

**Burle Industries, Inc. and Frederick A. Skinn.** Case  
4-CA-17734

October 15, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND OVIATT

On May 23, 1990, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and a supporting brief. Both the General Counsel and the Respondent filed answering briefs.

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, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Burle Industries, Inc., Lancaster, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Offer Frederick Skinn immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.”

2. Substitute the following for paragraph 2(b).

“(b) Remove from its files any reference to the unlawful discharge and notify Frederick Skinn in writing that this has been done and that the discharge will not be used against him in any way.”

<sup>1</sup>In agreeing with the judge that Frederick Skinn was engaged in protected, concerted activity on October 6, 1988, we find that Skinn's effort to induce group action by urging individual employees to leave the work area if they felt ill due to the chemical fumes constituted concerted activity. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), cited with approval in *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Further, we note Skinn's un rebutted testimony that Production Superintendent Richards stated to Supervisor Cechak, “didn't you say that [Skinn] led these people out of the factory,” and Cechak replied affirmatively. We thus find that in addition to Skinn's actual participation in concerted activity, the Respondent clearly had the perception that Skinn had engaged in concerted activity.

<sup>2</sup>We have modified the judge's recommended Order to comport with the Board's standard language directing reinstatement and removal of records.

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX B

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge any of you because you have engaged in protected, concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Frederick Skinn immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, plus interest.

WE WILL notify Frederick Skinn that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

BURLE INDUSTRIES, INC.

*Barbara A. O'Neill, Esq.*, for the General Counsel.  
*John H. Leddy, Esq. (Schnader, Harrison, Segal & Lewis)*,  
of Philadelphia, Pennsylvania, for the Respondent.  
*Frederick A. Skinn*, of Lititz, Pennsylvania, pro se.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. On a charge filed November 23, 1988, by Frederick A. Skinn, a complaint was issued on January 26, 1989, alleging that Burle Industries, Inc. (Burle or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (Act) by discharging Skinn because he engaged in concerted activities in connection with the objections of employees of the Respondent to chemical fumes in the workplace. Respondent denies the allegation.

A hearing was held in Lancaster, Pennsylvania, on June 5 and 6, 1989. On the entire record in this case, including my observation of the demeanor of the witnesses and on consideration of the briefs filed by General Counsel and the Respondent, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

Respondent is, and has been at all times material, a corporation engaged in the manufacture of electronic surveillance equipment, with a principal place of business located in Lancaster, Pennsylvania.<sup>1</sup> The complaint alleges, the Respondent admits, and I find that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

Respondent's production, maintenance, and warehouse employees are represented by the International Brotherhood of Electrical Workers, Local No. 1666. Technical employees such as Skinn, who is a manufacturing engineering technician, are excluded from the unit. Skinn worked in Respondent's Department 33 on the second shift. He was responsible for maintaining the equipment and the machines on one of Respondent's three production lines during the second shift. He worked for Burle, GE, and RCA for a total of 9 years.<sup>2</sup>

Regarding Respondent's management, it is noted that, as here pertinent, Paul Rintz is one of Respondent's owners and vice president of security products, William Hackman is the manager of manufacturing at the facility; that at the time involved, Dale Cartwright was the manager of manufacturing engineering and reported to Hackman; that Robert Richards is the superintendent of production in security products manufacturing and reports to Hackman; that the supervisors for the production employees in Department 33 on the second shift on the night of October 6, 1988, were Eric Cechak and Holly Reed, both of who report to Richards; that Skinn reported to Galen Lugsdun, a lead technician, who worked on the first shift; and that Lugsdun, in turn, reported to Cartwright.

On October 6, 1988, during the second shift, an outside contractor was doing some remodeling work in a part of the plant 375 feet from Department 33. Sometime between 5:15 p.m. and 5:30 p.m. employees in Department 33 began to notice a strong odor. Some of the employees started to get a headache and some of the employees started to experience burning eyes, nausea, and dizziness. Skinn's face was red and he had a headache. Some of the employees, including Skinn, left Department 33 and went to the mall area outside the building. One of the employees, Martha Faucett, told Reed that there was an odor in the Department 33 area and employees were leaving that area. Dwain Faucett, the union steward in Department 33, investigated the odor. Skinn went to a building across the mall area from the building that contained Department 33 and called Cechak, telling him that he had a crisis on his hands; and that he should evacuate the department or Skinn "would call outside the plant." Cechak testified that Skinn said that if they were not going to do anything about the chemical spill, he was going to get outside authorities to take care of it.<sup>3</sup>

<sup>1</sup> Prior to being owned by Burle, the facility was owned and operated by General Electric (GE) and prior to that it was owned and operated by RCA.

<sup>2</sup> Burle purchased the facility from GE in 1987.

<sup>3</sup> Reed testified that she believed that at about 6 p.m. Skinn approached her from a group of employees and said that he was not working in this condition

Skinn went back to the mall area and suggested to the employees standing outside that they should report to the cafeteria where there would undoubtedly be a head count. All of Department 33 was evacuated between 6:05 p.m. and 6:30 p.m. It was determined, after Reed took a roll call, that there was an employee missing. Skinn told some of the employees in the cafeteria that if anyone intended to go back into Department 33 to look for the employee, they should bring someone with them. Skinn also told Reed that she did not look well and that if she intended to go back into Department 33 to look for the missing employee, she should bring someone with her. Reed said that Skinn was blowing the situation out of proportion. And in reply, Skinn asked Reed "if that is true, then why is your face flushed?" Reed responded that it was because she had been running around. But Skinn then told Reed that her face was flushed because she was being affected by the fumes. Reed disagreed and Skinn then said that she was a "poor example of responsible supervision." According to Skinn's testimony, Reed laughed and walked away.

While the employees were kept in the cafeteria for approximately 2 hours, Cechak and Reed informed them of the source of the fumes and gave the employees a copy of a material safety data sheet (MSDS), which is a form prepared by chemical manufacturers which contains the health hazard information.<sup>4</sup> Dwain Faucett pointed out that the MSDS they had was not in fact for the chemical that was being used that night since the odor was not a citrus odor. When the outside contractor stopped the work and left the plant, he left the wrong MSDS behind. The employees were told by Cechak and Reed that they saw the correct MSDS and it was similar to the MSDS they were showing the employees. As here pertinent, Cechak had spoken with Norm Seidman, the chemical engineer for the plant, who, along with Cechak, concluded that the chemical was not hazardous in a properly ventilated room. While they were in the cafeteria, the employees circulated a label which was alleged to have come off the 5-gallon can containing the chemical in question.<sup>5</sup>

anymore and "[i]f you don't do something about it, I'm bringing in outside help."

<sup>4</sup> Jt. Exh. 2. As here pertinent, the document reads as follows:

EFFECTS OF OVEREXPOSURE: Acute: Eyes: Can cause severe irritation, redness tearing, blurred vision. Skin: Prolonged or repeated contact can cause moderate irritation and dermatitis. Breathing: Can cause nasal and respiratory irritation, dizziness, and nausea. Aspiration into the lungs can cause chemical pneumonitis, which can be fatal. Ingestion: Can cause gastrointestinal irritation, nausea, vomiting and diarrhea. Intentional misuse by deliberately concentrating and inhaling the vapors may be harmful or fatal.

CHRONIC EXPOSURE: Solvents have been reported to cause permanent brain and nervous system damage with possible liver and kidney damage. Respiratory and skin sensitization.

<sup>5</sup> Jt. Exh. 3. The label reads in part as follows:

DANGER: CONTAINS AROMATIC PETROLEUM DISTILLATES AND 2-BUTOXYETHANOL. WHEN APPLYING, FORCED VENTILATION MUST BE PROVIDED (E.G. EXHAUST FANS, ETC.). THE AIR MOVEMENT MUST BE SUFFICIENT ENOUGH TO REDUCE THE VAPOR LEVEL BELOW THE ESTABLISHED OSHA TLV LIMITS. IF SUCH VENTILATION CANNOT BE ACCOMPLISHED, THE OPERATOR MUST WEAR A CHEMICAL RESPIRATOR APPROVED FOR ORGANIC VAPORS (NIOSH TC23C). BEFORE PROCEEDING WITH THE APPLICATION, MAKE SURE THAT HEATING OR COOLING VENTILATION SYSTEMS OR OPEN DOORS OR WINDOWS WILL NOT SUBJECT UNSUSPECTING PERSONS TO SOLVENT VAPORS. . . . FIRST AID: Inhalation: Move person to fresh air. If breathing difficulty persists or occurs later, call a physician and provide

*Continued*

Cechak and Reed informed the employees at about 8:30 p.m. that Department 33, which had been ventilated, was now safe and the employees should go back to work. Employees were told that if they were bothered by the fumes they were free to leave. Some of the employees who went into Department 33 decided that the fumes were still bad and they went back to the cafeteria. Steward Faucett told Cechak and Reed that the odor was still strong and the involved employees were excused from working and returned to the cafeteria. About 30 minutes later they again checked the work area and returned to the cafeteria. It was about 10:30 p.m. before some of these employees began to work and even then some of them did not stay in the department.

While Skinn and some of the employees sat in the cafeteria between 8:30 p.m. and 9 p.m., other employees came back into the cafeteria complaining about the fumes. Skinn called Reed and asked her what the situation was in the department. Reed told Skinn that people were working on the line. Reed told Skinn that she had told the employees that if the fumes bothered them they could leave. Skinn asked Reed if she saw any evidence of people being coerced to stay in the department. Skinn told Reed that he thought that the employees were afraid to leave because they were trying to please their supervisor. Reed said that was ridiculous. Skinn then unsuccessfully attempted to speak to Hackman or Rintz.

Skinn then went back into Department 33 and asked employees on the line individually whether they were bothered by the fumes. He told them that if they were bothered by the fumes, they did not have to stay and work, and that they could leave. Skinn did not remember any of them leaving. Reed testified that she heard Skinn say "[d]on't be afraid to leave. Don't make [sic] them force you to stay. This is causing brain damage." Skinn was talking to another employee, Bob Sea, when Reed approached him, Skinn, in Department 33. She asked Skinn if he had a problem. According to Skinn's testimony, he told Reed "Holly, just walk away." According to Reed's testimony, Skinn said "[d]on't give me that shit, asshole. Just turn and walk away." Reed then said "[n]o, Fred, I really want to know, do you have a problem?" Skinn then asked Reed what she intended to do about the situation. Reed replied, "[w]hat situation, there is no situation." Skinn then said "I don't believe this . . . I'm glad I have witnesses to this, I want to get another witness for this." Skinn then called over another employee, Pete Kinzer. Skinn then said "how about this situation with these people . . . being coerced to work on this line, that they are staying here to make you happy because they feel that they could be reprimanded if they leave, but they are feeling sick and they need to be excused." Reed replied, "Fred, this is not the situation here at all." According to Skinn's testimony, he lost his temper and he told Reed twice that she was a "fucking asshole." According to Reed's testimony, Skinn said something like "you're a fucking asshole and your playing mind games with us all." Reed then left. Skinn testified that there was only one other employee present during this

exchange; that he spoke in a lower than normal conversational tone; and that the employees who were nearby could have heard what he said. Kinzer testified that he did not overhear the exchange between Reed and Skinn.

Skinn then went back to building 15 and telephoned Hackman, telling him that there had been fumes in Department 33; that it had taken a long time to evacuate the department; that the employees had been given the wrong MSDS but they had seen the label from the 5-gallon can which contained the chemical that was causing the fumes, which label indicated that the chemicals were dangerous even though Cechak said they were not; that employees were being asked to work in fumes but were told they could leave for a breather; that employees were told that they should come back and continue working until they need another breather; and that he did not think Hackman would want his factory to be run in this way. Hackman told Skinn that he was "getting a little emotional" and he asked Skinn to tell Cechak to call him. Skinn called Cechak and told him to call Hackman.

Skinn then went to the cafeteria. About 1 minute later, Cechak told Skinn that Richards wanted to talk to him. Richards had arrived at the plant at about 10:15 p.m. and almost immediately asked Cechak to bring Skinn to his, Richards', office. Skinn followed Cechak back to the stairway which leads to the supervisors' offices. Richards was standing on the landing in the middle of the stairway. Skinn stopped and said that he thought he should have a witness for this. Richards shouted to Skinn, "Fred get your ass up here." Skinn repeated his request for a witness and Richards, according to Skinn's testimony, said "Eric can be your witness. Fred get your fucking ass up here now." Richards testified that he did not use the word "fucking" but only said "get your ass up here." Cechak and Reed corroborated Richards on this point. The latter testified that she was in the bathroom for the entire conversation between Skinn and Richards. Richards, Cechak, and Skinn are in agreement on this point. Yet Reed also testified that she came out of the bathroom and overheard this exchange. According to Skinn, Reed did not appear until Skinn descended the stairs when he finally left Richards' office.

Skinn went into the office with Richards and Cechak. The former told Skinn that he had interfered with the supervisors and called Reed a "fucking asshole." According to Skinn's testimony, Richards said to Cechak "didn't you say that he led these people out of the factory?" And Cechak replied, "he led them right out of the factory." Also, according to Skinn's testimony, Richards yelled at him for that. Skinn told Richards that the fumes were very bad; that the employees had the label off the can for the involved chemical; that they were given the wrong MSDS and, as a result, they could not evaluate the dangers; and that the employees were complaining as they worked. Richards told Skinn to leave. According to Skinn's testimony, as he approached the top of the stairs Reed came out of the bathroom. He apologized to Reed for his conduct that night and then left the building.

The next day Skinn called in sick. Cartwright telephoned Skinn that afternoon, told him that he was suspended for 3 days and read the 3-day suspension letter which gave the following reasons: (1) interfering with two supervisors in their authorized responsibilities with hourly personnel, (2) abusive and obscene language directed to a female supervisor in the presence of others, and (3) being generally disruptive in the

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label information. EYE CONTACT: Flush with water for 15 minutes. SKIN CONTACT: Wash with soap and water. IF SWALLOWED: DO NOT INDUCE VOMITING. Call a physician and provide label information. Reports have associated repeated and prolonged occupational overexposure to solvents with permanent brain and nervous system damage and possible liver and kidney damage.

manufacturing area during a time that required calmness, thereby creating more problems. Cartwright told Skinn to report to Dan Bronson, Respondent's manager of employment development on October 12. It was decided on October 10, 1988, to terminate Skinn when he reported back from his 3-day suspension on October 12, 1988, because of his behavior on the night of October 6, 1988. Skinn called in sick on October 12. On October 13, 1988, Cartwright telephoned Skinn, after he called in and indicated that he would not be at work, and notified him of his termination.

Steward Faucett filed a grievance demanding "a longer evacuation time when obnoxious fumes are present in a work area."<sup>6</sup> The grievance was pending at the time of the hearing.

### B. Contentions

On brief, General Counsel contends that Skinn has the same level of Section 7 protection as the unit employees; that Section 7 of the Act declares that "[e]mployees shall have the right to . . . engage in other concerted activities for the purpose of . . . mutual aid and protection"; that Section 2(3) of the Act defines an employee as "any employee" and in no way excludes employees who are not part of a voluntarily recognized or certified bargaining unit; that the fact that the unit employees had a steward present that night does not alter this conclusion; that since this was not a situation where the Employer had sought union approval for going back to work and the Union agreed that it was okay for the employees to go back to work, Skinn's conduct can in no way be construed as contravening, or undermining, the Union's role that night; that Skinn was engaged in concerted activity on October 6, 1988; that in situations where other employees are present when an individual employee engages in alleged concerted activity, the Board will conclude that the individual was authorized to act by the other employees in the absence of some sort of disavowal by those employees present, *Consumers Power Co.*, 282 NLRB 130, 131 (1986); that if an individual employee expresses his support for another employee's complaint, that conduct is presumed concerted without any evidence of authorization, *Churchill's Restaurant*, 276 NLRB 775, 776-777 (1985); that in order to find concertedness in an individual employee's action, the Board looks to see if there has been some discussion among employees concerning the issues raised by the individual employee, and that there has been some sort of consensus reached by the employees that the issues must be addressed by management; that the Board will also find individual employee conduct to be concerted if it is a "logical outgrowth" of group action and/or a "continuation" of group action and it is not necessary to establish that the individual's conduct was previously authorized by the group; that Skinn's entire course of conduct that night was concerted activity; that his conduct that evening was a logical outgrowth and continuation of the initial group walkout; that Respondent knew that Skinn was engaged in concerted activity on the night of October 6; that when Skinn was called upstairs to the supervisor's office to talk to Richards about the events that

evening, Richards said to Cechak, "didn't you say that he had led these people out of the factory?" and Cechak replied, "he led them right out of the factory"; that Skinn's conduct on October 6 was clearly protected; that it is well-established that health and safety conditions are terms and conditions of employment and that concerted activity in connection therewith is for mutual aid and protection; that it is not necessary to decide that Skinn's concern that the employees not be exposed to the fumes was legitimate since the answer to that question does not affect the issue of whether Skinn was engaged in protected concerted activity; that Skinn did not otherwise lose his protection under the Act because of his alleged misconduct on October 6; that the reasons Respondent gives for the discharge are based on activity which is so closely tied to Skinn's protected concerted activity that this activity is itself protected; that the Board has long held that there are certain parameters within which employees may act when engaged in concerted activities; that in *Consumers Power Co.*, supra at 132, the Board stated

The protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses. Thus, when an employee is discharged for conduct that is part of the res gestae of the protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service;

that the Board recognizes that concerted activity may involve very emotional situations and gives some leeway for misconduct that occurs during the course of that concerted activity; that in analyzing whether words said during concerted activity would require a finding that the individual has lost his/her protection under the Act, the Board will examine the surrounding circumstances and take into consideration the subject matter of the discussion, where the discussion took place, the nature of the employee's outburst, and whether the outburst was provoked; that in general, unless the employee, by words or conduct, threatens physical injury or clearly indicates that he/she would no longer be fit for further employment, the employee does not lose his protection under the Act; that in *Great Dane Trailers*, 293 NLRB 364 (1989), the Board concluded that an employee who was engaged in concerted activity did not lose his protection under the Act when, on the production floor, in the presence of another hourly employee, he called his foreman a "fucked up foreman"; that the burden is on the Respondent to establish that the employee's conduct was sufficiently egregious so as to justify the discharge; that in "*The Loft*," 277 NLRB 1444 (1986), it was asserted that the employee engaged in concerted activity called her employer a "fucking asshole" and the administrative law judge who handled that case concluded that if the employee did call her employer a "fucking asshole," under the circumstances she did not lose her protection under the Act; that regarding Skinn calling Reed a "fucking asshole," this conversation was provoked by Reed in that Reed approached Skinn at a time when there really was not any reason to do so, Reed questioned Skinn about

<sup>6</sup>R. Exh. 1. The grievance also indicates that the employees were permitted to get a breath of fresh air "but must return to work." Also, the grievance indicates that many employees were afraid to evacuate for fear of repercussions at some later time.

his "problem" when she had just discussed the matter with him over the phone, and Reed made light of the situation; that under these circumstances the verbal abuse directed at Reed was in the heat of the moment and was "animal exuberance" and are so intricately connected to Skinn's concerted activity that it does not warrant a finding that Skinn lost his protection under the Act; that Respondent discharged Skinn because of his concerted protected activity on October 6; that Respondent's defenses that Skinn interfered with supervisors and that Skinn was generally disruptive are pretexts; that Respondent has failed to meet its burden under *Wright Line*, 251 NLRB 1083 (1980), to show that Skinn would have been fired for his "abusive and profane" language in the absence of his protected concerted activity; that in Department 33 Skinn only reminded the employees that if the fumes were still bothering them, they were permitted to leave the department which was nothing more than repeating the instructions of Reed and Cechak; that this conduct could hardly be perceived as interference with the authority of Reed and Cechak or of being disruptive; that Skinn did not convince anyone to leave the department so there was no evidence that Skinn interfered with production by this conduct; that Skinn was a long-term employee of Respondent and its predecessor and Skinn had a good work record; that up until this incident Skinn had never had any similar disciplinary problems; that comparing Skinn's employment record to those of employees John Nguyen and Ray Durkaj, Respondent cannot argue that Skinn would have been discharged in the absence of his protected concerted activity in that the former was not terminated after (1) saying "Fuck all Americans" on the production floor and subsequently accusing Supervisors Sara Wortman and Dick Nuss of "oppressing him" and repeatedly using the word "fucking" in their presence, and (2) threatening to kill fellow employee Mike Emerich; that Wortman prepared a memorandum concerning the incident and discussed the incident with Cartwright; that Wortman thought Nguyen's conduct "was distracting to the second shift operators," his language was "abusive and threatening," and he would not listen to supervisors directing him to calm down; that notwithstanding the fact that this was the third similar disciplinary incident with Nguyen within a 4-month period, Cartwright did not terminate him; that Cartwright's attempt to downplay the profanity in the Wortman incident is curious in light of how important a factor it played in the decision to terminate Skinn; that the fear expressed by Wortman is almost identical to the fear expressed by Reed over Skinn's behavior; and that while Durkaj, an hourly employee with a mediocre work record, was fired for threatening to kill his supervisor, Respondent subsequently agreed to reinstate this employee without backpay.

Respondent argues, on brief, that General Counsel failed to sustain the burden of proving that on October 6 Skinn was acting "with or on the authority of other employees." *Meyers Industries*, 268 NLRB 493, 497 (1984);<sup>7</sup> that it was not

<sup>7</sup> Remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In the first *Meyers* decision, the Board also concluded, at 497, that "[o]nce the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity."

Skinn's involvement in leaving Department 33 and later refusing to return to work there at 8:30 p.m. which led to his discharge but rather his individual activities in harassing Respondent's supervisors, making unwarranted statements that the employees were in danger of "brain damage" and calling Supervisor Reed a "fucking asshole" in the presence of bargaining unit employees; that it is clear that none of these activities were performed "on the authority of other employees"; that the employees in Department 33 were represented throughout the shift by Steward Faucett and there was not one scintilla of evidence presented by the General Counsel that any of the employees authorized Skinn to act on their behalf; that General Counsel's evidence of alleged disparate treatment proves nothing; that the situation involving Giang Nguyen, Wortman, and Nuss did not involve supervisors but was a disagreement among members of the technical staff; that there was no evidence presented that the use of the word "fucking" was directed at the female employee involved in an abusive, insulting manner, but was merely an expletive used by Nguyen in the course of the conversation; that there was no emergency situation in progress at the time of the Nguyen incident, and Nguyen's statements, as opposed to Skinn's were not made to bargaining unit employees in an attempt to upset them and exacerbate an already difficult situation; that Nguyen's conduct did not interfere with the efforts of Respondent's supervisors and the employees' union representative in dealing with such a situation as did Skinn's conduct; that Durkaj's situation involved a threat by him to a supervisor and he was terminated for this threat; that a referee for the Pennsylvania Unemployment Compensation Board made findings of fact that (a) Durkaj had been harassed by the supervisor involved, (b) the alleged threat was not meant literally, and (c) Durkaj's actions did not constitute willful misconduct; that the Union filed a grievance protesting Durkaj's discharge; that the Union and the Company settled the grievance on June 13, 1988 by reducing Durkaj's discharge to a disciplinary suspension without backpay; that there is no possible relevance between the handling of the Durkaj situation and its resolution by compromise and the discharge of Skinn for his nonconcerted, unprotected, flagrantly improper conduct in that there is no evidence in the instant case that Skinn was harassed in any manner by the supervisors, and Skinn freely admitted that he deliberately called a female supervisor a "fucking asshole" in the presence of the employees she supervised; that while some mitigating facts were put forth by the Union to explain Durkaj's statement, no mitigating facts were presented to excuse Skinn's statements and conduct on October 6; and that

[i]t is clear that the unauthorized and unwarranted attempts by Charging Party to intrude himself into a situation on October 6, which was being appropriately and adequately handled by Respondent's supervisors and the representative of the employees bargaining agent, were not authorized by the bargaining unit employees and were not part of any group action by the bargaining unit employees. Charging Party's egregious and vulgar conduct in twice calling a female supervisor a "fucking asshole" in the presence of the bargaining unit employees she supervised cannot possibly be sanctioned as being protected by Section 7 of the Act.

Whether Charging Party was driven by a Messianic complex or his mistaken view that “a higher concern” or his interest in “human kind” . . . required his aberrant behavior on October 6, it is clear that, under the Board’s directive in *Meyers*, the counsel for the General Counsel has not sustained her burden of proving that his conduct was “engaged in with or on the authority of other employees.”

#### Analysis

Section 7 of the Act grants employees the right “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.” And Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7.” To be protected under the Act, the employee’s activities must be “concerted” and “protected.”

In *Meyers Industries*, 268 NLRB 493, 497 (1984), the National Labor Relations Board (Board) concluded:

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. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee’s activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employees protected concerted activity.

Skinn’s involved activity on the night in question occurred during a continuation of the concerted protected activity which involved employees (1) leaving Department 33 without prior permission from the supervisor, (2) questioning the supervisors’ assessment of the hazard involved when the supervisors were unable to provide the proper documentation and the odor was not in accord with the documentation provided, (3) obtaining a label from a 5-gallon can which contained the chemical involved, and (4) some refusing to return to work at 8:30 p.m. when the supervisors indicated that it was okay to return to the department.

As noted above, subsequently the employees, through their steward, filed a grievance alleging that many employees were afraid to evacuate for fear of repercussions at some later time; that while employees were permitted to get a breath of fresh air, they had to return to work; and that a longer evacuation time is needed in similar circumstances.

While originally the supervisors told the employees that it was okay to return to the department after 2 hours, at 8:30 p.m., some of the employees did not return until 10:30 p.m. and even then not all the employees remained in the department. In other words, it took twice as long, in the opinion of those employees, for the department to be properly ventilated than the supervisors originally estimated.

Cechak’s memorandum regarding the events of the evening in question, General Counsel’s Exhibit 14, is attached as appendix A.<sup>8</sup> The exhibit speaks for itself.

<sup>8</sup>There is no explanation in the record with respect to the date on the memorandum.

As noted above, Respondent, on brief, submits that what led to Skinn’s discharge was his (1) harassment of supervisors, (2) making unwarranted statements that the employees were in danger of “brain damage,” and (3) calling Supervisor Reed a “fucking asshole” in the presence of bargaining unit employees.

Contrary to the picture presented by Respondent on brief, this was a bad situation. Employees were physically suffering from the involved chemical. Supervisors did not have the proper documentation on hand at the time so that employees could be sure that they were not going to be harmed. It was obvious to the employees that the documentation supervisors provided did not cover the involved chemical since the odor was different. Apparently the supervisors did not provide the label from the container which held the chemical. The employees themselves obtained the label and passed it around. As noted above, the label states, among other things: “[r]eports have associated repeated and prolonged occupational overexposure to solvents with permanent brain damage and nervous system damage and possible liver and kidney damage.” The supervisors advised the employees that they, the supervisors, had seen the applicable documentation and there was nothing to be concerned about. These were the same supervisors who told the employees that it was alright to return to Department 33 at 8:30 p.m. when in fact certain of the employees and the union steward refused to return at that time since those employees could not take the fumes still present in the department. When Skinn went down the line and spoke to individual employees, which was during the period when other employees refused to work in Department 33, he was doing two things, namely (1) repeating what supervisors had already told the employees—that they could leave the line if they were bothered by the fumes, and (2) advising them that there was a risk of brain damage. Regarding the latter, as noted above, the label had been passed around among the employees while they were evacuated in the cafeteria. In other words, if they were literate and if they looked at the label, they read the same information as Skinn. In those circumstances, Skinn’s statement about the risks involved would be considered in the light of what they had already read. It was not demonstrated that any of the employees left the line to join the other employees who refused to work in the fumes. So perhaps they concluded that the situation did not involve “repeated and prolonged occupational overexposure” or perhaps, as asserted in the grievance which Respondent introduced “[m]any people were afraid to evacuate for fear of repercussions at some later time.” Unlike those situations where the employee acts on behalf of himself, here Skinn, if he believed these people were at risk—and there is no reason to conclude that he believed otherwise—was unnecessarily placing himself at risk by being in the department at that time when he could have, as other employees did, stayed out of the department. In my opinion, Skinn, up to this point, was engaged in a continuing concerted protected activity.

Respondent knew that Skinn was engaged in a concerted protected activity. Neither Richards nor Cechak denied that during their meeting with Skinn they discussed the fact that Skinn led the employees out of the factory. Aside from the cursing, which will be dealt with below, it was obvious that everything that Skinn did that evening was part of a continuing concerted protected activity.

Did he lose the protection of the Act by calling Reed a “fucking asshole”? As noted above, General Counsel contends that Reed provoked Skinn since there was no reason to approach Skinn and question him about his “problem” when she had just discussed the matter with him over the phone, and that Reed made light of the situation. Add to this the fact that Reed had to be aware that at that time other employees refused to work on one of the lines of the department. General Counsel argues that Skinn’s verbal abuse of Reed was in the heat of the moment and was “animal exuberance.” I agree. Skinn was a good employee with a good work record<sup>9</sup> who had never had any similar disciplinary problems.

In *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), the Board stated:

The Administrative Law Judge cited no decisions, however, and we know of none, where the Board has held that an employee’s use of obscenity to a supervisor on the production floor, following a question concerning working conditions, is protected as would be a spontaneous outburst during the heat of a formal grievance proceeding or in contract negotiations. To the contrary, the Board and the courts have recognized . . . that even an employee who is engaged in concerted protected activity can by opprobrious conduct, lose the protection of the Act.

The decision as to whether the employee has crossed the line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.

And in *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), the court stated:

As other cases have made clear, flagrant conduct of an employee, even though occurring during the course of [S]ection 7 activity, may justify disciplinary action by the employer. On the other hand, not every impropriety committed during such activity places the employee beyond the protective shield of the Act. The employee’s right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer’s right to maintain order and respect. *NLRB v. Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946). Initially, the responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not to be disturbed. In the instant case we cannot say that the Board’s conclusion the Tinsley’s remark was within the protection of [S]ection 7 was either unreasonable or capricious.

*Thor Power Tool Co.* involved a grievance meeting. The instant case does not. Nonetheless, considering the cir-

<sup>9</sup>See G.C. Exhs. 2–11 which are memoranda complimenting Skinn for his good work. One, G.C. Exh. 2(a), states “[o]n 2/29/88 an operator in the ACI/SMD area was seriously injured, and the immediate actions of Fred Skinn are to be commended. He acted appropriately in a time of panic, to aid the injured person and seek medical help. His willingness to become involved indicates that he is a valuable employee and is an asset to Burle Industries.”

cumstances of this case I do not believe that Skinn crossed the line. His conduct was not violent or so extreme as to render him unfit for further service. As noted above, this was not the first time Reed and Skinn had words that night. Reed and Cechak did not provide the correct documentation and they told the employees to return to work well before many of them could work in the fumes. During the confrontation in question Reed was asserting that there was no situation notwithstanding the fact that at that very time some of the employees refused to work in the department. While Skinn’s profanity cannot be condoned, the frustration he must have felt at that time should be taken into consideration. Unlike *Atlantic Steel Co.*, the situation at hand did not involve a question about overtime and a prompt answer by the supervisor on the production floor which evoked, without provocation, an obscene reply from the employee. Here there was an emergency situation. Employees were told to accept the supervisors’ assessment of the hazards involved and to return to work. Some refused. It appears that Skinn, who could have remained in the cafeteria, was concerned whether those who were working on the line appreciated the situation. Reed did not appreciate this and she confronted Skinn. In view of what had occurred, and in view of the fact that Skinn believed that Reed was making light of what he viewed as a grave situation, he reacted. He overreacted but again I do not believe that he went over the line in the circumstances of this case.

In my opinion, Respondent’s real reason for discharging Skinn was his concerted protected activity. In *Wright Line*, 251 NLRB 1083 (1980), the Board set forth the following causation test, as here pertinent, in cases alleging a violation of Section 8(a)(1) of the Act which turned on employer motivation:

First, we shall require that General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place in the absence of the protected conduct.<sup>14</sup>

<sup>14</sup>In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees’ protected activities are causally related to the employer action which is the basis of the complaint. Whether that “cause” was the straw that broke the camel’s back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.

Here, General Counsel established a prima facie case. On the other hand, Respondent, in my opinion, has not met its burden to establish that the same action would have taken place in the absence of the concerted protected conduct. Respondent does not have a specific rule prohibiting profanity. And notwithstanding Respondent’s protestations to the contrary, the handling of the Nguyen matter by Cartwright sheds some light on how Respondent had handled the use of profanity on the production floor in the past. As noted above, Respondent, on brief, contends that the disagreement involving Wortman, Nuss, and Nguyen did not involve supervisors but was a disagreement among members of the technical staff;

that the profanity was not directed at Ms. Wortman; and that the profanity was merely an expletive used in the course of the conversation. Wortman, who described herself as a leadperson, testified that she had the responsibility for the technical supervision of two employees, including Nguyen. She went on to testify that she had “supervision for their day to day responsibilities.” Respondent’s policy for scheduling vacations was to schedule with either the secretary, Wortman, or Cartwright. When a conflict arose regarding the scheduling of vacations she and Nuss discussed the matter with Nugyen. Wortman testified that Nugyen said “you oppress me” and he used the word “fucking” several times in the course of the conversation. She did not remember the exact statements that he used but she remembered that what he said really upset her. In a subsequent conversation Wortman had with Nguyen, which might have been in the presence of Cechak, Nguyen again used the word “fucking” several times and threatened another employee’s life. In her report of the incidents, General Counsel’s Exhibit 12, which she gave to Cartwright, Wortman observed as follows:

1. His [Nguyen’s] conduct was distracting to the second shift operators.
2. He would not listen to his direct supervisors (both Dick and I). We told him to calm down many times and he did not listen.
3. His language was abusive and threatening.
4. He was extremely angry over this vacation scheduling problem. What if it was something major?
5. His general state of mind did not seem rational.

Cartwright told Wortman that if she gave the report to him he would have to take it to personnel and that it might result in Nguyen being fired. Nonetheless, Wortman gave the report to Cartwright. Cartwright did not submit the report to personnel and he told Nguyen that any further action like this could result in his dismissal. While it might be contended that Nguyen’s profanity was not directed at Wortman personally but rather was used generally in the conversations, Wortman specifically reported that Nguyen’s language was “abusive and threatening.” Contrary to Respondent’s assertion, Wortman was not just another member of the technical staff. In her report, which she gave to Cartwright, she refers to herself as a supervisor. Cartwright told her that if her report was turned over to personnel Nguyen could be fired. The fact that there was no emergency situation when Nguyen’s profanity occurred weighs in Skinn’s favor. In other words, words spoken in as stressful situation might be viewed in a different light than words spoken when there was no emergency. Cartwright and the Respondent handled the Skinn and Nguyen situations in a different manner. In my opinion the disparate treatment was the result of Skinn’s protected concerted activity. Skinn would have not been discharged in the absence of his protected concerted activity.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(1) of the Act by discharging Frederick Skinn because he engaged in concerted protected activities.
3. The aforesaid unfair labor practice affects commerce within the meaning of Sections 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I shall recommend that Respondent be ordered to cease and desist and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent discharged Frederick Skinn in violation of Section 8(a)(1) of the Act, it is recommended that Respondent offer Frederick Skinn immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of the discrimination against him by payment to him of a sum of money equal to that which he would have earned as wages during the period from the date of his discharge to the date on which Respondent offers reinstatement less net earnings, if any, during that period with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>10</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

#### ORDER

The Respondent, Burle Industries, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Discharging an employee because he has engaged in concerted protected activity.
  - (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
  - (a) Offer Frederick Skinn immediate and full reinstatement to his former or substantially equivalent job and make him whole for any loss of earnings he may have suffered by reason of Respondent’s discrimination against him in the manner and to the extent set forth in the remedy section of this decision.
  - (b) Remove all records kept of Frederick Skinn’s discharge and make whatever record changes are necessary to negate the effect of the disciplinary action taken.
  - (c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of the recommended Order.
  - (d) Post at its facility in Lancaster, Pennsylvania, copies of the attached notice marked “Appendix B.”<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent’s authorized

<sup>10</sup> Under *New Horizons*, interest is computed at the “short-term Federal rate” for the underpayment of taxes as set forth in the 1986 amendment to 26 U.S.C. § 6621.

<sup>11</sup> 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.

<sup>12</sup> If this 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.”

representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps it has taken to comply.

#### APPENDIX A

Bob,

Last evening we had to evacuate the department due to exposure to a chemical. The time lost due to the events are as follows: 2.5 hours of total production lost in both HCI and Assembly (1.5 hours completely shut down and 1 hour lost in slowed production). The ACI area had a loss of 5 hours of down time (5 hours completely shut down). The events that occurred last night are as follows:

6:00pm - Noticed strong smell, like that of a "solvent". Informed security of this smell and proceeded [sic] to investigate. Discovered that the source of the odor was a chemical which was being used by an outside contractor to remove the adhesive from the floors in a closed off ventilated area. Contacted the contractor and asked if the chemical was hazardous and requested the MSDS on the chemical. The chemical was not hazardous in a properly ventilated area. Began to contact official people as to proper procedures.

6:30pm - Chemical odor increased in the department causing complaints of red burning eyes, dry throat, and difficulty breathing. Eric and security guard noticed a "haze" in the 33b area. The operators in the department were then evacuated to the cafeteria. Attempted to contact D. Tshudy and R. Hartzell, received no answer. Contacted N. Seidman and informed him of the situation. It was agreed by the contractor and N. Seidman

that this work would stop. The total ventilation of the department started at this point. Power house was informed of the situation as well as our own efforts to ventilate the area by opening doors and floor fans to ventilate the department.

7:00pm - Operators were informed of the situation in the department and were informed that the chemicals posed no severe health hazards and that we were ventilating the areas to make them safe to work in again. Roll was taken at this time to insure that all operators were present and accounted for.

7:30pm-8:00pm - Lunches for the HCI and Assembly sides respectively, areas were still being ventilated.

8:15pm - Surveyed the areas for chemical odor. Odor was still noticeable, but was safe to work in. Informed the operators that we would attempt to resume work at 8:30 (after lunch). All operators were told that if the odors were affecting them that they were free to leave the area and go to an area where they felt that was safe.

8:30pm - Resumed production on HCI line and in assembly. There was still a strong odor in the ACI area. Production did not resume here at this time.

9:00pm to 12:00am - Production continued (but at a slower pace than usual). Several operators left the line when they felt the chemical was "affecting" them. Many came back during the night. ACI production did not resume this evening due to the odors still lingering in that particular area.

During the evening other contacts were made including R D Richards and W. Hackman. These are the events which caused supervision to evacuate the department on the evening of October 6, 1988. At no point in time prior to the detection of chemicals, were any of the supervision notified of the use of these chemicals.

Sincerely,  
Eric A. Cechak  
Holly Reed