

Praxair, Inc. and Teamsters Local Union No. 519.
Case 10-CA-27241

May 15, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

On July 7, 1994, Administrative Law Judge Robert C. Batson issued the attached decision. The General Counsel filed exceptions and a supporting brief.

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

The National Labor Relations 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,¹ and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed the complaint allegation that the Respondent refused to provide the Union with the Company's rules, written or verbal, which could lead to employee discipline. For the reasons set forth below, we reverse.

On May 6, 1993,² the Union's business agent, Allen Anderson, asked the Respondent to provide the Union with the Company's rules regarding disciplinary policies. The Union explained that it sought the information to facilitate administration of the parties' current collective-bargaining agreement. Receiving no response, in late October Anderson called the Respondent's plant manager, Gary Fiorino, concerning the matter. Fiorino claimed that there were no work rules. In a November 15 letter to the Union, the Respondent stated that many of its policies appeared in the parties' contract, but other relevant policies were not in writing and were determined case-by-case based on a progressive discipline system.

On November 29, the Union responded with a request for the Company's "verbal rules reduced to writing and any written rules which could lead to discipline [and] a copy of the progressive steps for each of these rules." By letter dated December 3, the Respondent refused to "generate a written set of disciplinary rules." The Respondent also advised the Union of its right to negotiate a contract containing disciplinary rules. The Union had unsuccessfully attempted to include disciplinary rules in the parties' contract.

The judge dismissed the complaint, finding in essence, that the Respondent does not maintain written work rules and that the General Counsel was attempt-

ing to force the Respondent to create a set of disciplinary rules and reduce them to writing. We disagree.

At the outset, we observe that the principle on which the judge relied is correct: The Board has no authority to dictate terms of an agreement. Thus, we do not require the Respondent to create work rules that previously did not exist. Based on the record, however, we disagree with the judge's apparent conclusion that the Respondent maintains no work rules.

The record contains evidence of both written and verbal work rules. The following rules are not disputed:

1. Facial hair is not permitted.
2. The presence of two employees in the plant is required during the performance of certain work.
3. An employee is required to obtain permission to arrive at work before the beginning of his scheduled shift.
4. An employee is required to notify the Respondent about leaving work before the end of a shift.
5. An employee is required to notify the Respondent of an absence before the beginning of a scheduled shift.
6. There is a rule regarding an employee arriving at work late.

The Respondent also admits that it has a number of work rules dealing with smoking, alcohol, drugs, and firearms on company property.

Further, the Respondent has disciplined employees for violating both written and verbal rules. For example, the Respondent admitted that it has disciplined employees for tardiness and absenteeism. The Respondent has issued a series of written reprimands to employees for violating the written rule prohibiting facial hair. In addition, the Respondent, pursuant to a contractual rule, has disciplined employees for not reporting to work for 3 consecutive days without notifying the Respondent. Finally, the Respondent discharged employee Harrell, inter alia, for leaving work before the end of a shift without notifying his supervisor. When the Union arbitrated the discharge, the Respondent's defense stated that

employees had been verbally informed of the rule that if they were going to leave the plant prior to the end of their scheduled shift, they must notify [the plant manager] or [a] supervisor The grievant's notice to another employee . . . did not suffice to bring him into compliance with the rule.

Westinghouse Electric Corp., 239 NLRB 106, 107 (1978), *enfd.* as modified 648 F.2d 18 (D.C. Cir. 1980), establishes that an employer must furnish information a union requests if there is a probability that the information is relevant and necessary to the union

¹ We disavow the judge's suggestion in the second paragraph of fn. 8 that the Respondent's counsel breached the Code of Professional Conduct.

² All subsequent dates are in 1993.

in carrying out its statutory duties as the employees' bargaining representative. The duty to furnish information "stems from the underlying statutory duty imposed on employers and unions to bargain in good faith with respect to mandatory subjects of bargaining." *Cowles Communications*, 172 NLRB 1909 (1968). Work rules that could be grounds for discipline are mandatory subjects of bargaining. *Womac Industries*, 238 NLRB 43 (1978); *Murphy Diesel Co.*, 184 NLRB 757, 762 (1970), *enfd.* 454 F.2d 303 (7th Cir. 1971). Regardless of whether a union has requested such information to negotiate a new contract or, as here, to administer an existing contract, the employer's obligation to supply the information is predicated on the union's need "to provide intelligent representation of the employees." *Westinghouse*, *supra*. A union with a duty to represent employees in disciplinary proceedings has the right to be informed of the existing work rules that might lead to discipline of unit employees. *Laidlaw Waste Systems*, 307 NLRB 1211, 1213-1214 (1992) (respondent unlawfully refused to provide the union with a safety rule involved in a grievance).

Given our finding that the Respondent maintains and enforces written and verbal work rules,³ it follows that the Union is entitled to be informed of those rules.⁴ Accordingly, the Respondent's refusal to provide the Union with the Company's written and verbal rules that could lead to employee discipline violated Section 8(a)(5).⁵

³Contrary to the implication of our dissenting colleague, we do not find a violation for failure to generate a list of work rules at the Union's request. The record demonstrates that the Respondent maintained verbal work rules that it communicated to employees and that it expected employees to obey. Discipline resulted from the failure to follow those verbal work rules. We reiterate that we do not require the Respondent to advise the Union when it will discipline employees for the violation of such verbal work rules; we simply require the Respondent to inform the Union of the rules themselves. Finally, our dissenting colleague's assertion notwithstanding, we note that part of the Respondent's violation was its failure to provide the Union with a copy of its safety manual containing some of the written rules. The Respondent's offer to provide the safety manual, referred to by the dissent, was made to the General Counsel rather than the Union; the General Counsel did not advise the Union of the offer; and the offer was made after the Union filed the charge in this case. Based on the allegations contained in the complaint and the evidence adduced at the hearing, we find a violation for the reasons stated in this Decision and Order.

⁴In claiming that the Respondent does not have a disciplinary policy, Fiorino testified that although the Company had rules, a violation of a rule would not necessarily result in discipline. The judge apparently took this testimony to mean that the Company did not have work rules. Given the evidence in the record, this obviously cannot be what Fiorino meant.

⁵The judge sought to distinguish two Board cases on which the General Counsel relied. In doing so, however, he was relying on his apparent conclusion that no work rules exist. Having found that work rules actually do exist, we conclude that the Respondent may not avoid its obligation to furnish the requested information by arguing that its work rules are not in writing. *Champ Corp.*, 291 NLRB 803, 809, 878-879 (1988), *enfd.* 913 F.2d 639 (9th Cir. 1990);

ORDER

The National Labor Relations Board orders that the Respondent, Praxair, Inc., Knoxville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to provide Teamsters Local Union No. 519 (the Union) with the Company's written and verbal rules that could lead to employee discipline.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Provide the Union with the Company's written and verbal rules, the breach of which could lead to employee discipline, as requested in the Union's May 6 and November 29, 1993 letters.

(b) Post at its facility in Knoxville, Tennessee, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized 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.

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

MEMBER STEPHENS, dissenting.

I agree with the judge that the Respondent did not violate Section 8(a)(5) and (1) of the Act and that the complaint should be dismissed. Therefore, I dissent.

I agree with my colleagues that the Respondent does maintain specific written rules that could lead to discipline. Those rules are contained in the parties' collective-bargaining agreement (e.g., the rule regarding loss of seniority for failing to provide an acceptable excuse for failing to report to work on 3 consecutive scheduled days), the Respondent's safety manual (e.g., the facial hair rule, the rule requiring the presence of two employees for the performance of certain work) and the posted signs at the plant (e.g., the rules regarding smoking, alcohol, drugs, and firearms on company property). In addition to those specific rules, the Respondent also maintains a general policy of progressive discipline and a general policy that considers the total-

Safeway Stores, 252 NLRB 1323 (1980), *enfd.* 691 F.2d 953 (10th Cir. 1982).

⁶If 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."

ity of circumstances in each given situation in determining whether the conduct in question requires any discipline. Those specific written rules and that statement of a general policy have been offered to the Union.¹

My colleagues find, however, that because other employee conduct not set forth in the written rules has resulted in discipline, the Respondent necessarily maintains some uniform and definite work rules or policies that it unlawfully refuses to supply to the Union. I disagree. The situations that my colleagues have characterized as work rules (e.g., an employee's late arrival at work, notifying the Respondent about leaving work before the end of scheduled shift, obtaining permission to arrive at work before a scheduled shift begins) are, in my view, merely factors that might, under the Respondent's totality-of-the-circumstances approach, lead to discipline depending on all of the attendant circumstances. These factors do not, in my view, rise to the level of a "work rule." Moreover, whatever judgment might be passed on the Respondent's apparently arbitrary system of management, the fact remains that the Union has not been able to gain a better system at the bargaining table, and the Board has no authority to order the Respondent to rationalize its system by generating a set of "rules." See *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

Accordingly, I find that the Respondent, by directing the Union to the written rules contained in the parties' collective-bargaining agreement, the safety manual, and the posted signs around the plant, as well as informing the Union of its general policies, adequately provided the Union with the information it requested. The Respondent thus did not violate the Act by failing to generate and provide to the Union a set of written work rules.²

¹ As the judge stated, the Respondent asserted that it had proffered the safety manual to the Union. In this regard, I note a colloquy before the judge in which the Respondent's counsel asserted that the manual had been offered to the Union before complaint was issued in this case, and the counsel for the General Counsel conceded that he was aware of that. Counsel for the General Counsel argued, however, that there were "other rules," i.e., that the rules in the safety manual "are not the only rules that the Employer has." Consistent with that implicit representation of what was urged as the basis for the violation, the General Counsel in his brief to the Board does not rely on any alleged delay in offering the safety manual to the Union. It argues, instead, that the judge erred in failing to find that the Respondent was "required to tell the Union what its unwritten, but viable, work rules and policies are."

² I also agree with the judge that *Champ Corp.*, 291 NLRB 803, 878-889 (1988), *enfd.* 913 F.2d 639 (9th Cir. 1990), and *Safeway Stores*, 252 NLRB 1323 (1980), *enfd.* 692 F.2d 953 (10th Cir. 1982) are distinguishable. In *Champ*, the Board ordered the respondent to provide the union with written descriptions of job duties of all employees, notwithstanding that the respondent argued that such written descriptions did not exist. Unlike here, as the judge found in *Champ*, those job duties existed in a concrete and observable form because an agent of the respondent has compiled such descriptions in response to a subpoena. Additionally, unlike here, in *Safeway*, the

Finally, I note that I would require the Respondent to provide the Union, on request, any disciplinary records that it may maintain on employees, such as the records of the Harrell discharge or notations of reprimands. I would consider that such records constitute rules of a sort (i.e., in a given set of circumstances, the Respondent took a definite, specific action). Here, however, there appears to be no claim that the Respondent has failed to turn over such documents.

Board required the respondent to furnish information that was already available from records in the respondent's possession, permitting the respondent to compile the information itself or grant access to the union so it could compile the information.

APPENDIX

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 refuse to provide our written and verbal rules that can lead to employee discipline to Teamsters Local Union No. 519.

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 provide the Union with our written and verbal rules, the breach of which can lead to employee discipline, as requested in the Union's May 6 and November 29, 1993 letters.

PRAXAIR, INC.

Victor McLemore, Esq.,¹ for the General Counsel.

Josephine Miller, Esq., of Danbury, Connecticut, for the Respondent.

Allen Anderson, Business Agent, Local 519, of Knoxville, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT C. BATSON, Administrative Law Judge. This case was tried before me at Knoxville, Tennessee, on May 4, 1994, on a charge filed December 21, 1993,² by Teamsters Local Union No. 519 (the Union) alleging that Praxair, Inc. (Respondent or Employer) violated Section 8(a)(5) and (1) of the Act by refusing on request to provide the Union with its "rules, written or verbal, which could lead to discipline of employees and the progressive disciplinary steps for each rule." On February 3, 1994, the Regional Director for Region 10 of the National Labor Relations Board issued a com-

¹ Hereinafter the General Counsel.

² All dates are 1993 unless otherwise indicated.

plaint alleging that on or about November 29 the Union requested Respondent provide it with Respondent's rules, written or verbal, that could lead to discipline of its employees and the progressive steps for each of such rules. The complaint alleges that the information requested by the Union was necessary and relevant for the Union's duty and responsibility to represent the employees in the appropriate unit, including the consideration and processing of grievances on behalf of such employees, and that since on or about November 29 Respondent has failed and refused to bargain in good faith with the Union as the exclusive bargaining representative of the employees in an appropriate unit, hereafter described by refusing to furnish the Union with the information in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (Act). The Respondent by its answer to the complaint denies that the Union requested such information and that the Respondent failed and refused to provide the information to the Union. The charge, complaint, and answer were properly served on all parties.

On the entire record in this case, including my opportunity to directly observe the witnesses while testifying under oath, and their demeanor, and after considering the posthearing briefs by counsel for General Counsel and the Respondent I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Praxair, Inc., has at all times material been a Delaware corporation with an office and place of business located at Knoxville, Tennessee, where it is engaged in the sale and distribution of bottled gas. During the 12 months preceding the issuance of this complaint, which is representative of all times material, Respondent sold and shipped from its Knoxville, Tennessee operations finished products valued in excess of \$50,000 directly to customers located outside the State of Tennessee. The complaint alleges, the answer admits, the evidence establishes, and I find that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges, the answer admits, the evidence establishes, and I find that Teamsters Local No. 519 has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Since 1988 the Union, Teamsters Local Union No. 519, has been recognized as the exclusive collective-bargaining representative of:

All hourly production and maintenance employees, including truck drivers, employed at Respondent's Knoxville, Tennessee plant, excluding office and clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act.³

This unit constitutes one appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. As noted above, the Union has represented the employ-

ees in the above-described unit since 1988. The parties are now operating under a collective-bargaining agreement that by its terms is due to expire November 30, 1994.

On May 6 the Union by its business agent, Allen Anderson, wrote to Gary Fiorino, the plant manager of the Knoxville facility, requesting copies of Respondent's disciplinary steps and procedures describing the major and minor offenses with respect to Respondent's work rules. Allen stated this request was made "due to problems that have been experienced with plant work rules, and due to unforeseen problems which may arise." (G.C. Exh. 7.)⁴ Fiorino made no response to this request. Anderson let the matter of the request ride until sometime in October, approximately October 22, at which time he called Fiorino and asked if they were going to respond to his request of May 6. Fiorino told Anderson, "They didn't have any work rules and they weren't going to send me a copy of any." (Tr. pp. 26 and 27.)

By letter dated November 15, 1993, after the original charge in this case was filed, Business Agent Anderson received a response to his request from Tracy Guy of the Employer's human resources department setting forth the Company's position, the thrust of which was that except as covered in the collective-bargaining agreement the Company had no written bargaining unit disciplinary policies. (G.C. Exh. 8):

Re: Disciplinary Policies

Dear Mr. Anderson:

You have requested copies of Praxair's disciplinary policies, apparently in the context of reviewing the Company's discipline of bargaining unit members for excessive absenteeism or tardiness and excessive on-the-job accidents. While this issue is one previously discussed in contract negotiations, perhaps this written confirmation of what you were then advised will put the matter to rest.

Many of Praxair's policies applicable to the bargaining unit appear in our Contract. However, with the possible exception of the Substance Detection Program which is part of our application for employment, Praxair has no written bargaining unit disciplinary policies of the sort I understand you to be requesting, meaning a statement or statements detailing various rules together with the disciplinary penalties to be applied for their violation under various circumstances. While Praxair generally applies a system of progressive discipline, applying more severe discipline, up to and including discharge as unacceptable performance or conduct repeats, we also consider the severity of each incident (e.g. accident resulting in minor injury vs. accident resulting in serious injury and property damage), any aggravating or mitigating factors (e.g. intentional misconduct; violation of known rules/practices vs. inexperience or inadequate training) and, if appropriate, the employee's work history in determining what discipline is appropriate, such that either no formal discipline or even discharge may result from even a single incident.

³The unit consists of 17 employees.

⁴Exhibits offered by counsel for the General Counsel and received into evidence are cited as G.C. Exh. and by Respondent as R. Exh.

We recognize that Praxair's responsibility is to provide an atmosphere of fair and impartial treatment for all its employees. If we fail to discharge this responsibility, employees have an effective means to voice their concerns or disagreement through recourse to the Contract's grievance and arbitration process, with your assistance.

Sincerely
/s/ Tracy Guy

Plant Manager Gary Fiorino testified that the Employer's safety manual contains some regulations, the violation of which employees might be disciplined. (Tr. 15.) The Respondent states that the safety manual has been proffered to the Union.

On November 29 Anderson made a written request to John B. Day, Respondent's chief labor counsel, for "a copy of the plant's verbal rules reduced to writing and any written rules which could lead to discipline. Also please send a copy of the progressive steps for each of these rules." (G.C. Exh. 9.)

By letter dated December 3 (G.C. Exh. 10), Day responded with the following:

Re: Knoxville Disciplinary Policies

Dear Allen:

I have and thank you for your November 29, 1993 letter, but will have to respectfully decline your request that the Company generate a written set of disciplinary rules. The Company's disciplinary philosophy and principles have already been accurately summarized in writing for you, in Tracy Guy's November 15, 1993 letter the receipt of which you acknowledge. As it stated, Praxair does not have a comprehensive written set of disciplinary rules at Knoxville or any other of its numerous other unionized and non-union facilities. Neither our contract with Local 519 nor the National Labor Relations Act obliges us to maintain or create one, and we do not plan to do so.

You are, of course, free to raise the issue of whether any given employee had an adequate understanding of the basis of any discipline, itself, may be argued there. You would also be free, although I suspect only in full contract negotiations, to seek the Company's agreement to negotiate a set of disciplinary rules. Absent such an agreement, however, the Company will continue its unbroken historical practice, at Knoxville and elsewhere, of proceeding without a schedule of discipline, permitting the consideration of all relevant factors in any particular case.

Finally, while I am always available to consider any inquiry you may have with respect to the Company's position on legal matters, we encourage you to direct all routine communications with the Company through local management or the assigned Human Resources representative, in this case Tracy Guy. Your cooperation and assistance in this matter is greatly appreciated.

Sincerely,
/s/ John Baldwin Day

During negotiations for a second contract in 1991 the Union proposed that an article relating to discipline and discharge be incorporated into the contract as article IX, sec-

tions 1, 2, and 3 (R. Exh. 1.)⁵ After the new collective-bargaining agreement became effective the Respondent issued several written reprimands to several employees that apparently triggered the Union to seek the information sought here. On February 4, 1992, Supervisor Rick Davis issued a written reprimand to employee Marcus Westfield (G.C. Exh. 3) for violation of the "facial hair program" and on February 17, 1992, issued a similar reprimand to employee Freddy Holloway (G.C. Exh. 4) for the same reason. On June 7, 1993, Davis issued a second reprimand to Westfield (G.C. Exh. 2) for violation of the shaving policy.

The Respondent's facial hair policy is written in its safety manual and is required by OSHA 1910.134 (respiratory policy). The reason for this is that its employees use respirators and must be clean shaven in order that the respirator will seal.

On May 5, 1993, Davis issued a written reprimand and a 3-day suspension to employee Bill Cross for having two motor vehicle accidents in a company vehicle. Davis writes in the reprimand, "Investigation prove that they could have been avoided if proper technique were used."

Another incident perhaps giving rise to the Union's request was the arbitration of the discharge of employee Danny Harrell in the summer or fall 1991. The testimony given at the arbitration and the Employer's brief to the arbitration panel (G.C. Exh. 6), as well as testimony by Plant Manager Gary Fiorino, demonstrates that the Employer had numerous verbal rules regarding employee conduct that might lead to discipline.

For example, verbal rules that had been given to employees over the years to notify their supervisor if they leave work prior to the end of their scheduled shift. (G.C. Exh. 6, p. 6.) The collective-bargaining agreement article IV, section 5(e) provides that an employee shall lose seniority⁶ if "The employee fails to report for work for three (3) consecutive days of that employee's work schedule and does not have an excuse acceptable to the Employer." (G.C. Exh. 6, p. 2.) The company policy that employees call in if they are going to be absent, however, is apparently a verbal one.⁷ The Employer's safety manual requires that there be at least two employees when working (at least on some jobs). There is a verbal rule, however, that if one employee shows up for work and another does not that employee must notify management. (Tr. 14.)

Plant Manager Fiorino testified in response to the General Counsel's questions that written rules consisted of signs posted in the plant with respect to "smoking," "alcohol," "drugs," and "firearms" on company property, but that violations of these were handled on a case-by-case basis and a violation would not necessarily result in discipline, but whatever action was taken would depend on all the circumstances. Likewise the written rules in the safety manual, only two of which came to light here, facial hair and the presence of two people in the plant when performing certain work, but again discipline for a violation of these rules

⁵The confusion appearing in record with respect to which party made this proposal will be dealt with below. I find that it was made by the Union and rejected by the Employer.

⁶The Respondent says that loss of seniority is the same as termination. The Union does not dispute this.

⁷Neither party offered the current collective-bargaining agreement into evidence.

would depend on all the circumstances. The same is true with sleeping on the job and Fiorino gave two examples when no discipline was taken. One, he testified he observed an employee performing a monotonous job asleep and Fiorino merely made a sound and spoke to the employee waking him up. Fiorino says the employee was a good one and being caught asleep on the job was enough embarrassment—no discipline was taken. Another employee having a problem staying awake on the job was not disciplined when Fiorino found that he had a new baby at home that was keeping him up nights. He further testified that tardiness, theft of company property, intoxication, or fighting on the job would be handled on a case-by-case basis. (Tr. 14–16.)

During negotiations for the current collective-bargaining agreement on August 28, 1991, the Union made a proposal labeled “Art. IX Discipline—Discharge” that consisted of about one and a half handwritten pages addressing a minimal number of employee offenses and proposing the discipline therefor. (R. Exh. 1.) According to Local Business Agent Allen Anderson the employer rejected it and made their final offer to the Union that the Union accepted.⁸

Analysis and Conclusions

The Board’s statutory authority with respect to the issue raised here is limited to compelling an employer to bargain in good faith with the duly designated representative of a majority of its employees over certain mandatory subjects of bargaining of which discipline and discharge is one. If the parties bargain over nonmandatory subjects such bargaining must also be in good faith. The Board has no authority and is expressly prohibited from dictating any terms of an agreement or to compel either party to make concessions or include any particular language on any subject. It is only when the parties have reached agreement that the Board has the authority to compel them to reduce such agreement to writing and execute it by signing it.

The Board also has the authority to order the employer to provide the union with certain information on request that is necessary and relevant to the union’s duties and responsibilities

⁸Employer’s counsel had Plant Manger Fiorino identify R. Exh. 1 as a proposal made by the Employer in response to a union proposal on discipline and discharge (Tr. p. 65.) On this identification both the General Counsel and Business Agent Anderson objected that R. Exh. 1 was the union’s proposal. During an off-the-record discussion the Union offered to accept R. Exh. 1 in settlement of this case saying “this is exactly what we want.” (Tr. 66–69.) During voir dire by the General Counsel, Fiorino began to waiver in his identification admitting that he was not sure, and if Anderson said it was the Union’s proposal he could not dispute it. (Tr. 67.) When the Union offered to accept R. Exh. 1 in settlement of the case Employer’s counsel began to hedge saying neither she nor Fiorino had the authority to negotiate or enter into a settlement agreement. Counsel argued that R. Exh. 1 was part of a package offered by the Employer and she had no authority to accept it now. (Tr. p. 82.) As a matter of fact it was not a proposal “package” or otherwise made by Respondent and by this time counsel was well aware of that fact—or at least that it would require more investigation. Counsel chose to ignore this, however, and did not pursue it in posttrial brief.

This footnote would not be necessary had counsel handled this incident as required by the Code of Professional Conduct. An attorney who has made an honest but mistaken representation to a court on learning of such mistake has a professional duty to immediately correct the mistake and apologize to the court. Here counsel did neither.

ities under Section 8(a)(5) to fulfill its obligations as the statutory representative of the unit employees.

Here the General Counsel and the Union are attempting to have the Board do that which it is prohibited from doing under the guise of a request for information to aid the Union in performing its duty as representative of the employees. The Union recognized that this subject was one that had to be negotiated, hence its proposal (R. Exh. 1).

This is the position taken by Respondent and, although citing no cases or other authority, it may feel that because this principle is so well settled it is unnecessary to do so.

The General Counsel correctly cites the standard for determining relevance of information sought by a bargaining agent as set forth in *Westinghouse Corp.*, 239 NLRB 106 (1978). In the instant case we need not deal with that standard of relevance because here the Board is being asked to order Respondent to compile and reduce to writing certain employee conduct for which an employee might be disciplined and the progressive steps in determining that discipline. Although it might be argued that such written data would be helpful to both the Employer and the Union, I have no authority to order it. To do so would have the effect of forcing the Employer to amend an agreed-on contract.

The General Counsel cites as precedent for what he seeks in *Champ Corp.*, 291 NLRB 803 (1988), and *Safeway Stores*, 252 NLRB 1323 (1980). These cases are inapposite on their face. In *Champ*, there were numerous unfair labor practices and a strike in 1979 and 1980. In its 1988 *Champ Corp.* decision, in fashioning a remedy, the Board said at 808–809:

In view of the long duration of the strike, commencing on October 15, 1979, and ending April 7, 1980, the extremely long period since the end of the strike, and the numerous unfair labor practices of Champ Corporation that prolonged the strike, certain special remedies are necessary to restore, insofar as practicable, the status quo ante. In all probability, many of the strikers have since taken employment with other employers and many have out of necessity moved to other locations. They should be accorded full and equitable opportunity to consider present offers of reinstatement free of any fears of the recurrence of the unfair labor practice against them.

Having said that the Board, *id.* at 810, ordered the Respondent to inter alia:

(g) Furnish the Union a description of the job duties performed by all unit employees for the preceding 12-month period and the date of layoff of all unit employees that have been laid off during the preceding 12-month period.

Thus it is clear the Board’s Order here requiring the Respondent to furnish this information arose out of its authority to fashion an appropriate remedial order.

With respect to *Safeway* the Board found that the Union’s request for “certain information in order to ascertain whether the applicable discrimination provision of the parties’ contract was being complied with in a number of pending matters involving the statutes and orders described in its request.”

The contract contained a “no-discrimination clause.” The Union requested information about the number of male and female employees, Blacks, handicapped, and Indian by race, sex, Spanish surname, and also their seniority. Also all promotions and upgrades for a 12-month period, the number of persons hired, and et cetera. The Respondent was ordered to furnish that information or make it available to the Union. Here the Union was not seeking to have the employer generate something not in its possession and was clearly for the purpose of administering the “no-discrimination clause” in the contract.

The Board clearly does not have the authority to order the Employer to amend the contract by generating the information sought and furnishing it to the Union. I shall dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

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

2. The Respondent did not as alleged violate Section 8(a)(1) and (5) of the Act.

On these findings of fact and conclusions of law and on the entire record I issue the following⁹

ORDER

The complaint is dismissed in its entirety.

⁹If 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.