United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 31, 1997

TO : Richard L. Ahearn, Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: L & BF Inc. 506-4033-5500
Case 9-CA-35052 506-4033-9300
506-6050-1260

This case was submitted for advice as to whether employees were engaged in protected concerted activity when they refused to take a respirator fitness test and insisted upon a more extensive physical examination and training before agreeing to work in and around what they believed to be unsafe chemicals.

FACTS

The Employer is a maintenance contractor at the Dow Chemical plant in Hanging Rock, Ohio. The Employer employees approximately 12 employees at the plant who perform mechanical and labor work. There is no history of collective bargaining affecting any of the Employer's employees.

The employees are required to work in areas where toxic chemicals are stored or produced and to clean up chemical spills. The Employer's contract with Dow mandates that the Employer comply with OSHA regulations which require all employees who must wear respirators to be medically certified as being able to wear such equipment and perform the work. In the past, a number of employees voluntarily took respirator fitness tests and wore respirators at work. The respirator fitness test consists of a simple medical examination designed to measure lung capacity and the ability of the employee to wear the respirator. The Employer's employees were aware that the Dow employees who worked with and around the same chemicals received a much more extensive physical examination with follow-up monitoring and, in addition, received training on the use of respirators and the handling of chemicals.

In April or May 1997, supervisor Sherman informed employees that they would no longer be using respirators. Upon questioning, Sherman admitted the reason was that the

physical exam the employees received was not adequate. Later in May, however, Sherman informed the employees that they would have to get updated respirator exams since they would be doing more extensive chemical cleanup work during Dow's maintenance shutdown. A number of employees objected to have the same "inadequate" exam as before when they would be cleaning up toxic chemicals. Later that afternoon, the 7 employees who objected to the exam met with the Lawrence Fields, the Employer's president. Fields denied knowing that the employees had been working in chemicals and stated that he would look into the situation.

The following day, Sherman met with three of the seven employees at work. He told them that the Employer's contract required them to wear respirators and that they would receive the same exam as they had in the past. All three employees stated that they would not work in the chemicals without receiving the same physical examinations and training that Dow employees received. Sherman fired all three employees at that time.

The remaining four employees met with Fields at his home that night. They, too, stated that they would not work around the chemicals or get fitted for the respirator without receiving proper training. Fields then fired each employee who refused to take the test.

On May 10, 1997, OSHA cited and fined the Employer for "Serious" violations of the OSHA statute: failure to monitor workplace and operation to determine the airborne concentrations of AN to which employees may have been exposed; failure to provide training to all employees exposed to AN; and failure to post materials safety data sheets.

ACTION

Complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by discharging employees for refusing to work around toxic chemicals without proper training.

Employees may not be discharged or otherwise discriminated against for engaging in concerted work

stoppages to protest working conditions.[1] However, it is well established that concerted activity is unprotected where employees refuse to work on the terms prescribed by their employer, yet remain on their jobs, thereby denying the employer the opportunity to replace them with workers who will accept the terms of employment.[2] To countenance such a "partial" strike would allow employees to do what the Board "would not allow any employer to do; that is, unilaterally determine conditions of employment."[3] Thus, employees have lost their protected status where they have engaged in a work "slowdown,"[4] and where they have refused to perform specific job tasks while continuing to perform their other duties.[5]

On the other hand, in Union Boiler, 213 NLRB 818 (1974), for example, the Board held that an employer unlawfully discharged employees for engaging in a protected work stoppage. In that case, employees refused to continue working inside a silo because of safety considerations. The employer told the employees to either work inside the silo or be discharged and when the employees refused they were discharged. Similarly, in Sargent Electric Co., 237

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[1] NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (spontaneous work stoppage to protest an existing adverse working condition (the extreme cold) was protected); Robertson Industries, 216 NLRB 361 (1975); L.C. Cassidy, 206 NLRB 486, 490-491 (1973).

[2] See New Fairview Hall Convalescent Home, 206 NLRB 688, 747 (1973)(unprotected intermittent walkouts).

[3] Valley City Furniture Company, 110 NLRB 1589, 1594-95 (1954).

[4] See Philips Industries, 295 NLRB 717, 732 (1989); Potter Electrical Engineering & Constr. Co., 181 NLRB 743, 747 (1970).

[5] See Highlands Hospital Corp., 278 NLRB 1097 (1986) (guards refused to escort nonstriking employees through picket line while continuing to perform their other duties); Audubon Health Center, 268 NLRB 135, 136 (nurses aides refused to cover section left vacant by ill worker).

NLRB 1545, the Board held that employees refusal to perform electrical work on a 100 foot silo during a snowstorm, which the employees regarded as unsafe working conditions, was protected. Finally, in L.C. Cassidy, supra, an employer violated Section 8(a)(1) when it discharged an employee, at least in substantial part, because he and another worker refused to do a certain job until their piece-rate wages for the job were changed to hourly wages. The ALJ, with Board approval, reasoned that their concerted refusal to work was an exercise of the right to bargain over wages.

Here, as in the above cited cases, the employees were engaged in a protected, concerted, refusal to work in protest of "unsafe" working conditions. Thus, when told by the Employer that they were required to wear respirators but would not receive the same comprehensive physical examination that DOW employees received, the employees all stated that they would not work under those conditions. The Employer then fired them.

The fact that the Employer's contract with DOW requires employees to be tested does not lead to a different result since the employees were willing to be tested; they only insisted on what they considered to be adequate testing and proper training for work around toxic chemicals. Further, although the Employer was not required to keep the employees working if there were no work available that did not require the use of a respirator, the above cases show that the Employer could not lawfully **fire** the employees for their protected, concerted activities.

The Board's decision in Bird Engineering[6] and the Advice memorandum in Interlink[7] are distinguishable. In Bird, employees clocked out of the employer's facility during their lunchbreak in protest against a new policy prohibiting employees from leaving the premises during their lunchbreaks. The Board found this deliberate violation of a known work rule to be unprotected insubordination. The Board noted that, unlike Washington Aluminum and its progeny,

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[6] 270 NLRB 1415 (1984).

[7] 121 LRRM 1354.

> [t]hese employees did not engage in a strike, withholding of work, or other permissible form of protest to demonstrate their disagreement with the Respondent's rule. Instead, they simply chose to ignore the rule in direct defiance of the direction and warnings of management. By treating the rule as a nullity and following their pre-rule lunchtime practice they did not participate in a legitimate protected exercise but rather engaged in insubordination. These employees were attempting to both remain on the job and to determine for themselves which terms and conditions of employment they would observe.

Similarly, in Interlink, employees simply refused to sign lawfully issued disciplinary notices, an act of insubordination, which was unprotected activity.

However, as discussed above, the employees here concertedly refused to work in protest over allegedly unsafe working conditions. This concerted refusal to work was not, as in Bird, a partial strike or mere insubordination, since the employees were withholding their labor until their demands for proper testing were met. In these circumstances, their activity was protected.

Accordingly, Complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by discharging employees who concertedly refused to work around toxic chemicals without proper training.

B.J.K.