

**Metro-Young Construction Company, a Division of
Olson Construction Co., Inc. and Michael D.
Stelzig. Case 21-CA-21472**

28 March 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 28 July 1983 Administrative Law Judge Michael D. Stevenson issued the attached decision. Charging Party Michael D. Stelzig filed exceptions. The Respondent filed cross-exceptions and a supporting brief.¹

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.²

ORDER

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

¹ We deny the Respondent's motion to strike the Charging Party's exceptions.

² In reaching our decision, we find it unnecessary to rely on the judge's findings that Stelzig acted to the detriment of his coemployees and that Stelzig would not have asked for the letter of reference if he really believed he was fired. We also note that *Alleluia Cushion Co.*, 221 NLRB 999 (1975), has been overruled by *Meyers Industries*, 268 NLRB No. 73 (Jan. 6, 1984). We find it unnecessary to pass on the applicability of *Meyers Industries* in the instant case.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at San Diego, California, on May 17 and 18, 1983,¹ pursuant to a complaint issued by the Regional Director for Region 21 of the National Labor Relations Board on April 12, 1983, and which is based on a charge filed by Michael D. Stelzig (the Charging Party) on August 6. The complaint alleges that Metro-Young Construction Company, a Division of Olson Construction Co., Inc. (the Respondent) has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act).

Issues

Whether the Charging Party was engaging in protected concerted activity when he withheld his services from the Respondent due to allegedly unsafe working condi-

tions, and, if so, whether the Charging Party was subsequently constructively discharged or terminated by the Respondent for engaging in protected concerted activity in violation of Section 8(a)(1) of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE RESPONDENT'S BUSINESS

The Respondent admits that it is a Nebraska corporation engaged in the construction business and having administrative offices located in San Diego, California. It further admits that during the past year, in the course and conduct of its business, it has purchased and received goods and materials valued in excess of \$50,000 from suppliers outside the State of California. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Charging Party Michael D. Stelzig, age 26, first began working for the Respondent in March 1976 as a laborer. For the past 4 years of more or less steady employment, he has performed the work of pipe layer and leadman.

Sometime in late 1981, the Respondent contracted to perform certain work in Palm Springs, California. Stelzig, a resident of the San Diego area, was offered an opportunity for employment on this project. The work involved the digging of a 5000-foot trench and the laying of 8-foot segments of 48-inch diameter pipe. At first reluctant to work at a job approximately 125 miles from his home, Stelzig was finally persuaded to take the job because no other employment was then available in the San Diego area. He began work on or about January 11.

In the beginning, the trench was only 3-4 feet deep. A digging machine described as a 5800 Link Belt was used. Operated by a man named McDaniel, this machine weighs about 110,000 pounds and has a 4-3/4 yard capacity bucket attached to it. The bucket is 60 inches high, 60 inches in width, and 60 inches in depth.

Stelzig's job was to remain in the ditch, using a shovel to make a level grade, and to assist in guiding in the 5-ton segment of pipe lowered into the trench by the digging machine. Before the new segment was attached, Stelzig soaped the inside of the other pipe to facilitate entry and attachment of the new pipe. In addition to machine operator McDaniel, there were other employees as part of the crew: Burnell Lurcook, the immediate job foreman, an oiler, and two laborers. With the exception of Lurcook, none of the other workers testified.

¹ All dates herein refer to 1982 unless otherwise indicated.

For the first week, Stelzig rode back and forth to San Diego on the weekends with Lurcook. Thereafter Stelzig rode with McDaniel, with whom Stelzig stayed during the week, in a Palm Springs motel room. While Stelzig and Lurcook knew each other from prior jobs, neither Stelzig nor Lurcook knew McDaniel before the Palm Springs job.

The Respondent paid Stelzig \$90 per week subsistence in addition to his salary. Stelzig felt he should be receiving \$110 per week. Without giving prior notice to Lurcook or any other supervisor of the Respondent, Stelzig did not report for work in Palm Springs on the Monday of the third week of his employment. Instead Stelzig appeared at the Respondent's San Diego offices on that Monday, and talked to the Respondent's vice president and general manager, James Kangers, a witness at hearing. Stelzig told Kangers that his subsistence was too low and again asked for a San Diego assignment. Kangers told him nothing else was available.

After refusing to work for 1 or 2 weeks, Stelzig finally agreed to return to Palm Springs and resume working on the project. As to whether Stelzig ever received the higher subsistence rate, he stated at one point:

[Kangers] said, talk to them [supervisors on the job] and they will probably give you more money, which I never did get but I went back up there anyways.

Later, I asked Stelzig, "You did get your \$110.00," and he answered, "Yes." Accordingly, I cannot tell for sure how much subsistence Stelzig received when he reported back to work.

In any event, Stelzig resumed his employment in Palm Springs, where he continued until February 25. The project involved an expansion of a sewage treatment plant. In order to lay the desired 200 feet of pipe per day, the crew would "dig and lay" on alternate days. However, as certain conditions changed, problems developed.

First, the trench became deeper as the topography of land changed. Eventually, the depth approached 11-12 feet. The dirt removed from the trench, called "spoil," was piled about 12-15 feet high alongside the trench. A disagreement soon developed between Lurcook and McDaniel over the correct method of operating the digging machine. McDaniel "pushed down" with the bucket which Lurcook felt wasted too much time and caused other problems such as tending to fracture the ground behind the bucket. Lurcook wanted him to "wipe up" which is to take the bucket down into the trench, fill it with dirt, and as you come up, wipe the slope to take all the bad areas and wrinkles out of the trench. According to Stelzig, McDaniel's method was much safer as it contributed to a sloping effect on the sides of the trench and made cave-in less likely. On the other hand, Stelzig allegedly felt that Lurcook's method described as "straight up and down" was too dangerous and increased the risk of injury to Stelzig.

The disagreement between McDaniel and Lurcook had been continuing for some time with McDaniel apparently persisting in using his method of digging the

trench. Before work began on February 25, Lurcook told his crew that more production was needed and that they would have to work harder and faster. There followed another verbal disagreement between Lurcook and McDaniel in late morning. Finally, about 1 p.m., McDaniel left the digging machine and told Lurcook that he had enough of his "bullshit." McDaniel then walked toward his van and left the area.

After McDaniel left, Lurcook made certain changes in procedures. First, Lurcook took over operation of the digging machine in place of McDaniel. Next, Lurcook told the oiler and a laborer to work on the backfill operation, that is, the replacement of the dirt that had been previously excavated. This left Stelzig in the ditch with only a single laborer to assist in the operation. Among other duties, the oiler had been watching the "spoil" and the sides of the trench to sound an alarm if a cave-in appeared imminent. Now no one was performing this job. Allegedly, Stelzig disapproved of and feared Lurcook's method of digging and his assignment of the oiler to the backfill operation. However, Stelzig made no complaint nor protest as he worked the remaining 2 hours of the shift. According to Stelzig, he did not approach Lurcook during the afternoon because Lurcook appeared to be too angry over his encounter with McDaniel to listen to anything Stelzig said.

After the shift ended, Stelzig continued to say nothing to Lurcook relative to working conditions in the trench. McDaniel appeared at this time to receive his regular paycheck but, due to an administrative problem, checks were not available until the next day, Friday. Then Stelzig left the scene with McDaniel in the latter's van and drove to a nearby public telephone.

Stelzig placed a telephone call to the Respondent's offices in San Diego where he spoke to Diane Murphy, at that time the Respondent's dispatcher and payroll clerk. There is a conflict between Stelzig's version of the conversation and that provided by Murphy. According to Stelzig, he first asked to talk to Kangers or Bill Ward, the Respondent's safety officer. Neither of them was available. Then Stelzig said somebody was probably going to be killed and it would probably be him since he was the only one in the trench. He wanted Kangers or Ward to come to Palm Springs and see for themselves. Stelzig asked Murphy to explain to company officials that Lurcook was using a dangerous method of digging. Murphy replied that company officers would probably just listen to supervision on the scene anyway. Then Stelzig asked Murphy to call Lurcook in Palm Springs to say that Stelzig would not be in the next day due to unsafe conditions. Murphy promised to call Lurcook with that message.

According to Murphy, Stelzig called asking about his check and never asked for Kangers or Ward. She said that it would be there the next day which was the normal payday anyway.² She refused to prepare a paycheck for him from the petty cash fund. Stelzig stated he was not going to wait until Friday as there had been a

² Lurcook had been distributing paychecks on Thursday, a day early, in violation of company policy.

big fight on the job and McDaniel had been fired. Stelzig went on to say that he was not going to return to work because he was fed up with Lurcook and that Lurcook was trying to kill him. Murphy then asked Stelzig whether he had given notice to Lurcook that Stelzig was not coming back. Stelzig answered that he had not. Then Murphy told him that she would call Lurcook and give him the news, and to this, Stelzig said, "fine." Then Murphy said she would have Ray Coles, Lurcook's supervisor on the Palm Springs' job, bring the checks back to San Diego for pickup on Monday. Finally, Stelzig asked her if there was any work available in San Diego. She replied that she did not think so, but that she would check.

I credit Murphy on this key credibility issue. At the time of the hearing she had quit the Respondent's employ after 6-1/2 years with it. This occurred in April 1983 after a dispute with Kangers. She had obtained other employment and owed nothing to the Respondent. Moreover, I found her to be a much more credible witness than Stelzig. Murphy was calm, consistent, and uninvolved personally in the controversy. Stelzig was inconsistent, evasive, and contradictory. For example, he had left the Respondent's job in Palm Springs once before without notice to Lurcook and this makes it more likely he would do so a second time under circumstances as described by Murphy.

According to Stelzig, he made a second call after talking to Murphy. He called a local union business agent named Sanders to request that he come out to the job. Sanders was not in and Stelzig left a message for him. Then Stelzig waited for him near the job until 5:30. When he never arrived, Stelzig left for San Diego with McDaniel.

On Monday, March 1, Stelzig and McDaniel went to the Respondent's San Diego office to pick up their paychecks. There is conflict as to what happened at this point. Stelzig stated he first went into Kangers' office to explain why he left Palm Springs, but allegedly Kangers refused to talk to him, saying, "the only thing I can tell you, you should have called OSHA."³ In his testimony, Kangers admitted talking to Stelzig, recalling that Stelzig had begun the conversation by saying that he had quit because he could not work with "Bernie [Lurcook] in Palm Springs" and that he simply could not get along with him. Kangers answered by expressing regret that Stelzig had quit, by stating that there were no further openings for him in San Diego, but that there might be something for him in the future.

In this dispute, I credit Kangers. I note that the Respondent employed a full-time safety officer and had a policy of cooperating with Cal OSHA only when their representatives had an administrative search warrant as authority to enter a jobsite. To suggest that a high official of such a company would suggest to a disgruntled employee to go to OSHA is too improbable and implausible. I do not believe it.

³ This is an apparent reference to the Occupational Safety & Health Administration, a Federal agency responsible for enforcement of health and safety regulations on jobsites. In the State of California, this job is performed by a state agency, sometimes called Cal OSHA.

With respect to the paychecks, Stelzig testified that he received from Murphy two paychecks on March 1. One was the check he would have received on Friday in Palm Springs; the second was his final check written on petty cash on March 1. Murphy denied writing a check for petty cash, testifying that on March 1 Stelzig received only one paycheck. The other paycheck was sent to him by mail a few days later. Murphy's version is supported by a computer printout prepared at the Respondent's headquarters in Lincoln, Nebraska, on March 1. (R. Exh. 3.) This shows that Stelzig's final paycheck would not have been mailed to San Diego until March 1, and refutes his testimony that he received a check from petty cash on that day. I also note that the General Counsel never produced any petty cash checks which could have been subpoenaed from the Respondent if it existed. I credit Murphy on this point.⁴

On Wednesday, March 3, Stelzig and a union business agent from San Diego named Washington went back to Palm Springs with a camera to take certain pictures of the jobsite. (G.C. Exhs. 2-7.) These photographs together with a letter of complaint were sent to Cal OSHA. As of the date of hearing in this case, Cal OSHA had held no hearing nor made any findings on Stelzig's complaint. However, a Cal OSHA investigator named Meyer was assigned to the case. Meyer testified briefly in the instant case.

On February 23, 1983, Stelzig called the Respondent's offices and asked Murphy for a letter of recommendation which he could use to obtain other employment. Kangers prepared such a letter which read as follows:

February 24, 1983
Reference: Michael D. Stelzig
SS#460-06-1623
To Whom It May Concern:

Michael D. Stelzig was employed by our company as a laborer and pipelayer for our company for a period of six years starting in 1976.

Prior to his transfer to our Palm Springs Project, he was considered to be a very good employee of above average skill and ability.

However, after his transfer to Palm Springs he began experiencing difficulty with supervision and a conflict with the foreman and superintendent which led to his quitting and leaving the jobsite on February 25, 1982.

Due to these problems we could not recommend that he be re-employed by our company.

Very truly yours,
Metro-Young Construction Company
/s/ James A. Kangers
Vice President
[G.C. Exh. 8.]

⁴ Resolution of this credibility issue affects the issue of whether Stelzig quit or was fired. Under the Respondent's policy, if an employee is fired, as Stelzig claims he was, he is paid off immediately from petty cash and sent on his way. If he quits or is laid off, he will be given his final check when it would otherwise be due, as I find happened here.

B. Analysis and Conclusions

I begin by finding that Stelzig was not discharged nor constructively discharged by the Respondent. Rather Stelzig, whose overall credibility I find to be generally suspect,⁵ voluntarily quit his job. I find further that he quit as of February 25 when he spoke to Murphy and stated he would not report for work on the next day. In reaching this conclusion, I rely on, among other factors, the testimony of Murphy and Kangers, together with the inferences flowing from Stelzig's request for a letter of reference. If he really believed that he had been fired, would he have requested a letter of reference. I think not. Moreover, I note that he never protested the wording of this letter. Despite a commendable, if not heroic effort by the General Counsel to persuade me in his brief that I should find in favor of Stelzig, I find in every respect that this case is completely without merit. I turn now to discuss additional reasons for so finding which I have considered both in toto and as alternative bases for my basic conclusion.

1. At all times material to this case, Stelzig lacked a good-faith belief that he was working under abnormally unsafe conditions⁶

By its very nature, Stelzig's job was dangerous. He was working in a deep trench, in sandy, unstable soil, which had previously been excavated for a parallel pipe about 2 feet away from that being installed by the Respondent. It is possible that the Respondent's procedures violated one or more regulations of Cal OSHA.⁷ However, it is unnecessary for me to make any finding on this point since Stelzig was not motivated by any concern for his safety. As of February 25, approximately 4300 out of 5000 feet of pipe had been laid and Stelzig had worked on all or most of it. Rather Stelzig was motivated by animosity toward Lurcook, and the former's alleged concern about safety factors is pretextual and an afterthought, supplied as a framework to secure reemployment. In addition to the evidence discussed above, I will discuss additional evidence below which supports this conclusion.

For example, I cannot credit Stelzig's testimony that, in the final week of his employment, he complained to Lurcook at least three to four times that the trench was being dug in an unsafe manner. I find that he made no such complaints. Lurcook denied that he did and I credit his testimony. All agree that on the final day, including the final 2 hours of Stelzig's employment, Stelzig made no complaint to Lurcook. This tends to impeach Stelzig's testimony that he complained while McDaniel was digging when conditions were not too bad, but made no complaint when Lurcook was digging when conditions

⁵ In repeatedly discrediting Stelzig on key conflicts in the evidence, I note a pattern which persuades me that overt fabrication of evidence may have occurred. Without specifically so finding, it suffices to say that Stelzig's repeated lack of credibility supports my finding of lack of good faith and honest belief, as discussed below.

⁶ Compare *Transport Service Co.*, 263 NLRB 910 (1982).

⁷ I note the lack of shoring and shields in the trench, the apparent lack of a ladder to enter and exit the trench, and questions relative to the proper degree of sloping in the trench. The regulations of Cal OSHA are contained in Cal. Admin. Code tit. 8, § 1539, et seq.

were completely unsafe. As to Stelzig's explanation for not complaining in the afternoon of February 25, because Lurcook was too angry to listen after his argument with McDaniel, again I discredit Stelzig and do not believe him. Lurcook's supervisor on the jobsite was Ray Coles, the Respondent's project superintendent at Palm Springs. Stelzig never complained to him about Lurcook and gave no explanation for not doing so. Instead, Stelzig complained cryptically, to a clerical worker, Murphy, that Lurcook was trying to kill him.

I am further convinced that Stelzig lacked a good-faith belief that he was working under abnormally unsafe conditions by the fact that he worked for at least 2 hours while Lurcook was allegedly attempting to kill him by operating the digging machine in an unsafe manner. Apart from Stelzig himself, who had no experience in operating the 5800 Link Belt machine, there is no credible evidence that the operation was unsafe or created unusually unsafe conditions.⁸ As to Stelzig's credibility on this point, like other contested matters, I found it to be low. On the other hand, Lurcook had 23 years of experience as a heavy equipment operator and was an experienced foreman and supervisor. He testified that he was operating the machine in a safe manner and I credit his testimony.

In conclusion, I note the testimony of Bill Suttles, a job superintendent for a concrete subcontractor at Palm Springs. Not connected to the Respondent, and with no reason to fabricate, Suttles credibly testified that, on February 25 about 2:30 p.m., he was near the Respondent's trench and observed Stelzig working in it. Suttles told Stelzig to keep his eye on the bank. Stelzig replied in a sarcastic "mind your own business" tone of voice, that he was not worried about the bank.⁹ Later that evening, after work was over, Suttles again saw Stelzig who said, referring to Lurcook, that he had had all of that "asshole" that he could take and that he was quitting, because that crazy "son-of-a-bitch" was going to kill somebody. This comment, like that made to Murphy a few minutes later, and like that made to Kangers on March 1, indicates to me that Stelzig was motivated solely by animosity toward Lurcook and not concerned for his safety nor the safety of others working on the job. That is, Stelzig was engaging in personal griping about a supervisor's style on the job which he did not agree with.¹⁰

⁸ It is true that Meyer gave certain testimony based on his view of one or more photographs in evidence. However, this testimony did not concern Lurcook's method of digging; more importantly, Meyer was not an unbiased witness since he would testify for the State in a Cal OSHA hearing. His testimony was of little benefit on the issues in the present case.

⁹ The impact of Suttles' credited testimony on the General Counsel's case is considerable. Thus, not only did Stelzig not complain about safety to a neutral person when he had an opportunity to do so, but he affirmatively told Suttles that he was not concerned.

¹⁰ See, e.g., *Capitol Ornamental Concrete Specialties*, 248 NLRB 851 (1980), where in denying a claim similar to that made here, the Board noted, among other factors, the lack of evidence showing that employees had discussed the condition of an allegedly unsafe road among themselves or that other employees considered the condition of the road unsafe. See also *Tabernacle Community Hospital*, 233 NLRB 1425 (1977); and *Snap-On Tools Corp.*, 207 NLRB 238 (1973).

2. Prior to quitting his employment, Stelzig never complained about his alleged safety concerns to the Respondent's officials, to a neutral contractor on the job, to union officials, nor to Cal OSHA representatives

As I have found above, Stelzig never complained to any officials of the Respondent about alleged safety violations prior to quitting on February 25.¹¹ There is evidence that said complaints if properly made would have resulted in some kind of investigation. The Respondent employed a full-time safety officer named Bill Ward. On March 1, when Stelzig and McDaniel went to pick up their checks, the former had a conversation with Ward. According to Stelzig, he told Ward about the unsafe conditions, "Just what was going on, about no oiler, the 'spoil pile,' the ditch." Then allegedly, Ward told Stelzig he was right about the unsafe conditions. According to Ward, Stelzig stated that Bernie was yelling at the operator of the hoe and that he did not feel that was safe because he, Stelzig, was down in the excavation. I credit Ward's version of the conversation and note that to the extent this conversation could be considered notice to the Respondent, it occurred after Stelzig quit his job and is of little or no benefit to him.

Although there is no issue regarding enforcement of a collective-bargaining agreement here, Stelzig was a union member and the Respondent's project was apparently a union job. The Respondent had access to Local 1184 of the Laborers Union located near Palm Springs, or to Local 89 in San Diego. The first complaint or grievance filed with any union was an alleged telephone call to Local 1184 after Stelzig had called Murphy.¹² No union representative showed up at the job location and Stelzig left for San Diego about 5:30. On Friday, February 26, Stelzig could have gone to Local 89 to file a complaint or grievance. There is no evidence that he did so.

The General Counsel contends that the testimony of both Murphy and Kangers indicates knowledge from Stelzig that Lurcook was going to kill him. Of course, Kangers spoke to Stelzig on March 1, after Stelzig had quit. Like the evidence regarding the statements to Ward, this evidence is irrelevant to the giving of notice to the Respondent.

The conversation between Stelzig and Murphy is similarly unavailing. Putting aside the failure of Stelzig to mention the alleged safety problems to either Lurcook or Coles who were on the scene, the credited remarks made to Murphy indicate some kind of disagreement with Lurcook over procedures and is not sufficient to give notice to the Respondent. The fact that Stelzig left Palm Springs that evening instead of discussing the matter on Friday with company officials either at Palm Springs or

¹¹ In order to find a discharge violative of Sec. 8(a)(1) it is necessary to show that the concerted nature of the employee's activity was known to the employer at the time of the discharge. *New England Fish Co.*, 212 NLRB 306 (1976). Of course here there is a quit rather than a discharge and individual rather than concerted action.

¹² The only proof that such a call was made is the testimony of Stelzig. Since I find his credibility low, I cannot credit this testimony to find that such call was made. I also make this finding since Stelzig never followed up the unsuccessful call the next day.

San Diego indicated further his desire to quit his job rather than resolve a safety complaint.

In support of his argument that the Respondent had adequate notice, the General Counsel cites *Tamara Foods*, 258 NLRB 1307, 1308 (1981), enfd. 692 F.2d 1171 (8th Cir. 1982). In that case the Board held that a specific demand on the employer was unnecessary to affect the protected character of the conduct, if from surrounding circumstances the employer should reasonably see that improvement of working conditions is behind the walk-off. In the instant case, all surrounding circumstances would suggest the actions of an unreliable and eccentric employee involved in a personality disagreement with a foreman. Unlike the facts in *Tamara Foods*, there were no prior complaints to OSHA, and no immediate job walkoff in response to an immediate threat. Instead, an employee who a few weeks before had failed to appear on the job without notice to the employer continued to work after the existence of the alleged dangerous condition and, when he finally acted, did so alone. Accordingly, *Tamara Foods* does not apply here and the General Counsel's proof suffers from a fatal defect.¹³

3. Stelzig's conduct in not reporting for work on February 26 was not concerted and therefore was not protected

The General Counsel cites the case of *Alleluia Cushion Co.*, 221 NLRB 999 (1975), for the proposition that even though Stelzig admittedly acted alone, and outside the scope of a collective-bargaining agreement, other employees impliedly consented to be represented by Stelzig as he was acting for the common good.¹⁴ On the contrary, the facts here show that Stelzig was acting to the prejudice of his coemployees. By leaving Palm Springs after having conveyed only a cryptic message to Murphy, Stelzig must have known that the employees reporting for work on Friday would be faced with a greater safety threat than Stelzig allegedly faced. That is, either the crew would be shorthanded due to an inability to replace Stelzig on short notice or, if replaced, Stelzig's replacement would probably be less experienced and unfamiliar with procedures in the trench. In fact, Lurcook

¹³ In *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962), the Court held that where employees are not organized a demand is sufficient to protect concerted activities if it occurs before, after, or at the same time as the activities occur. Here Stelzig could have complained to either a Palm Springs or San Diego local so he was not an employee without access to a union. Accordingly, by quitting his job prior to making any kind of complaint to a company official, his conduct cannot be found protected. When finally made on March 1, Stelzig's remarks were not such as would reasonably indicate to the Respondent that he was making a bona fide safety complaint.

¹⁴ In its brief, the Respondent has confused the line of cases delineated by *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967), with the line of cases designated by *Alleluia Cushion Co.* The former cases apply only when there is activity engaged in by an individual employee acting alone which was directed to enforce or implement the terms of a collective-bargaining agreement. This activity will be deemed concerted activity within the meaning of Sec. 7. In the instant case, there is no claim that Stelzig was acting to enforce a provision of a collective-bargaining agreement. Accordingly, the *Interboro* line of cases does not apply. In any event, the U.S. Supreme Court has decided to review the *Interboro* doctrine. *NLRB v. City Disposal Systems*, 104 S. Ct. 1505 (1984).

testified that he did not replace either Stelzig or McDaniel immediately, but continued the job with the crew remaining. Assuming for the sake of argument that bona fide safety hazards existed, Stelzig made them worse by not explaining them to his coworkers.

Although my finding above that Stelzig acted in a manner to endanger rather than assist those employees who continued to work, this assumes that Stelzig was sincerely concerned about an unusual risk to his own safety. I have also found this not to be the case as well. If I have erred in making that finding, then alternatively, I find in agreement with the Respondent that the allegedly unsafe conditions were of concern to and affected only Stelzig.¹⁵ In this regard, I note that, early on in this case, the General Counsel disavowed any theory that Stelzig was acting in concert with McDaniel. Thus, the General Counsel stated at hearing, "Our principal theory is that Mr. Stelzig refused to work due to unsafe conditions. We are not contending that Mr. McDaniel refused to work because of unsafe conditions." No evidence would support such a theory even if an explicit disavowal had not been made.

At page 30 of his brief, the General Counsel contends that because other employees did not complain and continued to work in the trench this does not amount to a disavowal of Stelzig's actions. I agree with this contention but for a different reason from that urged by the General Counsel. In the same way that Stelzig failed to give timely notice to the Respondent's supervisors and officers, both in Palm Springs and San Diego, nor to union officials of either local mentioned in this case, so did Stelzig fail to convey to his fellow workers that he was concerned about abnormally dangerous working conditions. If they did not know about his concern—because as I found above, such concern did not exist—Stelzig's fellow employees could not have decided to disavow his actions. Accordingly, based on the evidence in this case, when the other men reported for work on Friday morning, they knew only that Stelzig had joined McDaniel in quitting the job.

In conclusion, I note that the principle of *Alleluia Cushion Co.*, supra, has not been accepted by the Ninth

Circuit Court of Appeals.¹⁶ Yet, I am instructed by the Board to ignore decisions of the courts of appeals which are contrary to the Board's, even where that decision is from a court of appeals for the circuit in which the Board case arises.¹⁷ I must obey the Board's command and consider *Alleluia Cushion Co.* as a viable doctrine.¹⁸ Here, however, as found above, the case does not apply because Stelzig did not act in good faith, because he did not promptly complain to the Respondent nor to union officials, and because Stelzig was motivated by personal griping rather than by any genuine concern for alleged safety violations. Further, no violations of safety statutes are shown to have occurred and no abnormally dangerous condition was shown to exist at the Palm Springs project. Accordingly, I will recommend that this case be dismissed.

CONCLUSIONS OF LAW¹⁹

1. Respondent Metro-Young Construction Company, a Division of Olson Construction Co., Inc. is an employer within the meaning of Section 2(2) of the Act, engaged in commerce in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent has not engaged in the unfair labor practices alleged in the complaint.

On the basis of these findings of fact and conclusions of law and the entire record in this proceeding, I issue the following recommended²⁰

ORDER

It is hereby ordered that the complaint be, and it hereby is, dismissed in its entirety.

¹⁶ *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1242 (9th Cir. 1980); *Royal Development Co. v. NLRB*, 703 F.2d 363, 372-374 (9th Cir. 1983).

¹⁷ *Iowa Beef Packers*, 144 NLRB 615 (1963).

¹⁸ In *Alleluia*, the activity found to be protected was a complaint to OSHA in an attempt to achieve safe working conditions for all employees. Here, no complaint was made to Cal OSHA until several days after Stelzig quit his job.

¹⁹ In light of my conclusion, the Respondent's pending motion to dismiss made at the close of the General Counsel's case is moot.

²⁰ 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.

¹⁵ *Comet Fast Freight*, 262 NLRB 430 (1982).