to file Board charges as individuals, which they did.

<sup>13</sup> Whatever differences there may be between a collective-bargaining agreement and an "ordinary" contract, the fundamental principle of construing it according to the intention of the parties is equally applicable to both. See generally, Summers, "Collective Agreements and the Law of Contracts," 78 Yale L.J. 525, 549-550, 556-562 (1969).

That the parties discussed the eventuality of a sympathy strike during the negotiations leading to their first contract is undisputed. The Union expressly represented that it had no intention of honoring a picket line of the production and maintenance employees. Such a representation may not constitute, in itself, an intention to waive the right, but it is instructive as background to the provisions to which the parties agreed.

Turning to the provisions themselves, they do not fall neatly within the pattern presented in recent cases. For the Board's decisions have usually been premised on a finding that the no-strike provision was linked to the grievance-arbitration provisions and therefore covered only strikes over disputes subject to the grievance-arbitration machinery. See *International Union of Operating Engineers, Local 18, AFL-CIO (Davis-McKee, Inc.)*, supra at pp. 653-655; *Gary-Hobart Water Corporation*, 210 NLRB 742, 745-746 (1974), enfd. 511 F.2d 284 (7th Cir. 1975), cert. denied 423 U.S. 925. Here such a finding is not easily made. The grievance procedure, set forth in one article of the agreement, contains its own prohibition of work stoppages over "any differences or local trouble of any kind aris[ing] in the plant," in favor of use of the grievance-arbitration procedure.<sup>14</sup> A separate article of the agreement, entitled "Strikes and Lockouts," contains its own, even broader, no-strike provisions. The two articles are not contiguous. Following the second set of no-strike provisions is the representation that: "The Company on its part agrees that there shall be no lockout of the Union or its members during the life of this Agreement." The structure of the contract therefore suggests that, unlike the usual case, here the broad no-strike provisions in the "Strikes and Lockouts" article were not the *quid pro* for Respondent's agreement to arbitrate disputes, but were an independent undertaking by the Union in return for Respondent's no-lockout pledge. Subsequent bargaining history regarding sympathy strikes lends support to this view.

Thus, Respondent repeatedly reminded the Operating Engineers negotiators of the power department employees' obligation to work during a strike by the production and maintenance employees. The Operating Engineers never questioned this obligation. Since it is undisputed that the subject was discussed a number of times and that the Operating Engineers consistently told Respondent that the employees would

<sup>14</sup> A similar provision was found in *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 375-376 (1974), to be broad enough to encompass a dispute over safety. Indeed, Respondent presented evidence here to the effect that the no-strike provision in the grievance article was intended to make disputes over interpretations of the separate no-strike, no-lockout article subject to the grievance procedure. In light of our disposition of the case we need not pursue the implications of that contention.

cross a picket line, it would be surprising if the Operating Engineers had any doubt of their *obligation* to do so and yet did not once indicate that they were reserving the right to do otherwise. Indeed, at least in 1973, they affirmatively accepted Respondent's interpretation.

Coming to the 1977 OCAW strike, we agree with the Administrative Law Judge that Business Manager Mahnke's advice to the power department employees that their refusal to work violated the contract was insufficient, in itself, to constitute a waiver on behalf of the Charging Parties. But Mahnke was the responsible union official most closely connected with this event. The position he took with respect to the no-strike provisions was unequivocal and was stated not only to the employees but as the official union position in response to Respondent's contention that the employees were engaging in an unlawful work stoppage. We need not decide whether Mahnke's conduct, in these circumstances, amounted to a waiver. Clearly it is entitled to some weight in determining whether or not there was a waiver. *The Hearst Corporation, News American Division*, 161 NLRB 1405, 1416-17 (1966), *enfd. sub nom. The News Union of Baltimore v. N.L.R.B.*, 393 F.2d 673 (D.C. Cir. 1968). Compare *Keller-Crescent Company, a Division of Mosler*, 217 NLRB 685, 690 (1975), enforcement denied 538 F.2d 1291 (7th Cir. 1976); *Kellogg Company*, 189 NLRB 948 (1971). Mahnke's position was taken, moreover, in the presence of the Charging Parties, none of whom questioned his interpretation of the contract. The Charging Parties also acquiesced in Mahnke's explanation to Respondent that the employees were not engaged in a sympathy strike and were not honoring OCAW's picket line, but were refraining from work solely for reasons for personal safety. While this explanation does not necessarily preclude a finding, under Board law, that they were sympathy strikers (*G & P Trucking Company, Inc.*, 216 NLRB 620, 624 (1975), enforcement denied 539 F.2d 705 (4th Cir. 1976)), it harmonizes with a belief that an avowed sympathy strike would violate the contract.

The ultimate question, of course, is whether the parties had a clear understanding when they entered into the 1975 contract that it barred sympathy strikes. We think the bargaining history establishes such an understanding and that the parties' conduct at the time of the Charging Parties' refusal to work is further evidence of a consistent mutual understanding that the no-strike provisions were intended to cover sympathy strikes. In short, the overall history of the parties' conduct with respect to the no-strike provisions points unequivocally to a conscious waiver of the right to engage in sympathy strikes during the

contract period.<sup>15</sup> The conduct of the Charging Parties was, therefore, unprotected, and the discipline they received for this conduct did not violate the Act. Accordingly, we will dismiss the complaint.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER PENELLO, concurring:

I agree with my colleagues that Respondent lawfully disciplined the Charging Parties for engaging in an unprotected work stoppage in breach of the no-strike clause of the governing collective-bargaining agreement. In so doing, however, I rely on my separate opinion in *International Union of Operating Engineers, Local Union 18, AFL-CIO (Davis-McKee, Inc.)*,<sup>16</sup> in which I stated that unrestricted no-strike clauses in labor contracts, such as that involved here, should be read to forbid sympathy strikes as well as direct strikes, unless extrinsic evidence should indicate that the parties intended otherwise. In this case, the substantial amount of extrinsic evidence referred to by my colleagues is entirely consistent with the terms of the no-strike provision. Therefore, it is more than obvious that the contract waived the statutory right of the Charging Parties to participate in a sympathy strike.

<sup>15</sup> Certain evidence credited by the Administrative Law Judge suggests the possibility that Respondent condoned the Charging Parties' violation of the contract. Any such inference is negated, however, by undisputed evidence that during the May 11 and 13 negotiating sessions Respondent made it clear that it did not excuse the employees' refusal to work, and that signing in at the gatehouse did not satisfy their obligation.

<sup>16</sup> 238 NLRB 652 (1978); see also my dissenting opinion in *Daniel Construction Company, Inc.*, 239 NLRB 1335 (1979).

## DECISION

### STATEMENT OF THE CASE

IVAR H. PETERSON, Administrative Law Judge: The hearing in this case was held on November 14 and 15, 1977, in Parkersburg, West Virginia, upon the complaint issued by the Regional Director for Region 9 on September 12, which in turn was based upon charges filed on July 26 by each of the individuals<sup>1</sup> named in the caption against American Cyanamid Company, herein called Respondent. Briefly stated, the complaint alleged that on July 7, 1977, Respondent suspended the Charging Parties and at all times thereafter until on or about August 19 failed and refused to reinstate them to their former positions of employment. The complaint alleged that by the foregoing conduct Respondent

<sup>1</sup> Edgar signed a withdrawal request and, at the opening of the hearing, stated he did wish to withdraw. Counsel for the General Counsel's motion to amend the complaint was granted.

discriminated in regard to the hire and tenure of employment of its employees for the reason that they were members or sympathizers of Operating Engineers Local 589, herein called the Operating Engineers, and/or engaged in activities on its behalf by engaging in a sympathy strike in support of a lawful strike of the Oil, Chemical and Atomic Workers Union, Local 3-499, AFL-CIO, herein called OCAW, a labor organization within the meaning of Section 2(5) of the Act. In its answer, dated September 19, Respondent admitted certain jurisdictional allegations of the complaint but denied that it had engaged in any unfair labor practices.

Upon the entire record in the case, including my observation of the witnesses as they testified and a consideration of the briefs filed with me by both counsel, on or about February 1, I make the following:

## FINDINGS OF FACT

### I. JURISDICTION

Respondent, a Maine corporation, is engaged in the manufacture and wholesale distribution of chemical and other products at various facilities located in several States of the United States, including its Willow Island, West Virginia, facility, the only location involved in this proceeding. It is admitted and I find that Respondent, during the 12 months preceding issuance of the complaint, sold goods valued in excess of \$50,000 and caused these goods to be shipped directly from its Willow Island facility to customers located outside the State of West Virginia. I find that Respondent is an employer as defined in Section 2(2) of the Act and is engaged in commerce and operations affecting commerce as defined in Section 2(6) and (7) of the Act. I further find that at all material times the Operating Engineers and OCAW were labor organizations within the meaning of Section 2(5) of the Act, and that G. E. Mercer, Respondent's Superintendent of Industrial Relations, was an agent of Respondent acting in its behalf as a supervisor as defined in Section 2(11) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES

Mercer, who had occupied his position for the past 12 years, and had held other positions for 18 years prior thereto, testified that Respondent signed its last contract with OCAW on July 20, 1977, and had had contractual relations with that union since approximately 1952. He further related that Respondent had a contract with the Operating Engineers which was executed on May 14, 1975, effective through May 15, 1977, and had signed its first agreement with the Operating Engineers about 1950. Mercer testified that on May 9, 1977, OCAW went on strike and began picketing promptly. Negotiations between the Operating Engineers and Respondent began April 19 and concluded in August. Shortly before OCAW set up a picket line Mercer learned that that union was going on strike, and testified that he had given instructions to supervisors, including W.C. Epperly, Superintendent of the Power and Effluent Department, to be in the plant and be prepared to stay and work. There were approximately 500 employees in

OCAW's unit and, when the strike began, about 22 in the Operating Engineers unit. On the morning of May 10 Mercer observed about six members of the Operating Engineers going down to Respondent's gatehouse from the main highway. He stated there were approximately six or eight in the group. He had given no instructions allowing any employees to come to the gatehouse, but he said that it was "all right with me if they reported to work." He further testified that he saw the men going toward the gatehouse and that conditions were "relatively peaceful." Although there was a little confusion the first morning by reason of the fact that there was a rather large group at the entrance to the plant and some state police were there, he stated that as far as he knew anyone who wanted to get into the plant got in. Respondent had the plant security officer and guards on duty, but Mercer testified that he did not know what they were to do to the members of the Operating Engineers. Asked whether he expected the members of that union to come to work, Mercer stated that there was no question that they could come through the gate if they wished to and that Respondent had told the guards the night before to allow anyone in who wanted to come to work. He further testified that he expected members of OCAW to report to work and that Respondent had people available to report for work to replace anyone who did not appear, including members of the Operating Engineers.

After OCAW went on strike, Respondent, on May 10, obtained an injunction against it. The Operating Engineers refused to cross OCAW's picket line on May 11 and were absent from work from May 10-15, the expiration date of their contract, when they went on strike.

Francis Sellars, a boiler operator who had worked for Respondent for 15 years, credibly testified that on the morning of May 10, prior to 8 o'clock, he and several other members of the Operating Engineers were on their way to work; they were stopped by the state police when they reached the picket line and instructed to return to the side of the road away from the plant. Later, Sellars reached Epperly by telephone and was told that the men were to sign in at the gatehouse at the beginning of their shift. Sellars asked Epperly if he had to sign in each day, and Epperly replied that it was only necessary to sign in on days he was scheduled to work. Sellars advised the employees with him, and throughout the strike the Operating Engineers followed instructions they had received from Epperly. Sellars testified that he had talked to Epperly on May 9, the day before the strike, in the power department. They discussed the upcoming strike, and Sellars asked Epperly what they were supposed to do. Epperly replied that he and the other engineers should report to the gate. Sellars stated he had some concern about crossing the other union's picket line and having trouble. Sellars was asked on cross-examination why he did not work on May 10 and he replied that he had "made up my mind I would not cross the other union's picket line," and repeated that statement later.

In a memorandum dated May 12, 1977, directed to Epperly and signed by 13 members of the Operating Engineers at the gatehouse, instructions were given by Epperly to the effect that the employees who reported at the gatehouse were told to go home. Sellars testified that Epperly stated that the employees were concerned that if they had

to cross the OCAW picket line they might suffer bodily injury, and Epperly replied that he did not want the employees to endanger themselves in any way by crossing the picket line.

In a letter dated July 7 Mercer, Respondent's superintendent of industrial relations, advised employees that "effective May 10, 1977, your employment with American Cyanamid Company has been terminated for engaging in an illegal strike, walk-out and interference with operations in violation of the Working Agreement" between Respondent and the Union. Thereafter, the Union and Respondent worked out an agreement when the new contract was signed and the discharges were changed to 30-day suspensions beginning July 19, 1977. The strike ended on July 20.

James Gray, who had been a member of the Operating Engineers for many years and had helped negotiate the no-strike provisions in the agreement, testified that on May 10, when he reported to the gatehouse, a telephone call was made to Superintendent Epperly. Gray related that in a discussion with Epperly on May 9, to the effect that it appeared there was going to be a strike, Epperly stated he did not want any of the employees hurt and that the members of the Operating Engineers could report to the gatehouse and that they did not have to cross the picket line. Indeed, he recalled that Epperly told them that he did not want any trouble at the picket line and to just come to the gate, report, and go home. Gray further testified that the no-strike provision in the contract had been carried over from year to year and that there never had been a discussion to the effect that it would apply to a sympathy strike.

Gary Scadden, a union steward, testified that it was the position of the Union that the engineers were not going to work due to the picket line of OCAW and told Respondent that if that union removed the pickets, the engineers would work. James Van Dyke, an International representative of the Operating Engineers, testified that he was familiar with the contract between Respondent and the Operating Engineers which expired on May 14. He further related that the Operating Engineers did not work because of the picket line established by OCAW and that the no-strike provision in the contract did not apply to sympathy strikes.

Superintendent Epperly testified that some time on May 9 he and Gray talked about the negotiations and also discussed whether the Operating Engineers, in the event of a strike by OCAW, would report to the gatehouse and sign in. Epperly stated that he believed there was going to be a strike, that management was making arrangements for employees to work, that there was a plan for employees to use during a strike, and that he had already discussed the matter with his supervisor. He did not relate the details of the plan.

A substantial number of witnesses testified in this proceeding, and their testimony clearly establishes that the charging parties (except Edgar, who withdrew his charge) were suspended by Respondent. I find that Respondent, by suspending them and by refusing to reinstate them until August 19, 1977, did so because of their membership in and sympathy for and/or activities on behalf of the Union, or for engaging in a sympathy strike in support of the lawful strike by OCAW.

The contract between OCAW and Respondent expired May 10 and members of OCAW went on strike. The con-

tract the Operating Engineers had with Respondent expired May 15, and members of that union refused to cross the OCAW picket line. The Operating Engineers did not picket until their contract had expired. Superintendent Mercer, in a letter dated July 7, discharged the Charging Parties effective May 10, stating that they had been terminated "for engaging in an illegal strike, walk-out and interference with plant operations in violation of the Working Agreement" between Respondent and the Operating Engineers. On July 20 Respondent and the Union by a settlement agreement reduced the discharges to 30-day suspensions for the employees.

The contract provides that during the term of the agreement the Union "will not condone, sanction, or authorize strikes, walkouts, sitdowns, or slowdowns or other interferences with the plant operations" and that if an unauthorized strike occurs, officials of the local union and the international union will promptly meet with the Company and "take appropriate action to end the strike, including, but not limited to public renunciation of the strike, and instructions to employees to return to work." As counsel for the General Counsel points out, the contract "does not explicitly prohibit sympathy strikes."

He points out that the no-strike clause has been in the contract for many years and argues that "the testimony shows that the word sympathy was never in it and that the clause was never negotiated to include sympathy strikes." He acknowledges that "the only extrinsic evidence as to the meaning of the clause is the fact that a union business agent advised some employees that if they refused to cross the picket line to work, it would be in violation of the agreement." He points out that in *Kellogg Company*, 189 NLRB 948 (1971), the Board held that such a statement was insufficient to establish that the Union had intended to waive in the contract the right to observe the picket line of another union. He therefore concludes that under the circumstances "particularly the lack of evidence of any explicit waiver of the right to engage in a sympathy strike in this proceeding, it is clear that Respondent violated Section 8(a)(1) and (3) of the Act by suspending the charging parties." Referring to *The Hearst Corporation, News American Division*, 161 NLRB 1405 (1966), which was enforced by the Court of Appeals for the District of Columbia, 393 F.2d 673 (1968), the Board stated that "the considerations which require us to find in this case that the Union had not waived the right of these employees to observe a picket line of another union at this plant are equally persuasive." Furthermore, the Board stated that it did not read the *Hearst* decision "as a reversal of the long-established rule that a waiver of a statutory right can only be accomplished by 'clear and unmistakable' language."

### III. CONCLUDING FINDINGS

Under well-established law, it is clear that when the members of the Operating Engineers failed to cross the OCAW picket line they were engaged in protected concerted activity and, accordingly, Respondent's action in suspending them for doing so is violative of Section 8(a)(1) and (3) of the Act. I have not overlooked the contention of counsel for Respondent that Norman Mahnke, a representative of the Operating Engineers, told the employees, ac-

ording to Donald C. Wagner, an industrial relations representative of the Respondent, that the employees were in violation of their contract and that they should go to work. However, I am not persuaded that his direction to the employees had the effect of waiving their statutory rights. As the Board stated in *Keller-Crescent Company, a Division of Mosler*, 217 NLRB 685 (1975), at 687: "As we recently reaffirmed, it is now well established that the right to engage in a sympathy strike or to honor another union's picket line is a right created and protected by the Act. It is equally well established that such a statutorily created and protected right may be waived by appropriate provisions in a collective-bargaining agreement . . . but such a waiver must be shown by 'clear and unmistakable' language."

## CONCLUSIONS OF LAW

1. American Cyanamid Company, Willow Island, West Virginia, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local No. 589, International Union of Operating Engineers, AFL, CIO, and Oil, Chemical and Atomic Workers Union, Local 3-499, AFL, CIO, are labor organizations within the meaning of Section 2(5) of the Act.
3. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.  
[Recommended Order omitted from publication.]