

Air Products and Chemicals, Inc. and Kenneth Wycherley. Case 6-CA-9082

January 21, 1977

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND
WALTHER

On November 17, 1976, Administrative Law Judge Robert E. Mullin issued the attached Decision in this proceeding. Thereafter, the 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,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 Respondent, Air Products and Chemicals, Inc., New Martinsville, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ The Respondent 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), enf'd 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

ROBERT E. MULLIN, Administrative Law Judge: This case was heard on August 26 and 27, 1976, in Wheeling, West Virginia, pursuant to a charge, duly filed and served,¹ and a complaint issued on May 20, 1976. The complaint presents questions as to whether the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. In its answer, duly filed, the Respondent conceded certain facts with respect to its business operations, but it denied all allegations that it had committed any unfair labor practices.

¹ The charge was filed on March 15, 1976.

² The complaint referred to the address of the plant as Proctor, West Virginia, a town near New Martinsville. Throughout their testimony,

At the hearing, the General Counsel and the Respondent were represented by counsel. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, and to file briefs. The parties waived oral argument. On September 27, 1976, briefs were received from the General Counsel and the Respondent.

Upon the entire record in the case, including the briefs of counsel, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Delaware corporation, is in the business of manufacturing industrial gases. It has 87 plants located throughout the United States and the world. Only its plant near New Martinsville, West Virginia, is involved in this proceeding.² At that location, the Respondent is engaged in the production of liquid oxygen and nitrogen which are condensed from the air. In the course and conduct of its business during the 12-month period preceding issuance of the complaint, the Respondent shipped from this plant goods valued in excess of \$50,000 directly to points outside the State of West Virginia. Upon the foregoing facts, the Respondent concedes, and it is now found, that Air Products and Chemicals, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Sequence of Events

The Respondent's plant in New Martinsville has been in production since about 1969. Because of its advanced technology and the nature of its operations, it has had only six employees at any given time, all of whom are engaged as operators and/or maintenance men and who keep the plant open on a 24-hour, 7-day-a-week basis. In addition, during the period in question, John Mixon was the plant manager and Carl Dodgion was his assistant. At all times relevant herein, Godfrey C. Misus was the regional personnel manager, and Paul E. Hoffman, the assistant regional personnel manager, both of them with their headquarters in the Respondent's regional office in Creighton, Pennsylvania, a suburb of Pittsburgh. Jean Desnouee, manager of commercial production, who, according to his testimony, had overall responsibility for the New Martinsville plant and 13 similar facilities in other locations, had his office at the corporate headquarters in Allentown, Pennsylvania.

The employees at the plant here involved were not members of any union. Five of the six who were employed during the time in question testified, credibly and without contradiction, that when they first applied for work the personnel office questioned them as to how they felt concerning unions and each gave a negative opinion about unions.³

however, the witnesses, including all of the Respondent's officials who testified, referred to it as the New Martinsville facility.

³ See, for example, the testimony of employees Charles Fruner, Robert

For some while the Respondent's personnel officials have held an annual meeting with the employees at New Martinsville, during which the Respondent's current practices and policies are reviewed with them. On February 11, 1976,⁴ Assistant Personnel Manager Hoffman held such a meeting with the employees during which some of the latter presented demands for improved wages, working conditions, and other benefits. On March 10, Manager Desnouvee came to New Martinsville to announce that employees Kenneth Wycherley and David Poling were being dismissed. The General Counsel alleges that both were discriminatorily terminated for having engaged in protected concerted activity during the meeting with Hoffman the preceding month. This allegation is denied in its entirety by the Respondent, according to whom both Wycherley and Poling were discharged for cause.

B. *The Facts*

Kenneth Wycherley and David Poling, the discharges in this case, were employed as operator-repairmen. Both of them had been working in that capacity for approximately 2 years at the time of their dismissal. Both had good work records. In a prehearing affidavit, Dodgion, the assistant plant manager, averred that Wycherley "picked up the basis on how to run the plant very quickly; mechanically he is very smart," and, when on the stand, Manager Desnouvee acknowledged that there "was never [any question] as to whether . . . Poling had the ability and potential to be a very good operator." Prior to their discharges, neither received any warning or criticism from the management.

At some point during the winter the Respondent's employees learned that the personnel office would hold its annual meeting with them during the month of February. For several weeks prior to the projected conference they met among themselves to discuss the approach they should take to secure a hearing for some of their grievances. After several such discussions, they prepared several lists. The first outlined their wage requests. Among these were demands for an increase in hourly pay, an equalization of the base pay for maintenance work and operator's work, Sunday premium pay, paid lunches for the maintenance man, two additional floating holidays, a requirement that vacation and sick days be counted as time worked in the computation of overtime, and provision for call-in pay. A second list which they prepared was captioned "Policy Clarifications" and sought to secure answers from the Respondent as to several aspects of their working conditions in which, to the best of their knowledge, the plant manager appeared to have almost unfettered discretion. Thus, they sought an answer to such questions, *inter alia*, as to whether sick leave could ever be granted in excess of the 5 days each employee earned during the year, whether their supervisors were ever authorized to grant them time off for personal business of an emergency character, and whether

the Company actually had a policy of paying 20-percent shift premium. On this same list, they raised the question as to whether an employee handbook which had been issued several years earlier and which was then obsolete could be updated, and whether they could have a clarification as to the benefits to which they were entitled under the company retirement plan. In a third list they outlined the pay and wage benefits which Mobay Chemical, an employer that had a plant in the immediate vicinity of the Respondent's facility, had negotiated with its employees. All of the Respondent's employees participated in the discussions which led to the formulation of these demands, but the actual drafting of the lists was left to employee Wycherley, who was described by coworker James Sutton as one who was "good with words."

In deciding that they should present a written list of their demands to the personnel officials, the employees departed from their practices at all prior meetings when nothing comparable had occurred. Charles Fruner, an employee from 1969, when the plant opened, and one who had attended all previous conferences of this character, credibly testified that in no earlier meeting had any written list been presented to the personnel representative at the annual meeting. Robert Pletcher, another long-time employee, testified to the same effect. So, too, did employees James Sutton, David Hall, and David Poling.

On February 11, Assistant Personnel Manager Hoffman arrived for the meeting with the employees. Although originally scheduled for 4 p.m., the opening was delayed for about 20 minutes to await Wycherley's arrival. According to Charles Fruner, one of those present, the employees asked that the conference not begin until Wycherley, whom they described to Hoffman as "our lawyer," reached the plant.

Throughout the course of the meeting, Wycherley was the principal spokesman for the employees as he presented and reviewed with the personnel officer the employees' various requests and demands. During the early portion of the conference Poling also engaged in an extended discussion with Hoffman as to the need for more than one operator on a shift. During the night shift at that time, only one man was left to run the plant and handle the loading of customers' trucks. Poling contended that this was hazardous for the single employee, as well as the plant, in the event of an accident or an emergency. Hoffman responded that that practice was followed at other plants operated by the Respondent. After that rejoinder, Poling suggested that the regional office of the Occupational Safety and Health Administration (OSHA) might be able to do something about it and that the practice also might be illegal under the workmen's compensation laws. When Hoffman then asserted that there was nothing illegal about the practice under any existing laws, Poling declared "maybe a union would get two guys on a shift." Hoffman thereupon told the employees, "Unions don't create jobs, you lose jobs with

Pletcher, David Hall, David Poling, and Kenneth Wycherley Such interrogation has been held by the Board to be violative of Sec 8(a)(1) because it reflects "management's hostility toward the employee's union activities and, therefore, [has] a reasonable tendency to interfere with [them]" *Florida Steel Corporation* 224 NLRB 45 (1976) Whereas those incidents of interrogation, having occurred over a period from 1969 to 1974, and beyond the 10(b) period, may not serve as the basis for an unfair labor practice finding, they

are relevant background evidence that "may be utilized to shed light on the true character of matters working within the limitations" *Local Lodge No 1424, International Association of Machinists, AFL-CIO v NLRB*, 362 U.S. 411, 416 (1960)

⁴ Unless specifically noted otherwise, all dates hereinafter are for the year 1976

the union." Wycherley then joined in the exchange to dispute Hoffman's comments and to assert that, on the contrary, the presence of a union in the plant would lead to more jobs. Employee Charles Fruner testified, credibly and without contradiction, that at that point, Hoffman looked at Wycherley and said, "You should have been a lawyer."

Prior meetings had been quiet and relatively brief. This one, however, devolved into an exchange between Hoffman and the employees which lasted almost 5 hours and which was not concluded until about 9:30 p.m.

Subsequent to Hoffman's conference with the work force on February 11, the employees heard nothing from the personnel office or management until March 10 when Hoffman returned to the plant, this time accompanied by Manager Desnouvee. About 1 o'clock that afternoon both Poling and Wycherley were discharged. Each was summoned to the plant office where Desnouvee, Hoffman, Mixon, and Dodgion were waiting.

Poling, who was off duty that day, was called in especially for the meeting. Desnouvee was the only one who spoke. According to Poling, whose testimony was credible and uncontradicted, Desnouvee told him that he had failed to develop the necessary operator expertise during his 2 years with the Company and that he was being terminated immediately. Poling protested that after 2 years' employment he should be given at least 2 weeks' notice since he would have to accord the Company that much advance warning if he himself elected to accept a job with another employer. Desnouvee rejected his request, however, with the statement that "two weeks notice would just hinder you from assuming another job" and thereupon told Poling he would be terminated immediately.⁵

When Wycherley was called into the office, Desnouvee told him that he had learned that Wycherley was "unhappy with this company, you are unhappy with the way I am running the show . . . if you are not happy with the job or the company, then the company is not happy with you." Desnouvee then announced that Wycherley was being terminated at once. When the employee sought an explanation for his swift dismissal and asked Desnouvee to cite specific areas where his work had been deficient, Desnouvee cut him off with the declaration that he did not wish "to get involved in an intellectual conversation with you." Before he left the office, Wycherley asked Hoffman if he would receive any severance pay and the personnel officer answered in the negative.⁶

Neither Dodgion nor Mixon joined in any of the exchanges between Desnouvee and the two employees. As Wycherley left the office after getting his discharge notice, Dodgion accompanied him out of the plant and to his car. According to Wycherley's credible testimony, while doing so Dodgion told him that "he hated to see me go, that I was one of the best operators that he had."

Employee Robert Pletcher testified that about noon on March 10, and shortly after the discharge of Poling and Wycherley he had a conversation with Assistant Plant Manager Dodgion. According to Pletcher, Dodgion described a telephone conference that he and Plant Manager

Mixon had had with Regional Personnel Manager Godfrey Misus several days earlier. Pletcher testified that, in so doing, Dodgion told him that Misus commented on the lists which Wycherley had presented to Hoffman, characterized Wycherley as one who "would make a good union president" and stated that he (Misus) "wanted Ken Wycherley and Dave Poling fired." According to Pletcher, Dodgion told him that both he and Mixon tried to dissuade Misus from that course of action, but that "Godfrey said, no, that he wanted them fired." Pletcher testified that Dodgion further told him that after the February meeting "Hoffman had taken a personal dislike to Dave Poling" and that during the discussion on the telephone "Misus was madder than they [he and Mixon] had ever heard him before." At the hearing, Dodgion acknowledged having a conversation with Pletcher at this time, but he testified that he could not remember the details. Pletcher was a credible witness whose testimony was given in a forthright and convincing manner; consequently, it is now found that this conversation occurred substantially as he testified.

After having discharged Poling and Wycherley, Desnouvee and Hoffman met with the remaining employees, all of whom were summoned to the plant office. Mixon and Dodgion were both present while Desnouvee spoke to the men. Employee David Hall testified that Desnouvee told them, in explaining the reasons for the discharges, that Wycherley had a "bad attitude" and that during the 2 years that Wycherley and Poling were working at the plant "their bad attitudes were sprouting, we were heading in the wrong direction and it was time to put a stop to it." Employee Charles Fruner testified that Desnouvee also told them that after "two years of looking at these fellows, Ken Wycherley had not developed the operator expertise that was expected of him and Dave Poling was nervous and . . . was not cut out to work by himself." Fruner testified that he protested to Desnouvee that he could not accept that explanation because he had personally helped train both Wycherley and Poling, whereupon Desnouvee told him that by questioning him he (Fruner) was "getting into some troublesome areas" and Fruner would just have "to trust" him in assuming that the discharges were accomplished for the benefit of the other employees and the Company. After Desnouvee concluded his explanation to the employees for the terminations of Wycherley and Poling, he announced that the Company was granting them a wage increase of approximately 7 percent. Both Mixon and Dodgion were present throughout the meeting, but said nothing. The testimony of both Hall and Fruner as to this meeting was credible and it was not denied or contradicted by that of any other witness.⁷

Employee James Sutton, who was on the night shift during this particular period, testified that about 11 p.m., on the evening of March 10, both Mixon and Desnouvee came to see him and to discuss further the events of the afternoon. According to Sutton, Desnouvee assured him that the terminations did not constitute a "reflection of their [Wycherley's and Poling's] job abilities" but that the Company was dissatisfied with Poling because he wanted

⁵ The quotation in this sentence is from Poling's credible uncontradicted testimony.

⁶ The findings and the quotations in this paragraph are from the credible uncontradicted testimony of Wycherley.

⁷ The quotations in this paragraph are from the credited testimony of Hall and Fruner.

two men on a shift and dissatisfied with Wycherley because he was a "radical and had a bad attitude which . . . might reflect on the other operators." Sutton testified that throughout the time that Desnouvee was speaking to him, Mixon said nothing, but seemed "sort of glum." Sutton's testimony as to this conversation was credible and it was undenied by any of the other principals.

About 2 days later, Sutton and his wife, Janet Sutton, went to Mixon's home to question him about the shift schedule on which the employee was then assigned. According to both Sutton and his wife, during the time that they were at the plant manager's home, Mixon told them that Poling was terminated because he "was afraid of his job and wanted two men on a shift" and that Wycherley was terminated because he "had a bad attitude and was a bit of a radical." Sutton further testified that Mixon volunteered his own conviction that before their discharges the two men should have had prior warnings. At the hearing Mixon did not dispute this version of his conversation with the Suttons other than to deny that he had questioned the manner in which the terminations were effected.

Employee Charles Fruner testified that on the morning of March 11, in a conversation with Assistant Plant Manager Dodgion the latter told him that he had learned 2 weeks earlier that Wycherley was to be discharged, but that he heard about the decision as to Poling only 3 days before. According to Fruner, Dodgion further stated that he told Desnouvee that not only was Wycherley a good operator, but that with his discharge the Company would lose a potentially good supervisor. Fruner testified that later that same day he had a conversation with Mixon wherein the plant manager told him "where we got in trouble was turning in these demand lists." According to Fruner, Mixon cautioned him that the lists should have been shown to him before their submission "because whenever you sign something like that you are going out on a limb." Fruner testified that Mixon concluded their conversation with the statement, "Whenever you are prepared to make waves you better expect bigger waves back." Dodgion testified that he could not recall any such meeting with Fruner as the employee described; nor could Mixon recall having had the conversation which Fruner testified about. As found earlier, however, Fruner was a credible witness. On the basis of his demeanor and bearing during the course of his appearance on the stand, it is now found that his testimony as to these conversations was more convincing than that offered by Dodgion and Mixon.

Employee David Hall testified that, about a week after the discharges and while at work, he asked Mixon as to the real reason for this action by the Company. According to Hall, Mixon's only comment was "if you make big waves you best be prepared for big waves coming back." Hall further testified that about a week later, in another conversation with Mixon, he brought up the same subject again and, on that occasion, Mixon remarked, "When a man starts putting things down on paper, watch out." When

on the stand, Mixon testified that he could not recall having made the first statement which Hall attributed to him and as to the second statement he denied having told Hall that the discharges were related to the part which Wycherley and Poling had played in presenting the grievance lists to Hoffman. Hall was a credible witness who was still in the employ of the Respondent at the time of the hearing.⁸ His testimony was given in a frank and forthright manner. It is my conclusion that the conversations which he had with the plant manager occurred substantially as he described them.

Poling testified that about a week after his discharge Assistant Plant Manager Dodgion informed him that he had a paycheck for him, and when he went to get it the supervisor invited him to have coffee at a nearby restaurant. According to Poling, thereafter Dodgion told him that the management was "very mad about" their request for clarification of company policy which was made at the February meeting with Hoffman and that the management "didn't like the idea of us bringing up OSHA (Occupational Safety and Health Administration) and unions . . . that was something the Company frowned upon." Poling further testified that Dodgion told him that he was "perfectly satisfied with our work there" but that Wycherley was terminated because of his "poor attitude." According to Poling, Dodgion concluded the conversation by stating that Desnouvee had, in effect, given him and Mixon an ultimatum and that Desnouvee had told them that if Mixon "could not handle the situation [that had arisen] within the plant that he would fire him and hire somebody that could." When on the stand, Dodgion denied that during this conversation he had told Poling that employees should not bring up the subject of the OSHA or union matters. On the other hand, in a prehearing affidavit, Dodgion averred that during the discussion with Poling "I did tell Poling that Desnouvee had told Mixon and me that if John and I couldn't control the problem at the plant we would be replaced." When cross-examined at the hearing about this affidavit, Dodgion professed to have no knowledge as to the "problem" about which Desnouvee was referring. Dodgion was not a persuasive witness on this subject. Poling was credible and his testimony in this connection is now found to present a substantially accurate account of their conversation.

There was no dispute that Poling had a good work record. Poling testified that about a week after his discharge he learned that Mixon had recommended him highly for a job with another employer. When Poling telephoned Mixon to thank him for this assistance, the plant manager told him "I'll tell anyone, Dave, that you are a real good worker. . . . I have always said that and I always will."⁹

Although at the time Desnouvee notified them of their discharges Hoffman told Wycherley and Poling that they were ineligible for any separation pay, the Company subsequently reversed this position. In identical letters, dated March 30, 1976, Hoffman wrote to both Wycherley and Poling to tell them they were being given 2 weeks' separation pay at their base salary and that they were being

⁸ Along with Hall, Fruner and Sutton were still in the Respondent's employ at the time of the hearing. This has been held a significant factor in assessing credibility when the testimony of the employee is in conflict with that of the Respondent's agents, as was the case herein *The Coca Cola Company, Foods Division*, 196 NLRB 892, 893, fn. 5 (1972).

⁹ The quotation is from Poling's testimony which was credible and, in this respect, undenied by Mixon when the latter was on the stand.

granted this payment in lieu of notice prior to their involuntary termination.

The Respondent's witnesses testified to a series of complaints about Wycherley and Poling which purportedly led them to the conclusion that both of the employees must be discharged. All of them denied that any concerted or union activities of these two employees played a part in the Respondent's decision.

Plant Manager Mixon testified that, although Poling was a good employee, whenever he was assigned his turn to work alone on the night shift he displayed a great reluctance to be in the plant by himself. According to Mixon, Poling seemed to be afraid of the plant and the trouble which might arise while he was there alone. Mixon testified that by December 1975 he and Assistant Plant Manager Dodgion decided that they no longer had a place for Poling.

Mixon testified that Wycherley was very moody and that, at times, it was difficult to communicate with him. Mixon also criticized him on the ground that the employee objected to a requirement, put into effect in August 1975, whereby the operators, such as Wycherley, were required to help load the customers' trucks. Assistant Plant Manager Dodgion testified that Wycherley objected to this additional duty and appeared to think that it was demeaning. According to Dodgion, by December 1975, both he and Mixon had decided to terminate Wycherley.

Assistant Personnel Manager Hoffman testified that "sometime in January" he talked with Mixon and that at that time the latter told him about "problems" (without specifying the type of problems) he was having with Poling and Wycherley. Mixon testified that, early that same month, he told Manager Desnouvee that he did not think the Company should keep these two employees and that a few weeks later he told Desnouvee that both men should be terminated. Hoffman testified that when he was at the plant on February 11 he conferred with Mixon before going to his meeting with the employees. According to Hoffman, at that time he and Mixon spent almost an hour in a discussion as to whether the Company should keep Wycherley and Poling.

Mixon testified that late in February, or early in March, he had another conversation with Desnouvee on this subject. According to Mixon, he reiterated his earlier conclusion that Poling should be terminated, but that at that point he was undecided about Wycherley. Mixon testified that about a week later, however, J. P. Nicklos, a customer's representative, told him about an incident that reflected unfavorably on Wycherley, whereupon he again telephoned Desnouvee and told him that the latter employee should also be discharged. Nicklos was a quality assurance supervisor for the Department of Defense. According to Mixon, under a new contract with the National Aeronautics and Space Administration, Nicklos came to the plant during the first week in March to oversee the loading and to check on the quality of the first shipments of liquid nitrogen which the Respondent would supply. Mixon testified that during the course of that week Nicklos criticized Wycherley for spending too much time on the loading operation. When

called on rebuttal by the General Counsel, however, Nicklos did not corroborate Mixon. According to Nicklos, the only criticism he voiced at the time in question was directed at the Company itself, first for not having the proper equipment it needed for the job most particularly an efficient vacuum pump, and secondly for not having a truck available the latter part of the week. Nicklos testified that the Company eventually secured the needed pumping equipment and that Mixon explained the delay as to the truck as having been caused by the tardy arrival of the carrier. According to Nicklos, he watched Wycherley perform his work throughout that week and found it completely satisfactory. He further testified that he had no recollection of ever having talked with Mixon about Wycherley. Nicklos was a credible witness and on the basis of his testimony it is now found that, contrary to Mixon's statement at the hearing, Nicklos did not voice any complaints about Wycherley's work at any time in March.

At the hearing, Dodgion and Mixon also attributed misconduct to Wycherley during a fire which occurred in a dump tank at the plant in September 1975. From their testimony and that of Wycherley, however, it was apparent that at the time of the incident Wycherley was not blamed, and that prior to his discharge neither Mixon nor Dodgion ever criticized him for his work during the fire. Moreover, when on the stand, Mixon conceded that he never told Desnouvee that this incident was Wycherley's fault. It is now found that the attempt to link Wycherley with responsibility for what was known in the record as "the dump tank incident" was an afterthought on the Respondent's part.¹⁰ According to Mixon, the final decision to dismiss both employees was not made until March 10. Desnouvee corroborated, in general, the testimony of Mixon about the occasions during the period from January until March when they discussed the shortcomings of Wycherley and Poling and the course of action which the Respondent should follow. According to Desnouvee, he reported on the matter to his superior because "I would not make such a serious move as to discharge two employees in a six man facility, without carefully reviewing it with my boss." Finally, Mixon testified that he placed such importance on the subject that before the eventual termination of Wycherley and Poling he had hour-long conversations on three or four occasions with Desnouvee as to what should be done about them.

Notwithstanding all of the studied concern which the Respondent's officials purportedly devoted to the question of what to do about Wycherley and Poling, both Mixon and Dodgion conceded that they never warned either employee that his work or his attitude was unsatisfactory and that without improvement each faced the prospect of dismissal. Mixon and Dodgion acknowledged that these two employees were good workers. And, after their dismissal, Desnouvee told employee Sutton that their termination "was no reflection on their job abilities."

malfesance was of such duration as to provide inescapable indicia of afterthought "

¹⁰ See *NLRB v Fairview Hospital*, 443 F.2d 1217, 1219 (C A 7, 1971). "The continuance of employment after the discovery of the claimed

Concluding Findings

The General Counsel has the burden of proving discrimination, and the Respondent does not have the burden of establishing the contrary. *Indiana Metal Products Corporation v. N.L.R.B.*, 202 F.2d 613, 616 (C.A. 7, 1953). See also *N.L.R.B. v. Kaiser Aluminum & Chemical Corp.*, 217 F.2d 366, 368 (C.A. 9, 1954); *N.L.R.B. v. T. A. McGahey, Sr., et al. d/b/a Columbus Marble Works*, 233 F.2d 406, 413 (C.A. 5, 1956). Moreover, the burden of proof never shifts from the General Counsel, and the Respondent does not have the burden of proving that it discharged an employee for the reason which it asserts. As was said by a court of appeals in an early case, so long as the provisions of the Act are not violated, an employer may discharge an employee for a "good reason, a poor reason or no reason at all." *Edward G. Budd Manufacturing Company v. N.L.R.B.*, 138 F.2d 86, 90 (C.A. 3, 1943), cert. denied 321 U.S. 773 (1943). At the same time, it is also true that an employer does not ordinarily discharge an employee for "no reason at all," and that support for a finding of unlawful motivation "is augmented [when] the explanation of the discharge offered by the respondent [does] not stand up under scrutiny." *N.L.R.B. v. Bird Machine Company*, 161 F.2d 589, 592 (C.A. 1, 1947).

Mixon and Dodgion testified that the discharges of Wycherley and Poling were the first involuntary terminations in their experience as supervisors. Even Desnouvee, who had responsibility for 14 plants, acknowledged that he had terminated only 3 other employees in a 4-year period prior to March 1976. Notwithstanding the fact that their dismissals would be unique in the management's history, Wycherley and Poling were precipitately discharged, without warning, in the middle of a pay period and, in fact, in the middle of a workday, allegedly because of bad "attitudes" and because the Respondent had discovered that Wycherley was not "happy" with the Company. Mixon, Dodgion, Hoffman, and Desnouvee, the four management officials involved in the terminations, testified to lengthy discussions and conferences held over a 3-to-4 month period before the day on which the employees were summarily fired, during which meetings and telephone conversations they allegedly debated with each other what should be done about the failings of these two employees. Notwithstanding all of the time assertedly spent on these discussions, admittedly, at no time prior to their dismissal did any supervisor ever caution or admonish Wycherley or Poling that his "attitude" might lead to dismissal. "Such action on the part of an employer is not natural." *E. Anthony & Sons v. N.L.R.B.*, 163 F.2d 22, 26-27 (C.A.D.C., 1947), cert. denied 332 U.S. 773;¹¹ *N.L.R.B. v. Melrose Processing Co.*, 351 F.2d 693, 699 (C.A. 8, 1965). It is my conclusion that much of the testimony given by the four above-named members of the supervisory hierarchy was

¹¹ In *Anthony*, which, as to the timing of discharges, involved a situation similar to that present here. Judge Prettyman, speaking for the court, stated at 26-27

[T]hese employees had been longtime, responsible and faithful employees, and had been commended for their work. All were discharged summarily, without preliminary warning, admonition or opportunity to change the act or practice complained of. Such action on the part of an employer is not natural. If the employer had really been disturbed by the

not credible, insofar as they sought to establish a longstanding concern about what to do with Wycherley and Poling. On the basis of this record, it is now found that the Respondent's real concern about these two employees originated on February 11 at which time Wycherley presented the employees' extensive lists of demands and requests to Hoffman, the company personnel specialist, and thereupon sought to secure some commitments as to the numerous grievances which the employees had about their rates, hours, and working conditions. When the latter offered little hope that any of these demands would be met, Poling raised the question as to whether what the Company was doing violated the regulations of OSHA and then openly proposed that what the employees might need was a union.

It was not long after this meeting that Dodgion told Pletcher that "Hoffman had taken a personal dislike to Dave Poling." This, of course, was not a surprising reaction, since, for a long while, the personnel office had manifested its concern about its employees becoming interested in a union by interrogating job applicants as to their union views and sympathies. Thereafter, when Misus, Hoffman's superior, telephoned Mixon and Dodgion to discuss the demands which the employees had presented to Hoffman, he was "madder than they had ever heard him before," characterized Wycherley as a "union president," and announced that he "wanted Ken Wycherley and Dave Poling fired."

Later, when Manager Desnouvee arrived at the plant to effectuate the dismissal of these two employees he felt constrained to offer an explanation to their remaining coworkers, his action having abruptly reduced the work force by one-third.¹² In so doing, Desnouvee told the other employees that Wycherley and Poling had a bad "attitude" and that their "bad attitudes were sprouting, we were heading in the wrong direction and it was time to put a stop to it." After employee Fruner expressed his incredulity at Desnouvee's explanation for the dismissals because he had helped train both of the dischargees and knew them to be well-qualified workers, Desnouvee advised him that, by his question, Fruner was "getting into some troublesome areas." Desnouvee then asked that Fruner and the other employees "trust" him in assuming that the discharges were accomplished for the benefit of the other workers and the Company.

On the day after the terminations, Mixon told employee Fruner that "where we got in trouble was turning in [those] demand lists" and then expressed the view that "whenever you are prepared to make waves you better expect bigger waves back." A few days later Mixon made a similar comment to employee David Hall when the latter brought up the subject of the discharges. Mixon also commented, in another conversation with Hall on the matter of the

circumstances it assigned as reasons for these discharges, and had had no other circumstances in mind, some word of admonition, some caution that the offending lapse be not repeated, or some opportunity for correction of the objectionable practice, would be almost inevitable. The summariness of the discharges of these employees, admittedly theretofore satisfactory, gives rise to a doubt as to the good faith of the assigned reason

¹² Desnouvee testified that at that time Wycherley and Poling constituted two of the six workers in the plant

discharges of Wycherley and Poling, "When a man starts putting things down on paper, watch out." About a week after the discharges, when Dodgion brought Poling's paycheck to the employee, Dodgion volunteered the statement that the Company "frowned upon" Wycherley and Poling "bringing up OSHA and Unions" at the meeting with Hoffman. In this same conversation Dodgion disclosed that Desnouvee had threatened that if Mixon could not handle the situation which Wycherley and Poling had provoked "he [Desnouvee] would fire him [Mixon] and hire somebody who could."

It is manifest that Wycherley, Poling, and the other employees were acting in concert on February 11 when they came to the hearing with the Respondent's personnel officer and raised questions, *inter alia*, as to whether the Company was in compliance with the regulations of OSHA. This was concerted activity on their part and under the National Labor Relations Act it was protected. *Alleghenia Cushion Co., Inc.*, 221 NLRB 999 (1975); *G.V.R., Inc.*, 201 NLRB 147 (1973); *White's Gas & Appliance, Inc.*, 202 NLRB 494, 495 (1973); *Meade Construction Co., Inc.*, 220 NLRB 691 (1975).

The celerity with which the Respondent's management moved to dismiss Wycherley and Poling, two employees whose work records until then had been excellent, was not a normal reaction. It is my conclusion, on the facts present here, that the purported concern of the Respondent's officials with the "attitudes" of Wycherley and Poling and with Wycherley not being "happy" at the plant was a pretext and that the real reason for the precipitate termination of these employees was their participation in protected concerted activities on February 11 and Poling's having proposed that he and his coworkers might need a union. Consequently, it is now found that by its discharge of Wycherley and Poling on March 10, 1976, the Respondent violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce and the Union is a labor organization, all within the meaning of the Act.
2. By discriminating in regard to the hire and tenure of Kenneth Wycherley and David Poling, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that

the Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily terminated Kenneth Wycherley and David Poling on March 10, 1976, I will recommend that the Respondent be ordered to offer Wycherley and Poling immediate and full reinstatement without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered from the time of their discharge to the date of the Respondent's offer of reinstatement. The backpay for the foregoing employees shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner, and amount prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962). It will also be recommended that the Respondent be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay due.

As the unfair labor practices committed by the Respondent are of a character striking at the root of employee rights safeguarded by the Act, it will be recommended that the said Respondent be ordered to cease and desist from infringing in any other manner upon the rights guaranteed in Section 7 of the Act. *N.L.R.B. v. Entwistle Manufacturing Co.*, 120 F.2d 532, 536 (C.A. 4, 1941).

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, there is issued the following recommended:

ORDER¹³

The Respondent, Air Products and Chemicals, Inc., New Martinsville, West Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees, or otherwise discriminating in any manner with respect to their tenure of employment or any term or condition of employment, because they engage in activity having as its purpose the submission, presentation, or processing of protests relating to employee wages, hours, or working conditions.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid, or to refrain from any or all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Kenneth Wycherley and David Poling immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them whole in the manner set forth in the section of this Decision entitled "The Remedy."

¹³ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended 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.

(b) Preserve, and upon request, make available to the Board, or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary, or appropriate, to analyze the amount of back pay due under the terms of this Order.

(c) Post at its plant near New Martinsville, West Virginia, copies of the attached notice marked "Appendix."¹⁴ Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by the Respondent's authorized representative, shall be posted by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

¹⁴ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"

APPENDIX

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

WE WILL NOT discourage concerted activity on the part of our employees or discourage membership in any labor organization by discharging, or otherwise discriminating against any employees because they engage in activity having as its purpose the submission, presentation, or processing of protests relating to employee wages, hours, or working conditions.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL offer to Kenneth Wycherley and David Poling immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of pay suffered as a result of the discrimination against them, with interest.

AIR PRODUCTS AND
CHEMICALS, INC.