Active Products Corporation *and* Ronald D. Harms.
Case 25-CA 8923

May 17, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On December 26, 1978, Administrative Law Judge David L. Evans issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in answer to the General Counsel's exceptions.

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 and to adopt his recommended Order.

ORDER

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

[1] The General Counsel 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.

We note that in sec. II.A.2, par. 1, of his Decision the Administrative Law Judge inadvertently referred to the United Automobile Aerospace and Agricultural Implement Workers as the "United Mine Workers." Additionally, the correct citation for *Firch Baking Company*, referred to in fn. 16, is 232 NLRB 772 (1977).

In adopting the Administrative Law Judge's rejection of the General Counsel's condonation argument, Chairman Fanning relies solely on the Administrative Law Judge's primary holding that, based on the credited testimony, there is no evidence that Respondent condoned Charging Party Harms' conduct, rather than the Administrative Law Judge's alternative holding and his citation in *Chesty Foods, Division of Fairmont Foods Company*, 215 NLRB 388 (1974).

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge: This proceeding, with all parties represented, was heard on August 30 and 31 and September 1, 1978, in Marion, Indiana, on the complaint of General Counsel which issued on April 24, 1978. Said complaint was based upon a charge filed on April 18, 1977, by Ronald D. Harms, an individual. The charge alleges that Respondent discriminatorily discharged Harms and otherwise discriminated against employees Ron Small and Bruce Blaser, but the complaint does not refer to those employees. The complaint alleges that Respondent discharged Harms on February 23, 1977,[1] because said employee exercised his right under a collective-bargaining agreement "to present safety complaints to Respondent and to refrain from working under unsafe conditions" and because Harms and other employees concertedly sought correction of unsafe working conditions "and engaged in other concerted activities for the purpose of mutual aid and protection."[2] At the hearing, counsel for the General Counsel moved to amend the complaint to include an allegation that on August 28, 1978, Respondent, by its attorney Charles Herriman, interrogated an employee (Forrest Sutton) in violation of Section 8(a)(1) of the National Labor Relations Act, as amended. Said motion ws granted over Respondent's objection. Respondent admits the jurisdictional and commerce facts and the discharge of Harms on February 23, but denies the commission of any unfair labor practices.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally at the hearing. Counsel for General Counsel and Respondent filed briefs which have been carefully considered.

Upon the entire record, and from my observation of the demeanor of the witnesses and the inherent probabilities and improbabilities of the testimony of each witness, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT AND UNION STATUS

The Respondent, an Indiana corporation with its principal office and place of business in Marion, Indiana, operates a factory producing automotive parts and bathroom and kitchen sinks. In the regular course and conduct of its business operations at Marion, Respondent annually manufactures, sells, and distributes from said facility products valued in excess of $50,000 which are shipped from said facility directly to States other than Indiana, and Respondent annually purchases and receives goods and materials valued in excess of $50,000 which are transported to said facility directly from points outside the State of Indiana.

The Respondent concedes, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

There is no dispute that Local Union No. 1560, United Automobile, Aerospace and Agricultural Implement Workers (herein called the Union), is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

[1] Unless otherwise indicated, all events referred to herein occurred in 1977.

[2] General Counsel does not contend that any concerted activity, other than that relating to safety, caused discrimination against Harms.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Discharge of Ronald D. Harms*

There are three basic questions to be considered. The first is whether Harms' initial invocation[3] of the safety provisions of a collective-bargaining agreement was protected. Respondent contends Harms' conduct was unprotected *ab initio*, but assuming that it was, Harms was not fired for the initial invocation; General Counsel contends that the initial invocation was protected and that Harms was fired, at least in part, because of it. The second question is whether, assuming a protected nature of the initial invocation, Harms' subsequent conduct was protected by the contract and, therefore, the Act. The third is whether, assuming an unprotected nature of Harms' conduct subsequent to initial invocation of the contract, Respondent condoned the employee's action so that the discharge therefor was rendered violative.

I have concluded that Harms' initial invocation of the contractual safety provisions was protected but that he was not discharged for this protected activity. I have further concluded that Harms' conduct subsequent to the shift safety committee's decision on the safety issue in question exceeded the protection of the Act, that he was discharged for such misconduct, and that Respondent had not condoned the unprotected activity before the discharge so that Respondent did not violate the Act in the discharge of Harms.

1. Relevant contractual provisions

At all times material herein, Respondent and the Union were parties to a collective-bargaining agreement which provides for an extensive grievance and binding arbitration procedure and a prohibition against strikes "or other curtailment of work" This case involves a work stoppage which unquestionably would have been unprotected in its entirety by this no-strike provision were it not for the fact that the employees involved initially ceased work, advancing a claim of the existence of unsafe working conditions. General Counsel does not contend that the work stoppage was protected by Section 502 of the Act. Rather, General Counsel contends that the work stoppage, in its entirety, was protected by operation of the safety provisions of the contract under the theory of *Roadway Express, Inc.*, 217 NLRB 278 (1975), enfd. 532 F.2d 751 (4th Cir. 1976). The provisions are:

> Section 21. There shall be a Plant Safety Committee, consisting of two (2) Union members and two (2) Company members, including the Local Union President and the Company Director of Safety.
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> This Committee will conduct at least one monthly safety tour of the plant, establish an agenda of safety items during such tour, if any, and initiate or complete correction of such items prior to the regular monthly safety meeting(s) to be held aproximately two (2) weeks after each tour.
>
> There shall be a Shift Safety Committee on each shift, consisting of two (2) Union members and two (2)Company members.
>
> Whenever an employee feels affected by an unsafe condition, he shall discuss it with his Supervisor. Should they not agree on it to the employee's satisfaction, the Supervisor will call one (1) Union member and one (1) Company member in on the issue without undue delay and before the affected employee is expected to continue his work under the alleged unsafe condition affecting him. Should the members of the Shift Safety Committee disagree on the issue, the remaining two (2) members of the Shift Safety Committee will be called in. If no agreement can be reached at that time, the Plant Safety Committee will be called in on the issue as soon as possible. If their decision is not agreeable, the Plant Engineer or his alternate will be called in and his decision will break the deadlock.
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> Conditions found to be unsafe shall be dealt with by whatever means are required to correct them or to prevent an imminent accident to a person or persons.
>
> The Shift Safety Committee members shall report plant conditions affecting safety and health of employees and which cannot or are difficult to correct on a shift level, to any of their two (2) members of the Plant Safety Committee for presentation to the Plant Safety Committee.
>
> The decisions of the Shift Safety Committee are to be obeyed by the respective Shift Supervision and employees.

2. The Employer's operation and background

For a number of years Respondent has recognized United Mine Workers, Local 1550, as the exclusive bargaining representative of its production and maintenance employees who numbered about 220 at the time of the events involved herein. The production operation, at least as far as this case is concerned, involves first the unloading of bathroom or kitchen sinks and placing them in an overhead conveyor system for routing through the plant. An electrically charged primer coating is sprayed on the sinks, and then they continue on to booths where they are sprayed with enamel in an electrostatic process. After this spraying, the conveyor system carries the sinks to an oven for baking and then to a point where they are passed, rejected, or sent back for repair.

Harms and other employees directly involved herein worked in the enamel spray booths. There were two of these booths, one large booth where four employees, including Harms, were stationed, and one small booth which accomodated two sprayers. On February 23 all six enamel spray stations were in use.

The enamel is placed in containers which have varied in size over the years. On February 23 the employees were using 10-gallon cans which look like, and were referred to by everyone who spoke at the hearing, as "milk cans."[4] The

[3] Herein, the term "initial invocation" refers to the employee's ceasing work and consulting with the shift safety committee.

[4] In describing the milk cans and the spraying process, the present tense is used for the purpose of clarity. However, there was testimony that the use of the milk cans was being phased out at the time of the events in question and was completely discontinued in favor of larger containers on April 1.

water-base enamels used by Respondent are placed in the milk cans in the mill room, an area separate from the spraying booths. After placing the enamel in the cans, mill room employees put 20 to 25 p.s.i. of air in the cans for testing purposes. After being brought to the booths the milk cans are attached to hoses which connect to a central system of compressed air which is maintained at 90 to 94 p.s.i. Each can has gauges which display the pressure of air going to and maintained in the cans. Each has regulators which control the pressure of the air being injected into the cans as well as the pressure of air flowing into the spray guns. Each milk can has a "pop-off" valve which is designed to allow air to escape when the pressure in the cans exceeds a prescribed maximum. The pop-off valves used at the time in question were rated at 30 p.s.i. maximum. If the pressure in a can exceeded 30 p.s.i., the pop-off valve was supposed to release all air in excess of that pressure. If it did not do so, the enamel would be sprayed at the pressure set by the gauges. If the gauges were set at 32 p.s.i., and the pop-off valve were stuck for some reason, the spray would leave the guns at 32 p.s.i. Use of too much pressure had the deleterious effect of producing an unacceptable surface. Whether use of pressure in excess of 30 p.s.i. also gave the sprayers reason to feel affected by an unsafe working condition is an issue in this case.

As the enamel flows from the can to the gun and is sprayed out, it is electrically charged. The charge on the enamel is opposite to that of the primer, permitting smooth adhesion while requiring less air pressure than was necessary before Respondent began using the electrostatic process in June 1976. Harms had been regularly employed as a sprayer since December 1973, and therefore had sprayed enamel, utilizing the milk cans at higher pressures than required at the time of the events in question.

At the start of January 1977, Harms was on the day shift, directly supervised by Production Superintendent and General Foreman William Faulkner. Harms worked that shift for 2 weeks in January, than went to the second shift until February 10, when he was again returned to the first shift.

Harms testified that around the first week in January he witnessed a blowout of a rubber seal, or gasket, which is between the can and the bolted on lid. Harms further testified that during that week he saw a bolt, which was one of two which had held the lids on the cans, break "allowing the lid to blow off the can approximately 15 (feet) in the air, falling to the floor." He further testified that, as a result of these events "a month prior to the twenty-third [of February], the sprayers asked the shift safety committee for written specifications of the maximum air pressure which could safely be used on the cans." He testified that the shift safety committee said it would investigate and report back to him with the answer, even if it had to go to the manufacturer, but he heard nothing further from it. Harms did not identify any members of the shift safety committee to whom he addressed this question. He testified, alternatively, that he addressed the question to a supervisor, but he could not remember which supervisor it was, although he stated that Faulkner was his supervisor at the time.

Faulkner worked only the day shift during the month of January. In January and February, employee Forrest Sutton, also a sprayer, was chief union steward and member of the first-shift safety committee. Sutton categorically denied that Harms addressed his question to the first-shift safety committee. Sutton did testify that he witnessed a gasket blow on a milk can, but neither he nor any other employee, except Harms, testified that they witnessed anything such as a bolt breaking, propelling a milk can lid 15 feet in the air, and Faulkner denied witnessing such an event.

Therefore, except for a blown rubber gasket, Harms' testimony in regard to the explosion of a tank and his question addressed to the shift safety committee, or supervisor, is completely uncorroborated.

I find that Harms did witness a gasket blowing, but discredit his testimony that he saw a milk can lid blow 15 feet in the air. Certainly if such had happened, there would have been many witnesses to such a dramatic event, and General Counsel would have presented them or explained their absence.

General Counsel did seek to introduce testimony regarding the blow up of a milk can in the mill room where cans are filled.[5] I rejected this testimony because it did not appertain to the employees' concerns arising from the *operation* of the milk cans, which was the issue in this case. I adhere to my ruling.[6] I further find that Harms did not address his question to the first-shift safety committee in January. (As well as Sutton, Faulkner denied knowledge of such a request, and I credit this denial).

While no member of management and no employee was indentified as having received Harms' request for information, I find that Harms was genuinely concerned with ascertaining the maximum safe air pressure. He could have asked any number of persons on either shift he worked in January. Specifically he could have asked some member of the second shift safety committee,[7] none of whom testified. Be that as it may, I find Harms did have the question in mind as he worked with the milk cans during the months of January and February, and that at some point he asked someone, but he did not receive an answer.

Nevertheless, the employees continued working throughout January and February without knowing what the maximum safe operating air pressure was.[8] What the sprayers and the shift and plant safety committees did know was that the enameling process had been conducted within excess of 30 p.s.i. for a considerable amount of time in the past, specifically in the several days before the events of February 23. In this regard I especially note the essentially undisputed testimony of the use of higher air pressure before introduction of the electrostatic process, Harms' testimony that the sprayers had operated at 32 p.s.i. "for a couple of days" before February 23, and the statement of fact in a grievance filed by Sutton on behalf of the sprayers that "it is true that this process has in the past ran (sic) at this pressure."

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[5] Faulkner acknowledged that such an incident occurred about a year before the events of this case.

[6] Moreover, General Counsel's arguments on this point are moot, as I find, as discussed *infra*, that Harms initial invocation of art. XIII, sec. 20, of the contract was protected.

[7] Sutton testified that a second-shift steward had reported such an inquiry to him, but it is unclear when this occurred.

[8] After the work stoppage involved herein, but before Harms' discharge, Respondent conducted a test of the milk cans away from the production line. The cans withstood 92 p.s.i., the maximum output of the central compressed air system. While this test may have provided the answer to Harms' question, and proved that the operation was, in fact, safe, it is irrelevant to the resolution of this case.

3. Events of February 23, 1977

On February 23 the day shift began at 7 a.m. There were four employees in the large spray booth, Ronald Harms, Forrest Sutton, Ron Small, and Bruce Blaser. Harms testified that the employees were having to use excess air pressure, about 32 p.s.i.,[9] as they had done on the 2 preceding days. The employees agreed that the enamel was too thick,[10] so they stopped spraying and called Faulkner. It is undisputed that this stoppage shut down the entire production line.

Harms testified that his initial request to Faulkner was that he add water to the cans so that less pressure would be required for the spraying operation. According to Harms, Faulkner refused, so the four sprayers began discussing the matters among themselves and they concluded:

> We felt that we needed something done. They hadn't been showing any effort at all as to trying to solve the matter on our previous request to have information given to us. That day we asked for water in the tank to try to eliminate some of the higher air pressure. We couldn't get any water in the tank so at that time the sprayers, Forrest Sutton,[11] Ron Small, Bruce Blaser and myself, decided we would call in the shift safety committee.
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> At that time I called the foreman, Bill Faulkner, over and requested that he get the safety committee.

Harms testified that Faulkner did call the shift safety committee, as required by the contract, but only after 20 minutes of further argument. The management members of the committee that day were Faulkner and Bill Reed, the electrical maintenance supervisor. Union committee members were Sutton and Gene Mitchner, another bargaining unit employee. When asked by General Counsel what he told the shift safety committee, Harms testified:

> I expressed to them my concern over the fact that I felt I had too much air pressure in my tank, that I requested that something be done about the enamel itself so I could reduce the pressure. I told them at that time that we had already a month earlier asked them if they couldn't possibly come up with something, something that would give us grounds to know whether we were working in a safe area or not, and we had never heard anything on it and they weren't attempting to get us anything on it then. They just said to go back to work and they would try to get hold of the manufacturer, they would try to find out what the maximum air pressure was on the tanks, and they would get back with us.

At this point Harms acknowledges that the shift safety committee members called to the scene instructed the employees to return to work. As discussed *infra*, this constituted a "decision" of the shift safety committee, as contemplated by the contract, and it is the point beyond which the work stoppage was unprotected.

When asked what the other sprayers told the shift safety committee, Harms testified:

> At one time the four of us were all in a group. The other sprayers were expressing similar feelings as mine, just as far as the pressure goes, and we would like to see something in writing telling us this is a maximum, this is a safe level. And then each of the sprayers were also talked with, pulled aside and talked with on an occasion or two, just like I was.

Not satisfied with the response of the shift safety committee, the sprayers decided among themselves to call the plant safety committee to pursue their objective, further as described by Harms:

> A. The sprayers, Forrest Sutton, Ron Small, Bruce Blaser and myself, we then talked it over. We saw there was no effort whatsoever by the shift safety committee to correct the problem or to justify the fact that we have got to stand there and use this high air pressure. So we had the right to call in the plant safety committee to try to get a ruling from them. We figured okay, maybe they would have someone else that knew something more. So at that time we agreed to call in the plant safety committee. And I asked the foreman to do so.
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> Q. (By General Counsel) You asked --
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> A. Bill Faulkner, the foreman, to do so.

As discussed *infra*, Harms at this point acknowledges that he, not the shift safety committee, caused the plant safety committee to be called, and information was his objective. Also, when Sutton was asked what the plant safety committees were told by him and the other sprayers, he related only the request for an answer to "Ron's question." Sutton further acknowledged filing grievances which stated that the only reason for calling the committee "was to find out whether or not (it) was safe or not."

Upon Harm's request, Faulkner called the plant safety committee, the management members of which were Michael Baker, plant safety director, and Marion Hubbard, forklift supervisor. The union members of the plant safety committee were Herbert Smith, union president, and Byron Cook, then union vice president. According to Harms, the following occurred when the plant safety committee arrived:

> A. The plant safety committee came up into the booth. They looked at all four of the regulators, all four of the tanks. They asked all of us what was going on. We stood there in a group. Each of the sprayers give their opinion as to what was going on, their concern over the fact that we were using high air pressure, had been for a couple of days and nobody seemed to

[9] As shown by the discussion of the pop-off valves above, pressure above 30 p.s.i. could not be attained if the valves were functioning correctly. Harms' can could be operated that day at 32 p.s.i. because the valve was clogged with enamel. This wasn't known until sometime during the work stoppage, but was apparently assumed, as this was not an uncommon event. In fact, there was some testimony that employees had occasionally used sticks to jamb the valves so that higher pressure could be attained. At any rate, Harms at no time claimed that the clogged valve was a part of the reason for his conduct.

[10] The higher the specific gravity of the water base enamel, the greater the air pressure which was required to spray. Of course, addition of water would reduce the specific gravity.

[11] Sutton, chief union steward and member of the shift safety committee, informed the sprayers that they had a contractual right to continue their work stoppage.

want to do anything about it and we would like to see something in writing telling us that this is safe, whether it was ten, twenty, thirty pounds, what it was, saying this is the safe air pressure so that if anything happened at least we knew if we were over the safe limit then it would have been our fault if we got some type of damage.

Q. (By General Counsel) Did you have any conversation during that time when the plant safety committee was there did you have any conversation with Mr. Cook?

A. Yes. I was pulled aside first-off by Mr. Herb Smith who pulled me to the side and asked me what was going on. And so I told him what was going on. And he said well, he didn't know what the pressure was supposed to be on the tanks, that all he could do was try and check on it. So he walked back over to the group.

And Mr. Cook, the he pulled me aside and told me about the same thing, that they didn't really know what it was supposed to be but that production was stopped and we had to get going and they would just have to check on it.

And they talked to every one of the other sprayers in the same respect.

By this testimony Harms acknowledges again that the sprayers' objective was securing information and that Cook and the plant committee instructed them to "get along." A Sutton grievance over the matter acknowledges "a decision" was reached by the plant safety committee but argues that the sprayers complied immediately therewith.

Union Plant Safety Committeeman Byron (Butch) Cook was called by General Counsel and testified unequivocally that the plant safety committee had asked the employees to return to work. When asked by General Counsel to state the Union's position in handling grievances filed on Harms' behalf, Cook testified:

> We felt that in answering some of the Company's questions in there toward the grievances that Mr. Harms was holding the line up and that there should have been some kind of penalty in the grievance. At the Fourth Step Level when Mr. Davy was there we made the decision he did deserve some kind of penalty because *the safety committee did ask the employees to go back to work.*
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> * * * * *
>
> Like I said, it's been a long time. But we said if they would bring him back at—I don't know if it was the correct days that he said here, thirty– fifteen, thirty, seventy-two and seventy five or not, but we did say bring him back at certain dates because this would be a penalty towards him for not going back to work when *we did ask him to go back to work.* [Emphasis supplied.]

Although again requested to return to work, the sprayers, led by Harms, continued to engage in their work stoppage. The plant safety committee went to the office area to consult and to search relevant files for the information. While the plant safety committee was in the office area, it explained the situation to Plant Manager Don Bedford, specifically that Harms was demanding documentation of the maximum safe operating pressure, and that such documentation could not be found. Bedford asked the plant safety committee if he could intercede and attempt to reason with Harms. They consented, although section 21 of the contract does not provide for participation of the plant manager. Accompanied by Cook[12] and Faulkner, Bedford approached the sprayers. Harms testifies that Bedford asked that they return to work because production was shut down and that otherwise he would have to send all employees home with loss of pay. About the same time Sutton informed Harms that he had called the Union office and had been told by the representative there that the sprayers should return to work. Harms testified that because of the request of Bedford and the instruction of the Union, the sprayers decided to return to work and did so.

When led by General Counsel, Harms testified that Faulkner added water to the cans but unequivocally states that it was *after* the employees had returned to work. Faulkner denied that he added water to the enamel, and no other employee testified that he did.[13] I credit Faulkner's denial on this point; however, even according to Harms, the employees returned to work without any change in the conditions which gave rise to the sprayers' invocation of the contract to cease work.

The sprayers' work stoppage continued about 1 hour after the decision of the shift safety committee, idling some 40 production employees. According to Faulkner, the production finished during the remainder of the day was slower and the enameling was of inferior quality. He credited this to the work stoppage.

Shortly after the production line was started again, Harms asked Faulkner to get him a Union steward. He told Faulkner that he wanted the steward because he felt that he had been harassed when he had earlier asked for the shift safety committee. Faulkner immediately got Union Steward Jim Livesay, and the three men went to an unoccupied office to discuss the matter. Harms told Livesay that he wanted to file a grievance over the "treatment" he received from Faulkner when he requested the shift safety committee. According to Harms:

> Mr. Faulkner then told me, "Well, Mr. Harms, Ron, I am sorry. I was under a lot of pressure this morning. We had a lot of things to get out and nothing seemed to be going right. I lost my cool. I just didn't keep my head together. I am sorry about it. We should go out and go to work." He said, "When we go out, you and me, in the other employees eyes, I want the employees to see there is a good Company and employee relationship here, that there is no hard feelings whatsoever here about what has happened with the safety committee. I have no grudges held against you. Everything is

[12] According to the unrebutted testimony of Bedford and Personnel Director Rhoten, Smith refused to return to the area stating that Harms was a "raving maniac" and that he was afraid that he and Harms would come to blows. Smith was not called to testify. Cook was called in rebuttal by General Counsel, but he was asked no questions about the arguments and the report thereof to Rhoten and Bedford.

[13] Small, called by General Counsel, credits the reduction of air pressure after the work stoppage to a slowing down of the production line, not to the watering of the enamel by Faulkner as claimed by Harms.

> fine. Let's go out of the office smiling and let's go back to work."

Upon this one remark, and the fact that Harms was allowed to complete the shift, General Counsel propounds his entire theory of condonation. Faulkner admitted he told Harms that he had no hard feelings toward him personally, but denies stating that he had lost his head (or "cool") and denies suggesting that they leave the office pretending that nothing was wrong. Livesay, the one witness who could have substantiated Harms' version, was not called, and no reason for not doing so was advanced. As noted above, Harms' own testimony concedes that both the shift and plant safety committees had sided with Faulkner and requested the employees to go back to work, and there is abundant other testimony to that fact in the record. In such a circumstance it is impossible to believe that Faulkner so abjectly apologized to Harms or asked him to feign false accord. For this reason, and upon my observation of the witnesses, I credit Faulkner's denial of any statement beyond a perfunctory "no hard feelings" comment and an urging that they simply return to their respective jobs.

At 3:20 p.m., 10 minutes before the end of the shift, Faulkner discharged Harms by personnel memo stating:

> Discharged -- For instigating a disturbance and sabotage of production process, disrupting the work force, and not abiding by decision of Plant Safety Committee on a Safety issue.

Small and Blaser were given written warnings for essentially the same stated reason, but these were later reduced to verbal warning. Sutton was given no discipline because Faulkner was, correctly, under the impression that he had acted only as a union committeeman and was actually instrumental in securing a cessation of the work stoppage.

General Counsel's witness Blaser was a particularly guileless witness who impressed me by refusing to be led by either side into stating one whit more than what he perceived to be the precise truth. His testimony warrants quoting at length because he gave a simplistic, but comprehensive account of the primary factual issues in this case Harms' actions and objectives, and the response of the plant safety committee:

> Q. (By General Counsel) When the plant safety committee arrived on the scene what happened at that time?
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> A. Well, then there was a big crowd there and, you know, I didn't they was all arguing and everything. I really didn't care to have anything to do with the battle that was going on, you know. Everybody seemed to be doing all right without my help so I just more or less, you know, just set back.
>
> Q. I understand that, but do you recall What do you recall the plant safety committee members saying at that time? What do you recall Mr. Harms saying?
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> A. They said just about the same thing that the shift safety committee was saying, that they would check on it because they didn't know what, you know, the pressure was, you know, what the can would hold.
>
> Q. Did any member of the plant safety committee tell you or any of the other sprayers Now this is to the best of your recollection, that you heard
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> A. Yes.
>
> Q. Did any member of the plant safety committee tell you of any of the other sprayers that the tanks were safe?
>
> A. No.
>
> Q. Did any member of the plant safety committee tell you or any of the other sprayers to go back to work?
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> A. I believe I heard it a couple of times pretty loud.
>
> Q. Who was saying it?
>
> A. Butch Cook and Mr. Harms. He was saying it to Mr. Harms.
>
> Q. Butch Cook was?
>
> A. Yes. He was asking him why he wouldn't go back to work and he said, you know, that he didn't see any problems why we shouldn't go back to work.
>
> Q. That was Mr. Cook?
>
> A. Yes.
>
> Q. Do you recall hearing any that statement or any statement like that made by any other members of the plant safety committee?
>
> A. No. Mr. Harms and Cook were really getting, you know, pretty heavy.
>
> Q. What do you mean pretty heavy?
>
> A. Well, they was about to knock one another down.
>
> Q. They were. They were arguing?
>
> A. Uh-huh.
>
> Q. Was Mr. Harms arguing with anybody else on the plant safety committee?
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> A. Well, I think he did with Herb Smith a little bit, you know, but it wasn't as bad as Cook.
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> * * * * *
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> Q. (By Respondent) Now you say Cook was having an argument with Harms, is that correct?
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> A. Yes.
>
> Q. And your interpretation of that disagreement was that Cook felt the cans were safe and Harms did not think they were, is that correct?
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> A. I believe so.
>
> Q. And also that Smith had an argument that you say was less volatile, less angry?
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> A. Yes.
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> Q. Smith also was having an argument with Harms, is that correct?
>
> A. Yes.
>
> Q. And your judgment of that argument at the time was that Smith were [sic] saying the tanks were safe and Harms was saying that they weren't, is that correct?
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> A. I couldn't really say because I couldn't hear. I knew that they were arguing because I saw fingers and motions.
>
> Q. With respect to Mr. Baker, the safety director-
>
> A. Yes.
>
> Q. He was also trying to get the line back in operation, was he not?
>
> A. Yes, he was.

Q. And Mr. Hubbard, the other Company member of the safety committee, was trying to get the line back in operation? He was there, was he not?

A. I don't remember his name.

Q. What I am getting at is you say you were sitting back and not participating in the hassle. That's what I get the image of your role in this thing, is that correct?

A. That's correct.

Q. Reminding you that you are under oath and a conscientious person, you knew, did you not, that the members of the plant safety committee thought this line should be operating and that there wasn't any danger? Isn't that what you knew at the time, truth to tell?

A. Well, I'd say so.

* * * * *

Q. (By General Counsel) You stated that you knew the plant safety committee felt that there was no danger with the tanks. Is that what you said on cross-examination?

A. Yes, I believe so.

Q. How did you know that? What makes you say that?

A. Well, I figured they were all arguing about the same thing.

Q. Did any member of the plant safety committee Did you hear any member of the plant safety committee say that the tanks were safe?

A. I never did hear anybody on the plant or the shift committee say the tanks were safe. They just said to go back to work.

MR. ROBLES: No further questions.

JUDGE EVANS: Mr. Blaser, did Mr. Harms or any of the spray painters say they wouldn't go back to work until they got something in writing?

THE WITNESS: Yes, sir.

JUDGE EVANS: Was that Mr. Harms that said that?

THE WITNESS: I don't remember if it was just him alone or not.

JUDGE EVANS: But he was one of the persons who said that?

THE WITNESS: Yes, he was.

JUDGE EVANS: And what did he demand to have in writing before he went back to work?

THE WITNESS: What was the maximum air pressure those tanks would hold before blowing.

JUDGE EVANS: Did he say from whom he wanted this written document?

THE WITNESS: He wanted it from the Company.

I credit Blaser completely on these points and find that all members of the plant safety committee instructed Harms and the other sprayers to return to work but the three employees refused demanding written specification of the maximum safe operation pressure of the milk cans. I further find that Harms engaged in arguments just short of violence with the plant safety committee.

B. *The Interrogation of Forrest Sutton*

General Counsel contends that Sutton was unlawfully interrogated by Respondent's attorney, Charles Herriman. Since Herriman did not testify, the following statement of facts is Sutton's undenied account:

On August 28, 1978, 2 days prior to the opening of the trial, Plant Manager Don Bedford asked Sutton if he would mind talking to a company attorney. Although Bedford did not state the basis of the request, Sutton "had an idea" it was about Harms' case. Sutton agreed to talk to the attorney, and the two went to the plant conference room. In the past, this room had been used for union-management meetings and meetings held by the Union at which no management officials were present.

When the two men were alone in the conference room, the attorney introduced himself by name. Sutton testified that "he wanted to know if I would talk to him . . . on the matter of Ron Harms." Sutton agreed to do so. During the conversation Herriman told Sutton several times that he was just trying to find out the truth. Herriman took notes, but Sutton did not see them. At one point in his testimony Sutton stated that Herriman asked "if in my opinion Bill Faulkner had ever harassed Ron Harms."

Herriman did not, *in haec verba*, say that Sutton's participation was voluntary or that he had a right not to participate in the questioning. Nor did Herriman assure Sutton that no reprisals would be taken against him if he refused to participate.

III. DISCUSSION

A. *The Discharge of Ronald D. Harms*

1. The protected demand for shift safety committeeman

Respondent contends that Harms, as spokesman for the sprayers, did not "perceive an unsafe condition" and therefore his entire course of conduct in the work stoppage was unprotected. Respondent acknowleges that Harms did initially make claims of unsafe working conditions but contends this was a mere "lip service" in a ruse to invoke the safety provisions of the contract for the objective of securing a written statement of maximum safe operating pressure of the milk cans.

I conclude, upon the above, that the sprayers, in calling for the shift safety committee, had an objective of securing a statement of the maximum safe air pressure. However, I find that the employees wanted this statement because they felt affected by what they perceived to be an actual or potential unsafe working condition. There is no other reason for the inquiry, regardless of whether or to whom it was made the preceding January. Respondent does not contend that Harms' activities and demands were an attempt to malinger or that his inquiry was merely academic.

For its invocation, section 21 of the contract requires only that an employee "feels" affected by an unsafe condition. This is a very low standard. It is far less than the requirement of objective evidence of Section 502 of the

Act.[14] It is even less than that in the contract before the Board in *Roadway Express* wherein the contract specified that the refusals to operate equipment could not be "unjustified." The contract herein plainly contemplates a *subjective* test for its initial invocation by an employee; there is no other explanation for the word "feels."

I find that the employees did feel affected by what they perceived to be an actual or potential unsafe working condition and conclude that their calling for consultation with the shift safety committee, and their refusal to work until that committee reached a decision, as discussed *infra*, was protected.

However, there is no evidence that Harms was, in whole or in part, discharged (and Blaser and Small warned) because of their conduct which proceeded the making of a decision by the shift safety committee.

2. The shift safety committee's decision and Harms' unprotected conduct thereafter

In his brief, General Counsel argues that neither safety committee could have reached a "decision" as contemplated by the contract because the parties followed contractual procedures which are available only where decisions have not been reached. He further argues that the plant safety committee's testing the equipment after the termination of the work stoppage indicates that no decision could have been reached.

General Counsel argues that by calling the plant, as well as shift, safety committee when demanded by Harms, Respondent implicitly acknowledged that no "decision" had been reached, and, therefore, Respondent acknowledged that Harms was engaged in a continued course of protected activity. The obvious answer to this contention is that Respondent was attempting to mollify Harms and get production started again when it called for the plant safety committee. It cannot logically operate to an employer's detriment when it responds in a fashion prescribed by the contract when an employee makes a claim of right under the contract. It is true that the contract does not provide for calling for the plant safety committee upon demand of the individual employee(s), as is the case regarding the shift safety committee. However, General Counsel's contention in this regard would require strict construction of the contract which would have operated to the unjustifiable detriment of Respondent in this particular instance and would operate to the detriment of employees in future safety cases.

General Counsel contends that since the shift safety committee conducted a test of the equipment to determine the maximum safe operating pressure, it could not have determined that the operation was safe. Lack of specific information had caused one shutdown; Respondent was not required to risk another. Moreover, the test was conducted several hours after the employees had returned to work. Necessarily, the plant safety committee had decided that it was safe for the employees to continue working, and the test was only to confirm that conclusion. Finally, conducting tests to ascertain specific safety limits, like adherence to a contract, should not operate to the detriment of any employer in circumstances such as these.

There were decisions within contemplation of the contract by both committees. That decision was that the employees should return to work. Implicit in such a decision was a further decision that it was safe to do so.[15]

General Counsel does not dispute that the committees requested Harms and the other sprayers to return to work, and the above-quoted testimony of Harms, Blaser, and Cook removes any doubt. (In addition to the testimony directly on the point, it should be noted that it was Harms, not the shift safety committee, who called for the plant safety committee. Unquestionably, had there been disagreement among the shift safety committee members, including Sutton, they, not Harms, would have called for the plant safety committee as provided by the contract. Also, it should be noted that no one called for the plant engineer, a positive indication that there was no disagreement among members of the plant safety committee.)

The decision was not an "answer" to the factual question raised by Harms. General Counsel would seemingly equate the two terms to bring all of Harms' conduct, subsequent to his call for consultation with the shift safety committee, within the protection of the contract, and, therefore, the Act under *Roadway Express* which holds that a work stoppage is not rendered unprotected by a no-strike clause if the employee is seeking to enforce a contractual right.

The contract which provided the sprayers' right to cease work and seek consultation also limited those rights to cases in which no decision is reached and/or conditions found to be unsafe are corrected.[16] The contract does not provide employees with the right to call the plant safety committee if they are dissatisfied with the decision of the shift safety committee. On the contrary, it specifically states that "the decisions of the shift safety committee are to be obeyed by the respective shift supervision and employees."

As well as leading the work stoppage for a period of time beyond that protected by the contract, Harms and the other sprayers assumed an objective not contemplated by the contract. After the decision of the shift safety committee, Harms conditioned return of the sprayers upon receipt of written specification of the maximum pressure the milk

[14] See *Gateway Coal Co. v. United Mine Workers of America et al.*, 414 U.S. 368 (1974). Moreover, there is sufficient objective evidence to support the employees' feelings about the safety of the operation of the milk cans when the shift safety committee was called. While it is undisputed that the sprayers had operated previously at pressures of, and in excess of, 32 p.s.i. it is also undisputed that gaskets had blown off milk cans during the operation. While a blown gasket is not, of itself, perilous, it is certainly objective evidence of physical conditions which are actually, or potentially, perilous.

[15] At various points during the hearing General Counsel elicited testimony from his witnesses (including Blaser), exclusively by leading questions, that neither committee, *in haec verba*, and as a group, pronounced the operation as "safe." Harms, on cross-examination acknowledged that the plant safety committee did so, an in a pretrial affidavit acknowledges that Smith and Cook told him the cans were safe. Harms attempted to repudiate the affidavit, but could advance no rational explanation for the admission in his affidavit. Upon the authority of *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978), I find that Smith and Cook expressly told Harms that the operation was safe. I further rely on the testimony of Faulkner and Baker, which I find credible, that the plant safety committee told the sprayers that it was, in fact, safe to return to work.

[16] This contractual limitation has not been present, or not discussed in similar safety cases previously considered by the Board: *Roadway Express*, which is relied upon by General Counsel; *B & P Motor Express, Inc.*, 230 NLRB 653 (1977); and *Finch Baking Company*, 232 NLRB 772 (1977). Of course, it was not present in the cases cited by General Counsel which involve no contractual provisions regarding work stoppages or cases in which the work stoppages were protected by Sec. 502 of the Act.

cans would sustain. He did not condition the return of the strikers upon reduced air pressure by watering the enamel or changing the equipment, either of which could have been done.

The contractual safety provisions are not procedures of employee self-help in securing information. Harms had no right to demand such information, in writing or otherwise, by the device of the work stoppage.

Accordingly, I find that Harm's conduct after the consultation with, and decision by, the shift safety committee was not an attempt to enforce the contractual safety provisions by securing relief from conditions he felt to be unsafe. It was an attempt to secure specification of the point at which the conditions would become unsafe. This was not an attempt to enforce a contract, as was the case in *Roadway Express, supra;* it was an attempt to expand rights under it.

That Harms initiated and led a continuation of the strike for a substantial[17] period of time beyond the reaching of decisions by the committees is not disputed. Nor is the fact that he did so for the sole objective of securing information, in writing. I further find that he did so in a bellicose manner.[18]

That the sprayers' conduct directly caused a diminution of quality during the remainder of the shift is not readily susceptible to proof. However, I find that Faulkner, in good faith, believed that it had. I find and conclude that it was for these reasons, as stated on his discharge notice, that Harms was discharged, and not for any reason proscribed by the Act.

3. No condonation of Harm's unprotected activities by Respondent

General Counsel argues that even if any part of Harms' activities were unprotected, Respondent condoned the misconduct by Faulkner's statements to Harms in the meeting with Livesay and Respondent's allowing Harms to work until the end of the shift. In so doing, General Counsel cites *Super Valu Xenia, A Division of Super Valu Stores, Inc.*, 228 NLRB 1254 (1977), and the Second Circuit decision upon which the Board case relies, *Confectionary & Tobacco Drivers and Warehousemen's Union, Local 805, IBTCWHA* v. *N.L.R.B.*, 312 F.2d 108 (1963). *Super Valu* was a case in which an employer extended a deadline for returning from an uprotected strike and informed the employee involved that he had, in fact, saved his job by returning to the plant by the extended deadline. *Confectionary Tobacco Drivers, etc.*, involved a negotitated settlement which was reaffirmed in open court by the employer. Thus, both cases relied upon by General Counsel are factually distinguishable.

As stated above, I have found that Faulkner said nothing more than that he had no hard feelings personally toward Harms and that they should return to work. However, assuming the truth of Harms' account of an abject apology and appeal for a pretense of false harmony, even coupled with the fact that Harms was allowed to work the remainder of the day, this is not a case of condonation. In *Chesty Foods, Division of Fairmont Foods Company*, 215 NLRB 388 (1974), the Board, Member Fanning dissenting on this specific point, found that such a conciliatory statement even coupled with a failure immediately to discharge the employees, did not constitute condonation. In that case, the employer allowed employees to return from an unprotected walkout and work for a full day while it completed an investigation to ascertain the "ringleaders" of the unprotected strike. The Board reasoned (215 NLRB at 388–389):

> It would have placed an undue and unnecessary economic burden upon both Respondent and the employees who wished to return to work to have delayed the reopening of the plant until completion of Respondent's investigation.

This is not a case in which the employees left a plant and then were allowed to return to work; Harms was simply allowed to continue his shift. Therefore, this was much less of an act of condonation than was the case in *Chesty Foods*. Moreover, as in *Chesty Foods*, Faulkner used much of the elapsed time for consultation with Rhoten and Bedford. While about 2 hours elapsed between the time the final decision was reached and the discharge, Respondent was under no duty to implement the termination as soon as the decision was made.[19] Harms had clearly demonstrated his ability to shut down the entire enameling operation. Respondent was not required to risk the "undue and unnecessary economic burden" of a second work stoppage that day by a second midshift confrontation with Harms.[20] Therefore, I find that Faulkner's delay in presenting the dismissal notice was not unreasonable, and his waiting until the end of the shift was not an act of condonation of Harms' misconduct.

Since Faulkner did not condone, by either work or deed, the unprotected activity for which Harms was discharged, I conclude that Respondent did not violate the Act by the discharge of Ronald D. Harms.

B. *Conclusions Regarding the Interrogation of Sutton*

General Counsel would have the Board read literally, and require a *per se* application of, *Johnnie's Poultry Co. and John Bishop Poultry Co., Successor*, 146 NLRB 770 (1964), to find Herriman's interrogation of Sutton unlawful and order Respondent to cease and desist from such conduct.

This I am unwilling to do in the absence of express au-

[17] Harms conceded that "arguments" with the committees exceeded an hour.

[18] I credit the testimony of Respondent's witnesses Bedford and Faulkner that Harms yelled at and cursed members of the plant safety committee. Harms testified that he believed that during "the argument" (or "the battle" as Blaser called it), Cook would have punched him in the nose had it not been for the presence of witnesses. Sutton conceded that the confrontation was angry and loud. As noted above, Smith reported to Bedford that Harms was a "raving maniac." Finally, I find, as described by Faulkner, that Harms physically blocked maintenance employee Henderson in his attempt to change the pop-off valve during the confrontation.

[19] As well as there being no logical reason for requiring immediate discharge in the circumstances of this case, art. 20 of the collective-bargaining agreement provides, in relevant part:

> Any disciplinary penalty issued through a warning slip reprimand, discharge slip, etc., if required, must be issued within the recipient's next scheduled eight (8) working hours after the violation is known.

[20] A requirement of precipitous action could well have resulted in undue "economic burden" to employees Small and Blaser; they also could have been (lawfully) discharged rather than simply warned if a hasty decision had been required.

thority. I stated on the record that I did not believe that *Johnnie's Poultry* required a *per se* application, and General Counsel cites no cases in his brief to the contrary.

Johnnies Poultry and the cases which follow it do not involve isolated[21] interrogations of union officers,[22] in a place away from the locus of managerial authority, in an atomsphere free of other unfair labor practices, in a context of a long-established and viable collective-bargaining relationship—each of which factor is present in this case. Moreover, Bedford's asking Sutton if he would "mind" talking to the company lawyer implied a right to refuse, as did Herriman's asking Sutton *if he would* talk to him about Ron Harms. While no express assurance against reprisals was given Sutton, his prodigious[23] grievance-filing activity, as well as his history of holding union offices demonstrate that, in this case, none was necessary.

The question regarding Sutton's opinion of alleged harassment does not establish a coercive character of the interrogation. Alleged harassment of Harms by Faulkner was the stated reason for the grievance meeting of Harms, Faulkner, and Livesay. As noted above, General Counsel's condonation theory rests principally upon this meeting. Therefore, the subject of the inquiry was directly related to an issue in the case.

Relating the wording of Herriman's question on this point was difficult for Sutton. While it is true that he first testified that Herriman asked for opinion, he immediately modified his testimony. The entire context of this testimony is as follows:

> Q. (By General Counsel) Did he at that point begin to ask you questions about the case?
>
> A. Yes, sir.
>
> Q. What did he ask you?
>
> A. He asked me if Bill Faulkner—if in my opinion Bill Faulkner had ever harrassed (sic) Ron Harms. He asked me quite a few things but I couldn't remember *per se.*
>
> MR. NOLAND: I can't hear your answer.
>
> JUDGE EVANS: Louder please.
>
> A. I couln't remember everything he asked.
>
> Q. What do you remember?
>
> A. I do remember that he asked me if to my recollection or to my knowledge did Bill Faulkner harrass (sic) Mr. Harms in any way that day.

I find that Sutton's second version reflected the wording of Herriman's question. According to my observation, and as reflected by the words used by the witness, Sutton was, at that point, trying to be as precise as he could. Moreover, even if I were to find that Herriman asked for opinion regarding harassment of Harms, it would not invalidate the inquiry. The opinion allegedly requested was not of the nature insulated from inquiry by *Johnnie's Poultry.* It did not involve covert or union or protected, concerted activity. It was in the nature of a preliminary inquiry as to the conduct of a management official. Finally, I would not find that because the question was phrased in terms of "opinion," an inquiry into the employee's state of mind was being made, especially since Sutton was definite that Herriman stated a number of times during the conversation that he was just trying to find out what had happened.

Accordingly, I conclude that Herriman's interrogation had neither coercive context nor content, and it therefore did not violate Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[24]

The complaint is dismissed in its entirety.

[21] General Counsel proffered no evidence that other employees were questioned.

[22] Sutton had held several union offices including steward, chief steward, and shift safety committeeman. At the time of the interrogation he was vice president of the Local.

[23] Sutton filed seven grievances on the events of February 23 and he participated in their processing through the third step of the grievance procedure.

[24] In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.