American and Efird Mills, Inc. *and* **Addie L. Justice.** Case 11-CA-9973

19 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 27 May 1982 Administrative Law Judge Hutton S. Brandon issued the attached Decision in this proceeding. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the attached decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order.

In affirming the judge's ultimate determination that employee Addie Justice was not engaged in concerted activity when he refused to drive tractor number 88 on 18 February 1981, we do not agree with all of the judge's reasoning and discussion. Rather, in finding that Justice was acting only for his own benefit and was not engaged in concerted activity, we rely solely on the lack of evidence that Justice discussed his concerns with any fellow worker and secured their support.

In *Meyers Industries*,[1] the Board stated as follows:

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.

Thus, the Board no longer finds the activity of an individual employee to be concerted based on a presumption that the issue involved is of interest to other employees.

Justice's refusal to operate a truck was clearly not concerted activity within the definition set forth in *Meyers*. We therefore agree with the judge that Respondent did not violate Section 8(a)(1) of the Act by discharging Justice.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] 268 NLRB 493, 497 (1984).

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge. This case was heard at Charlotte, North Carolina, on March 22, 1982. The charge was filed on March 20, 1981,[1] by Addie L. Justice, an individual, herein called Justice, alleging that American and Efird Mills, Inc., herein called Respondent or the Company, violated Section 8(a)(1) of the National Labor Relations Act, herein called the Act, in the discharge of Justice on or about February 18. The complaint in the matter issued on June 17 alleging that Respondent violated Section 8(a)(1) of the Act by discharging Justice because he had engaged in concerted activities with other employees for the purpose of collective bargaining and mutual aid and protection. Respondent filed a timely answer denying that it had engaged in any violations of the Act attributed to it. The issue presented by the pleadings and the evidence is whether Justice was engaged in protected activity under the Act when he refused to perform his work as a truckdriver claiming that the truck emitted nauseating and noxious fumes and asserting it would be against the law to require that he drive such a truck.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the positions and arguments of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with a plant in Mt. Holley, North Carolina, where it is engaged in the manufacture of textile products. Respondent during the calendar year preceding the issuance of the complaint purchased and received goods and materials valued in excess of $50,000 from points directly outside the State of North Carolina. During the same period Respondent manufactured, sold, and shipped goods valued in excess of $50,000 directly to points outside North Carolina. The complaint alleges, Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Material Facts*

The facts in this case are not in substantial dispute. Justice was employed by Respondent as a truckdriver and had been so employed for a period of 10 or 11 months prior to his discharge on March 10. Justice, who had about 24 or 25 years of prior driving experience, was suspended on February 18 as a result of his refusal to drive Respondent's tractor No. 88. Justice credibly testified that he had been assigned to drive tractor No. 88 on February 17,[2] and during his driving of the tractor that

[1] All dates are in 1981 unless otherwise specified.

[2] Respondent's drivers are not assigned specific trucks. Thus, a driver may drive one truck one day and a different one the next.

day he noticed some fumes which he found nauseous. Justice, assuming that the fumes were coming from the gear shift well, attempted to rearrange some cloth waste material in the gear well to block the fumes. Justice continued to smell fumes, however, which, besides making him nauseous, made him feel lethargic and drowsy. When he returned to Respondent's plant he reported the problem to Jimmy King, Respondent's traffic manager and an admitted supervisor within the meaning of the Act. Justice testified without contradiction that he told King the fumes were excessive and were making him sick. King responded, however, that they had a heavy workload that day and he could not take the truck out of service; he asked Justice to go ahead and drive it that day and after one additional run the following morning King would take the truck to Diesel Alignment & Service, a repair shop under contract with Respondent, to repair its trucks. Accordingly, Justice continued to drive tractor No. 88 for the remainder of the day.

On the morning of February 18 during his first trip out in tractor No. 88 to Lenoir, North Carolina, Justice continued to smell the fumes that he had smelled the preceding day. As a result he rolled the windows down and when he returned to the plant he was given some additional dispatches by the individual acting for King who was not in at the time. Justice protested that King had told him the day before that when he had gotten back in from that trip he could take the truck and have it repaired. He was then told to wait until King returned and talk to him about it. When King returned, Justice reminded him of their conversation the preceding day when King had said that, on his return to Mt. Holley, Justice could take the truck to have it repaired. However, King responded that they had another heavy work schedule that day and they could not take the truck out of service since the work had to be done. Justice stated he did not feel like he could take it another day but King replied that he would have the truck fixed as soon as they had a slack day. Justice asked King not to force him to drive tractor No. 88 and suggested that they let him drive tractor No. 89 which was sitting on the yard. King replied that they did not want to use that truck, but he nevertheless got a key and went out to tractor No. 89 and unsuccessfully tried to unlock it. King then told Justice that he would just have to drive tractor No. 88 or go home. Justice then stated that there were state laws and Federal laws that prohibited the Company from forcing an employee to drive a truck in the condition that tractor No. 88 was in. Justice testified that he made that remark twice to King and also added that he said it was against the laws of common decency to make him drive something unhealthy and which was making him sick. Nonetheless, King persisted stating that he would either have to drive No. 88 or go home, and that if he did go home he should not come back because he was "through."

Justice admittedly refused to drive the truck. Instead he went to the office of the plant manager, William Boaz, where he related the problem to Boaz and asserted to Boaz that he told King that it was against the law to force anybody to drive a truck like that, and expressed the hope to Boaz that Boaz could change King's mind. Boaz, according to Justice, stated, however, that when Justice had refused an order from his superior he voluntarily quit. Justice asked if he would not reconsider letting him keep his job and Boaz responded that he would put Justice on a 14-day leave of absence at the end of which time King, who had given notice of resigning to accept other employment, would be gone and he would take the matter up with the new traffic manager. However, Boaz then changed the leave period from 14 days to 21 days after explaining he did not believe that the new traffic manager would be on hand at the expiration of the 14-day period.

At the conclusion of the 21-day period on March 10 when Justice again went in to see Boaz, Boaz stated that Justice would not be able to return to work. Boaz explained that he had talked to 10 or 12 people who had said that Justice was hard to get along with and that he should not be allowed to return to work. Moreover, Boaz added that Justice had refused an order and voluntarily quit. There was further discussion about inadequacy of Justice's work performance but at the conclusion of the conversation Justice specifically asked if his discharge was not based on his refusal to drive the truck. Boaz' reply was that because he had refused to drive the truck he had voluntarily quit. Justice testified that he again told Boaz that he thought that there were state and Federal laws against forcing an employee to drive in an unsafe or unhealthy situation to which Boaz replied, "You will just have to sue us."

Although Respondent through Boaz asserted other grounds for the discharge of Justice, i.e., inability to get along with other employees, it is clear that it was Justice's refusal to drive tractor No. 88 which immediately resulted in his suspension and the investigation that subsequently ended with his discharge on March 10. Plant Manager Boaz admitted as much. However, Respondent defends the suspension and discharge on grounds that the truck was not unsafe and that Justice was not engaged in concerted activity under the Act when he refused to drive the truck.

With respect to the safety of the truck, Respondent presented its employee and truckdriver Vernon Jennings who testified that he drove tractor No. 88 on February 16, and noticed no fumes or problems. His testimony was supported by his drivers' log[3] which reflected he had driven tractor No. 88 for 378 miles on February 16. Jennings further testified, credibly I find, that he had also driven tractor No. 88 on February 23 and 24, after Justice's suspension, and again noticed no fumes. Respondent's former traffic manager, James King, testified that he had driven tractor No. 88 around noon on February 18, and had not smelled any fumes. On cross-examination he admitted, however, that his driving had involved only moving the truck around the parking lot.

Finally, Roy Sullens, owner of Diesel Alignment & Service, testified that he had been called on February 19 to pick up tractor No. 88 and check it out. Sullens credibly testified that he drove tractor No. 88 from Respond-

[3] R. Exh. 1.

ent's plant to his shop, a distance of some 8 miles.[4] He detected no fumes during this drive. In making general repairs on the truck, he found nothing which would contribute to extraordinary or unsafe odors or fumes. While he found a small oil leak in the fuel pump he testified that such leak would not be the basis for any odor. There was no fuel leakage found. His invoice on which Respondent was billed corroborated Sullens' testimony as to the repairs made.

B. *Arguments and Conclusions*

The General Counsel, relying primarily on the Board's decision in *Pink Moody, Inc.*, 237 NLRB 39 (1978), contends that Justice's complaint about fumes involved a safety matter, and although there was no evidence of actual support of his fellow employees with respect to Justice's complaint, the requisite employee support to establish concerted activity could be inferred because resolution of the complaint would inure to the benefit of all employees. In this regard, the General Counsel also relies on *Alleluia Cushion Co.*, 221 NLRB 999 (1975), cited in *Pink Moody, Inc.*, supra, as holding that "where an employee speaks up and seeks to enforce statutory provisions related to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find implied consent thereto and deem such activity to be concerted."

While not specifically cited by Justice at the time of his suspension of discharge, the General Counsel urges that the statutory provisions relating to Justice's safety complaint are found in 49 CFR §§ 392.3, 393.84 (1981). The first provision, captioned "Ill or fatigued operator," reads as follow:

> No driver shall operate a motor vehicle, and amotor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle. However, in a case of grave emergency where the hazard to occupants of the vehicle or other users of the highway would be increased by compliance with this section, the driver may continue to operate the motor vehicle to the nearest place at which the hazard is removed.

The second provision simply captioned "Floors," read as follow:

> The flooring in all motor vehicles shall be substantially constructed, free of unnecessary holes and openings, and shall be maintained so as to minimize the entrance of fumes, exhaust gases or fire. Floors shall not be permeated with oil or gasoline, and shall have the interior surface in good condition.

Since these provisions or regulations are maintained in part for employee safety, the General Counsel argues, it would be reasonable to presume that Justice's fellow employees would agree with his efforts to insure complaince by Respondent with such regulations. As the Board said in *Alleluia Cushion*, supra at 1000, "[T]he consent and concert of action emanates from the mere assertion of such statutory rights."

Respondent argues that tractor No. 88 was, in fact, not unsafe and that Justice's action and refusal to drive it was not a protected activity under the Act.

Based on the testimony, which I credit, of Roy Sullens, a qualified mechanic, I must conclude that tractor No. 88 was not, in fact, unsafe. The absence of a safety problem is also indicated by the testimony of Jennings who drove tractor No. 88 substantial distances both before and after Justice's suspension. But the testimony of neither Sullens or Jennings can preclude the possibility of some operational quirk or condition which might have given temporary rise to a fume problem on tractor No. 88 which could possibly have warranted Justice's complaint. Thus, and because Justice, as a witness, conveyed the impression of truthfulness while testifying, I conclude that he did believe he detected fumes which he found were nauseating to him on February 17 and 18. Further, in this regard, there was no apparent motivation shown on the record for Justice to have lied about the fumes. Moreover, his good faith in the matter is shown by his willingness to drive another truck. Finally, because of his 24 or 25 years of experience as a truckdriver, Justice's complaint about the fumes cannot be disregarded as the concern of a novice. Accordingly, I conclude that Justice had a subjective good-faith belief that there were fumes present in the operation of tractor No. 88 which made it unsafe to continue driving it over an extended period of time. I further conclude that he genuinely believed that Federal or state statutes protected him from having to drive a tractor which he perceived to be unsafe because of fumes. The question presented then is whether Justice's refusal to drive tractor No. 88 under these circumstances was a concerted activity protected under the Act.

The Board has long held that a single employee's efforts to enforce the provisions of a collective-bargaining agreement constitute concerted activity protected under Section 7 of the Act. See, e.g., *McLean Trucking Co.*, 252 NLRB 728 (1980); *Woodings Verona Tool Works*, 243 NLRB 472 (1979); *Roadway Express, Inc.*, 217 NLRB 278 (1975), enfd. 532 F.2d 751 (4th Cir. 1976); *Eric Strayer Co.*, 213 NLRB 344 (1974); *C & I Air Conditioning Inc.*, 193 NLRB 911 (1977), enf. denied 486 F.2d 977 (9th Cir. 1973); *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967); *Bunney Bros. Construction Co.*, 139 NLRB 1516 (1962). The rationale for this principle is that implementation of the agreement by an employee is but an extension of the concerted activity which had given rise to the agreement. The protection remains even if other employees are unconcerned with the asserted violation of the agreement. *Woodings Verona*

[4] In a statement given the Board during the investigation of the case, Sullens asserted he had not driven tractor no 88. He explained this as simply a mistake and reaffirmed that he had driven the truck to the shop. I find Sullens to be a candid and forthright witness and, notwithstanding the contradiction by his pretrial statement or the fact that he could not be regarded as totally unbiased in the case because of his business relationship with Respondent, I credit him.

Tool Works, supra. Further, the merit of the employees' complaint under the agreement is irrelevant to the existence of protection under the Act so long as the complaint is not frivolous or asserted in bad faith. *ARO, Inc.*, 227 NLRB 243 (1976). Here again it would appear that the rationale is that the conduct is concerted because it arises under the contract. However, it is not necessary that the employees refer to the applicable contractual provisions before protection can attach. *Woodings Verona Tool Work*, supra; *T & T Industries, Inc.*, 235 NLRB 517 (1978).

The Board has also held that, even in the absence of a collective-bargaining agreement, individual employee action may be considered as concerted and, thus, protected if such action relates to conditions of employment that are matters of mutual concern to all affected employees. *Pace Motor Lines*, 260 NLRB 1395 (1982), *Allen M. Campbell Co.*, 245 NLRB 1002 (1979); *U.S. Stove Co.*, 245 NLRB 1402 (1979); *Air Surrey Corp.*, 229 NLRB 1064 (1977), enf. denied 601 F.2d 256 (6th Cir. 1979); *Diagnostic Center Hospital Corp.*, 228 NLRB 1215 (1977); *Alleluia Cushion Co.*, supra. Moreover, the Board has held that efforts by an employee to insure compliance of his employer with statutory provisions or Federal regulations relating to working conditions and designed for the safety and benefit of all employees are protected. See *Pink Moody, Inc.*, supra; *Lloyd A. Fry Roofing Co.*, 237 NLRB 1005 (1978); *U.S. Stove Co.*, supra; *Diagnostic Center Hospital Corp.*, supra; *G. V. R., Inc.*, 201 NLRB 147 (1973).

The foregoing case law suggests that the action of Justice in the instant case would be considered as concerted and therefore protected when he refused to drive tractor No. 88 on his good-faith, even if mistaken, belief, that it was unsafe under applicable statutory or regulatory provisions because of fumes. A recent decision of the Board, *Washington Cartage*, 258 NLRB 701 (1981), on the other hand, appears to indicate a contrary result. Thus, in *Washington Cartage*, a truckdriver was discharged when, based on his personal past experience, and the experience of fellow drivers with whom he had talked, he refused to drive a particular tractor for a safety reason, its propensity to "drop trailers." While the administrative law judge in *Washington Cartage* found that the driver's "concern was real enough" and that there existed an objective basis for the driver's "reasonable concern" over safety of the tractor, he concluded, with Board approval, that the concern was based largely on the driver's own inexperience, and that the problem with the tractor was not a matter of common concern and interest to other drivers. Accordingly, the administrative law judge found, again with Board approval, that notwithstanding the driver's good faith in his safety concerns his refusal to drive the tractor did not constitute concerted activity under the Act. His discharge for refusing to drive the tractor did not violate Section 8(a)(1) of the Act.

The *Washington Cartage* case therefore appears to hold that even safety-related complaints may be unprotected if such complaints are based on concerns wholly personal or peculiar to the employee making the complaint. The "good faith" of the employee in *Washington Cartage* in asserting the safety complaint on the belief that others were also concerned was insufficient to make the complaint concerted and protected.

Washington Cartage can be distinguished from the sub judice on the basis that in that case the employee in making his safety complaint did not invoke or allude to any Federal or state statute.[5] That appears to be a distinction without a difference, however, since Justice in the instant case cited no specific statutory provision or regulation in his refusal to drive. It was only after the charge was filed that the previously quoted CFR provisions were concluded to have possible application to the case. Moreover, there is no evidence that Justice was suspended or discharged because he made a generalized reference to statutory provisions on safety. Thus, unlike the case of *Alleluia Cushion*, supra, or *Bighorn Beverage*, 236 NLRB 736 (1978), this is not a case of a discharge for filing a claim, or the expression of an intention to file a claim, with some governmental body under a statute relating to, or regulating, conditions of employment. Rather, Justice was suspended and discharged because he refused to drive the tractor. Accordingly, I conclude this case is distinguishable from *Alleluia Cushion*, supra, and to that line of cases, and is more in line factually with *Washington Cartage*. But see *Air Surrey Corp.*, supra. I conclude that the mere reference to unspecified statutory provisions on safety does not ipso facto make Justice's refusal to drive tractor No. 88 a concerted activity under the Act. It provided Respondent no knowledge of the concerted nature of Justice's action which is a necessary element to the establishment of a violation of the Act. *Diagnostic Center Hospital*, supra at 1216. Accordingly, I conclude that the concerted nature of Justice's conduct must be based on some other evidence reflecting that his action was actually, or implicitly, in the common interest of his fellow employees.

As already indicated, the Board has found that merit of an employee's complaint arising under a collective-bargaining agreement is irrelevant to the issue of whether the employee is engaged in protected concerted activity. Similarly, the Board and the courts have held that, even in the absence of a collective-bargaining agreement where employees are engaged in concerted action manifested by group activity, the merit of the group complaint is immaterial. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Union Boiler Co.*, 213 NLRB 818 (1974). It would appear, however, that where there is no collective-bargaining agreement the merit of a single employee's complaint on a safety matter must be corrobo-

[5] It seems reasonable to assume that operating a tractor which has an unremedied propensity to "drop trailers" as was the situation in *Washington Cartage* would be contrary to some statutory proscription regarding safety if not a violation of traffic laws. An inference to this effect would appear to have been appropriate in *Washington Cartage* in view of dicta in *Pink Moody*, supra. There, while no specific statutory provision was cited by an employee in making a safety complaint regarding malfunctioning truck brakes, the Board observed, 237 NLRB 39, 40:

> [C]ompliance with an order to drive a motor vehicle with malfunctioning brakes would clearly violate traffic regulations[2] and thus any benefits resulting from [the driver's] refusal to drive such an unsafe vehicle would inure to the benefit of all of Respondent's drivers.

[2] An employer's ordering of a commercially licensed driver to violate traffic regulations and ordinances would be a matter of grave concern to all drivers.

rated by at least some objective criteria establishing a basis for a reasonable belief of the existence of a dangerous condition so as to make it a likely concern to more than just the complaining employee. *Washington Cartage*, supra; *U.S. Stove Co.*, supra. Cf. *Union Boiler Co.*, supra; *Tamara Foods*, 258 NLRB 1307 (1981). I conclude that, in the absence of objective evidence of an unsafe condition, concerted, and thus protected, activity must be shown by evidence that fellow employees share the acting employee's concern and interest in the safety complaint. There is no such evidence in the instant case.

No general hazard to employees was shown to exist in the instant case through the "fumes" detected and objected to by Justice. No objective criteria existed to corroborate Justice's claim of a dangerous condition. No objective evidence was presented to show a reasonable basis for the belief that other employees would be endangered if they were required to operate tractor No. 88 or that they would be concerned about any fumes from tractor No. 88. On the contrary, other evidence in the form of credited testimony of Jennings and Sullens would reflect no actual hazard present in tractor No. 88. Jennings detected no fumes either before or after Justice's suspension, and Sullens could find nothing wrong with the tractor which would provide a source for the fumes. There was no evidence that any driver other than Justice refused to drive tractor No. 88 or that any other driver experienced nausea or became lethargic while driving tractor No. 88. Accordingly, although I have previously concluded that Justice acted in good faith and had a real concern, I am persuaded that his reaction as well as his concern was entirely personal and subjective as was that of the employee considered in the *Washington Cartage* case. Accordingly, no basis exists for requiring the inference to be drawn that Justice's complaint involved a general hazard to employees and that he therefore was acting for the common good of his fellow employees and in concert with them when he refused to drive tractor No. 88. I find that Justice's refusal to drive tractor No. 88 did not constitute protected concerted activity, and I therefore find no violation of the Act in Justice's suspension and discharge. Accordingly, I shall recommend dismissal of the complaint.

Having found that Respondent did not violate Section 8(a)(1) of the Act in its actions with respect to Justice, I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent has not committed any unfair labor practices within the meaning of Section 8(a)(1) of the Act with respect to the suspension and discharge of Addie L. Justice.

On the basis of the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed in its entirety.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.