Lorac Construction Services, Inc. *and* Jeffrey H. Ayers. Case 9–CA–30994

September 8, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On June 30, 1994, Administrative Law Judge J. Pargen Robertson 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 Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleged that the Respondent violated Section 8(a)(1) of the Act by: (1) transferring employee Jeffrey Ayers on July 14, 1993,[1] to a second worksite because he engaged in protected concerted activity; and (2) laying off Ayers that same day because he would not accept the unlawful transfer. The judge dismissed the complaint.

We do not agree with the judge's dismissal of the complaint allegation concerning Ayers' July 14 transfer. A brief review of the facts is necessary. The Respondent contracted to maintain and repair equipment at the Mead Paper Company's Chillicothe, Ohio plant (Mead), at the time of its annual shutdown. The Respondent contracted with Millwright and Machinery Erectors Local Union 207 (Union) for the work performed at the site. The Union referred Ayers to begin work on July 12.[2] The Respondent assigned Ayers to perform welding work on a large metal outdoor slasher-shredder. Ayers immediately began complaining to the Respondent's superintendent, Ron Eaches, and general foreman, Bill Burkes, about the Respondent's allegedly inadequate provision of supplies for the job. He wanted to know why Gatorade and picnic tables were not available for the employees. He maintained that the oxygen supplies were insufficient. He also demanded that the Respondent provide gang boxes to secure the employees' tools.

The next day, July 13, Ayers continued to register his displeasure. He noted the Respondent's failure to provide ice water continually at readily accessible locations and to provide employees with adequate supplies of welding gloves, goggles and tips. Ayers also repeated his request that the Respondent provide gang boxes to secure the employees' tools. Finally, Ayers complained to Eaches about the demotion of Foreman Rocky Gibson after Ayers had discussed the demotion with Union Steward Don Pitsbarger.

Initially, the Respondent tried to accommodate Ayers' complaints. The Respondent determined that oxygen was available and provided a secure storage room for the employees' tools in the absence of sufficient gang boxes. Some welding supplies were unavailable initially but the Respondent furnished more supplies as the job progressed. The Respondent assigned a laborer to look after the water containers and reinstated Gibson to his foreman position. The Respondent, however, did not provide Gatorade and picnic tables. The Respondent told the employees that Mead was responsible for the Gatorade and that the picnic tables were still bolted down in a trailer.

On Ayers' third day on the job, July 14, Superintendent Eaches told Ayers that he was transferring him to another location because he needed a welder there. Eaches said that he was concerned about Ayers' incessant complaining and hoped that Ayers would be happier and satisfied at another site. Eaches testified that he made the decision to transfer Ayers based on the many complaints he had received from Ayers and from no one else. Significantly, Eaches also testified that Ayers told him that Eaches ''didn't want to go by the contract rules and provide anything the contract provided for.'' Eaches drove Ayers to the new location.

The judge found that some of Ayers' complaints touched on matters covered by the collective-bargaining agreement.[3] In the judge's opinion, however, Ayers was often seeking more than he was entitled to under the contract, or there was no support for his position in the contract. The judge noted that the Respondent tried to satisfy Ayers and that Ayers engaged in no

[1] All dates are in 1993 unless otherwise indicated.

[2] The Union referred approximately 50 employees to the Mead job.

[3] Art. IV, secs. B, H, and I state the following:

> All necessary equipment for burning and welding shall be furnished by the Employer.
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> . . . The employer shall furnish a suitable room for use of members for the purpose of storing tools . . . The room in which tools of members are stored shall be provided with a substantial lock. Employers shall carry adequate fire and theft insurance on tools of United Brotherhood members and shall be required to replace stolen tools . . . .
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> Any contractor . . . who employs members shall furnish refrigerated water and/or ice water during the hot weather, from April to November 30, in sanitary containers with sanitary drinking cups available at all times when work is performed by members.

Art. IX, secs. A and D state the following:

> A Millwright crew shall consist of six (6) Journeymen and two (2) apprentices. After six (6) Journeymen and two(2) apprentices are employed, one (1) Foreman in addition to the General Foremen will be hired when additional Millwrights are hired.
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> . . . The pay rate for the supervisory classifications under this Agreement shall be as follows: . . . Foreman . . . $1.00 above Journeyman rate.

confrontation with the Respondent about any specific provision of the contact. Indeed, the judge found no nexus between Ayers' reluctance to transfer to the new worksite and a contractual right.[4] Accordingly, the judge found that the General Counsel failed to establish a prima facie case of unlawful transfer.[5]

We disagree with the judge's interpretation of *City Disposal Systems*, supra. First, the Supreme Court endorsed the Board's *Interboro* doctrine,[6] which recognizes that an employee's

> honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated.[7]

Second, the Court recognized that although the principal tool for invoking this right is the contract's grievance machinery, another legitimate tool is an employee's simple protest to the employer.[8] Third, the Court concluded that, in voicing a complaint, the complaining employee need not explicitly refer to the collective-bargaining agreement as the basis for the complaint, but that

> [a]s long as the nature of the employee's complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective bargaining agreement, the complaining employee is engaged in the process of enforcing the agreement.[9]

We find that Ayers' complaints to the Respondent fall within *City Disposal's* definition of concerted activity. We note that Ayers raised issues in his complaints that were specifically addressed in the collective-bargaining agreement. Thus, the collective-bargaining agreement required the Respondent to provide all necessary equipment for burning and welding. Ayers complained about inadequate supplies of oxygen and welding gloves, tips and grinding disks. The collective-bargaining agreement required the Respondent to provide a secure room for storing the employees' tools. Ayers complained about the lack of gang boxes to store the employees' tools safely. The collective-bargaining agreement required the Respondent to provide drinking water and Ayers complained that it was not readily accessible and always available. The collective-bargaining agreement required the Respondent to appoint a foreman with extra pay for every six journeymen and two apprentices and Ayers complained about the Respondent's demotion of Rocky Gibson. Finally, and significantly, we note that Superintendent Ron Eaches admitted that Ayers invoked the terms of the collective-bargaining agreement.[10]

Under *City Disposal*, Ayers did not have to be correct in his position that there was a breach of the collective-bargaining agreement; nor was it necessary for him to file a formal grievance. Indeed, Ayers did not even have to invoke a specific provision of the agreement in voicing his complaints to the Respondent. Ayers merely had to honestly and reasonably invoke collectively bargained rights. This is what Ayers did, and the Respondent transferred him to a new work location for that reason. In this latter regard, we note Eaches' testimony that he transferred Ayers because of complaints and that the complaints were contractual. Accordingly, we find that the General Counsel established a prima facie case of unlawful transfer, and the Respondent failed to rebut the General Counsel's case.[11] We therefore find that the Respondent's transfer of Ayers from the slasher-shredder location to a new worksite on July 14 violated Section 8(a)(1) of the Act.

On the other hand, we agree that the Respondent did not violate the Act when it laid off Ayers on July 14. Ayers repeatedly testified that, at all critical times on July 14, he was refusing to work rather than refusing to accept a transfer. Thus, Ayers testified that he initially told employees at the second worksite that he could not weld because of a recent injury. Ayers further testified that he then told Superintendent Ron Eaches the same thing when Ayers returned to the location from which he had been transferred. Next, Ayers told Union Steward Don Pitsbarger that he could not weld and Pitsbarger spoke to Eaches on Ayers' behalf, repeating Ayers' alleged inability to weld. Finally, when Eaches offered Ayers the job of ''fire watch'' back at the work site to which he had been transferred, Ayers refused the fire watch job. Ayers own testimony established that throughout this sequence of events, he was refusing to perform welding work because of his physical limitations, not that he was refusing to accept the transfer. The record establishes that welding was an integral part of the slasher job, and we therefore conclude that the Respondent did not discriminate against Ayers simply because it offered him an alternative assignment as a fire watch,

[4] The judge sought to distinguish *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984).

[5] The judge also noted that the Respondent transferred Ayers because of his continuing complaints, without regard to whether those complaints involved matters discussed in the contract.

[6] *Interboro Contractors*, 157 NLRB 1295 (1966).

[7] *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 840 (1984).

[8] Id. at 836.

[9] Id. at 840.

[10] Even if some of Ayers' complaints were not based on the contract, the Respondent made no distinction between Ayers' complaints that honestly and reasonably invoked the contract and those that did not.

[11] *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

at the same rate of pay. Because he also refused that work, we agree with the judge that the Respondent did not violate Section 8(a)(1) of the Act with respect to Ayers' July 14 layoff.

REMEDY

In order to remedy the violation found, we will require the Respondent to cease transferring employees because they engage in protected concerted activity. We will also order the related affirmative remedies. We will order no affirmative remedies, however, with respect to Jeffrey Ayers. We note that had Ayers remained at the slasher-shredder on July 14, the Respondent would still have laid off Ayers. On July 14 Ayers refused to weld. Ayers also refused to fire watch, the job the Respondent offered him as a substitute. As indicated above, Ayers refused to work without qualification, and the Respondent lawfully laid off Ayers. Accordingly, there is no purpose to requiring the Respondent to restore Ayers to the position he would have been in absent the unlawful transfer. The Respondent would have lawfully laid off Ayers shortly after this event anyway because Ayers refused to work.

ORDER

The National Labor Relations Board orders that the Respondent, Lorac Construction Services, Inc., Chillicothe, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Transferring or otherwise disciplining employees because they exercise their right to engage in concerted activities as guaranteed by Section 7 of the Act.

(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) Post at its Chillicothe, Ohio facility copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 9, 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.

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

IT IS FURTHER ORDERED that the complaint allegation not specifically found is dismissed.

MEMBER TRUESDALE, dissenting in part.

Contrary to my colleagues, I agree with the judge that the Respondent's transfer of employee Jeffrey Ayers from his job on the slasher machine to another job at the Mead worksite did not constitute a violation of Section 8(a)(1). Specifically, I find that the General Counsel failed to demonstrate that the transfer was in retaliation for protected concerted activity by Ayers.

Ayers was referred to the jobsite on the morning of July 12, 1993, and almost immediately began expressing his dissatisfaction. Michael Sturgill testified that when Sturgill arrived in the parking lot that morning, he heard Ayers comment, ''That's a hell of a place to park a truck.'' At a safety meeting before work began that morning, Ayers kept snapping his fingers and saying that he did not want the assignment to last more than 8 days, so that he would not lose his place on the union referral list.

Ayers' complaints persisted after his work on the slasher machine was underway. He complained that an oxygen bottle was empty, and at first contended that a second bottle was empty when it clearly was not. He protested when promised Gatorade and picnic tables were not provided at lunchtime. Superintendent Eaches explained that the customer that owned the jobsite would not provide the Gatorade and that the tables were bolted down in a trailer. Ayers reminded Eaches that the Respondent was required to provide a gangbox for the employees' tools and complained that the box pointed out by Eaches was too full with the Respondent's tools. Eaches left and returned 10 minutes later with a forklift carrying an additional gangbox. Ayers protested that the Respondent did not provide torch tips needed by the employees, and Eaches replied that he would take care of it in the morning.

Ayers' second day on the job was marked by a similar series of complaints. Upon reporting for work, Ayers complained that the water jug was empty. The judge, however, credited Eaches' testimony that the Respondent maintained three containers of water on the slasher, and that a laborer made constant runs to supply water and tools that day. Ayers testified that, even though water was available, he complained because there was no water on either the first or second level of the slasher. After lunch, Ayers protested because another employee had been reassigned from foreman to journeyman, which Ayers believed to be out of compliance with the collective-bargaining agreement. When Ayers informed Eaches of the reassignment, the employee was restored to the foreman position.

[12] 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.''

On the morning of July 14, Ayers informed the union steward, a laborer, and Eaches in turn that the employees needed welding gloves. Eaches told him that he was a man short on the other side of the worksite and that he needed Ayers to go there to do some welding. Ayers resisted, stating that he liked it on the slasher, but Eaches insisted that he needed Ayers at the other location. The judge credited Eaches' testimony that he was overstaffed on the slasher that day, that he needed a welder at the other location and knew that Ayers could weld, that the workload on the slasher varied, and that several employees were transferred among the six locations at the Mead site during the Respondent's work there.

I agree with my colleagues that an ''honest and reasonable invocation of a collectively bargained right constitutes concerted activity,'' even if the employee's assertion turns out to be incorrect. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 840 (1984). I further agree that some of the subjects raised in Ayers' complaints, notably the provision of welding tools and water, the storage of tools, and the foreman position, are addressed in the collective-bargaining agreement. Ayers' unrelenting complaints, however, go well beyond the ''honest and reasonable invocation'' of contract rights. For example, Ayers concedes that the Respondent provided water at the slasher, as it is obligated to do under the contract. Nevertheless, he complained because the water was not on the first or second level of the slasher. In addition, he complained that an oxygen bottle was empty when it obviously was not. Such complaints exceed the bounds of any reasonable perception of contract rights, and reflect instead Ayers' personal whims and general discontent with his assignment to the Mead site. As noted above, Ayers displayed his unhappiness from the time of his arrival at the job, and emphasized that he did not want to work there for more than 8 days.

Some complaints registered by Ayers, such as his complaint regarding the foreman position, appear to be more reasonably based on perceived contract rights. Even conceding that these protests constitute protected concerted activity, however, I do not find that the record supports the General Counsel's contention that the Respondent's transfer of Ayers was in retaliation for that activity. Although Ayers' complaints would have tested the endurance of even the most accommodating of employers, the record is replete with evidence of the Respondent's attempts to satisfy his demands by conscientiously furnishing water, tools, and an additional gangbox, and by immediately restoring Ayers' coworker to his foreman position. I find that these efforts far outweigh any possibility of retaliation that my colleagues may infer from Eaches' statement that he transferred Ayers because of his complaints on the slasher. Instead, I find that Eaches reached the inescapable conclusion that Ayers was unhappy on the slasher, and that when the slasher was overstaffed and a welder was needed at the other location, he reasonably decided to transfer Ayers. On this basis, I conclude that the General Counsel has failed to establish a prima facie case that Ayers' transfer was in retaliation for protected concerted activities in violation of Section 8(a)(1).

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 transfer or otherwise discipline you because you exercise your rights to engage in concerted activities as guaranteed by Section 7 of the Act.

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.

LORAC CONSTRUCTION SERVICES, INC.

Patricia Rossner Fry, Esq., for the General Counsel.
Edward R. Bunstine, Esq., of Chillicothe, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This matter was heard in Chillicothe, Ohio, on April 14, 1994. The complaint was filed on September 17, 1993. The charge was filed on August 5, 1993.

The parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Respondent and General Counsel filed briefs. Upon consideration of the entire record and the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent amended its answer during the hearing to admit, among other things, that during a representative 12-month period it has been a corporation and it has been a building and construction contractor in Chillicothe, Ohio; it performed services valued in excess of $50,000 for firms located in Ohio which, in turn, sold and shipped goods valued in excess of $50,000 from their Ohio facilities directly to points outside Ohio; and that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In view of the full record I find that Respondent is and has been at material times, an employer engaged in commerce as defined in the Act.

II. LABOR ORGANIZATION AND SUPERVISORY ALLEGATIONS

Respondent admitted the supervisory allegations in the complaint. It admitted that at material times Millwright Local Union 1519, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Union) has been a labor organization within the meaning of Section 2(5) of the Act. It admitted that at material times it and the Union have been parties to a collective-bargaining agreement covering certain employees of Respondent at the Mead Paper Plant in Chillicothe, Ohio.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

The complaint alleged that Respondent and Millwright Local Union 1519, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Union) have been parties to a collective-bargaining agreement at material times. It was alleged that the Charging Party (Ayers) complained to Respondent about matters covered by that collective-bargaining agreement and because of those complaints Respondent told Ayers that he was being transferred. When Ayers refused to be transferred Respondent allegedly discharged him on July 14, 1993.

Respondent admitted that it told its employee Jeffrey H. Ayers on July 14, 1993, that he was being transferred to another area of the jobsite and that it discharged Ayers on that same date when he refused to accept the job transfer.

Union Business Agent Gerald Piatt testified that Respondent is party to some four different collective-bargaining agreements including the local agreement with Local 1519.

Ayers testified that he is a member of the Union and he holds the local office of conductor. On three occasions in the past he served as union steward on various jobs.

Ayers was referred to Respondent's job on July 12, 1993. After reporting on the job, he was assigned to the slasher machine at the Mead Paper Plant.

Superintendent Ron Eaches testified that Ayers was transferred on July 14 because he was unhappy with his job on the slasher. Michael Sturgill testified that he worked for Respondent on the Mead job. When he arrived in the parking lot on July 12 he heard Jeffrey Ayers comment ''that's a hell of a place to park a truck.''

Before work on the July 12, which was Ayers' first morning with Respondent, the employees attended a safety meeting. Admitted Supervisors Ron Eaches and Bill Burks were present along with Union Steward Don Pitsbarger. Safety glasses, hard hats, and other safety matters were discussed. Ayers testified that Ron Eaches told them that they would have Gatorade and picnic tables at lunch.

Superintendent Ron Eaches testified that the job Respondent was working at Mead was a shut down. Mead had shut down its operation until Respondent completed the job. It was important to finish that job as quickly as possible in order to permit Mead to resume their work.

Eaches testified they held a safety meeting early on the first day of the job. Jeffrey Ayers kept snapping his fingers and saying that he did not want any more than 10 days on that job. On cross-examination Eaches admitted that he was wrong that Ayers had actually said he did not want to stay on the job more than 8 days rather than 10.

Ayers was asked if he didn't comment in the safety meeting on Monday, that ''all I want is eight days, no more than eight days, I don't want to lose my place on the list. I don't want to be here.'' He admitted that he did say that all he wanted was 8 days but he did not recall making a statement that he did not want to be there. Ayers admitted that he complained they had a bad come-along on the job that Monday morning. He did not recall complaining that he wanted Respondent to furnish him with tinted safety glasses. He admitted complaining that there wasn't any oxygen in the bottle.

Eaches recalled that Ayers complained about the oxygen on July 12. Ayers took the cap off one oxygen bottle and it was empty. Ayers then cracked the valve on second bottle and Eaches testified that the sound was loud evidencing plenty of oxygen but Ayers yelled out there is no oxygen. Eaches responded, ''Jeff, you know there's air in that bottle.'' Ayers took the bottle, hooked it up, and continued to work.

The employees did not have Gatorade or picnic tables at lunch. Ayers asked Ron Eaches about that. Eaches replied that Mead would not buy the Gatorade and the picnic tables were bolted down in his trailer. Ayers also asked Eaches about a gangbox and Eaches told him they would have gangboxes at the end of the day.

Around 4 p.m. that day Ayers again asked Eaches about gangboxes and Eaches pointed to one and said they could use that one. Ayers told Eaches that box was filled with the Company's tools. Ayers pointed out that the second shift would use the tools in that box. Eaches told him to go ahead and use the box and asked if he was afraid that his buddies on the second shift would steal his tools. Ayers complained that was not the point, that they had tools stolen. Eaches told him to use the box and if he lost tools, Respondent would replace them. Ayers told Eaches that they needed some torch tips and the Company would not get those tips. Eaches replied they did not have any. Eaches told Ayers that he would take care of the problem in the morning. Ayers told Eaches that it was in the contract that he was to provide a gangbox and to lock the employees' tools. Eaches walked off and returned in about 10 minutes with a gangbox on a forklift.

Everyone, but about four or five guys, was able to get their tools in that box. Those four or five had to place their tools on the truck.

Ron Eaches admitted there weren't enough gangboxes but after he saw how many employees brought their tools he was making provisions to get gangboxes.

General Foreman Burks admitted there were not enough gangboxes and the employees were told their tools could be locked up in the fab shop.

General Foreman Bill Burks testified that he has been in the Union for 29 years. He has known Ayers for about 12 years. He admitted that Ayers complained to him about grinding disks. Burks walked over to the gangbox and pointed out a package of 7-inch grinding disks and Ayers picked up one of those. He recalled that Ayers complained about oxygen and Ayers was there when they checked and found that one of the three bottles of oxygen was full.

On reporting on the following morning, July 13, at 7 a.m., Ayers complained to either General Foreman Burks or Foreman Rocky Gibson that their water jug was empty. Afterward the water jug was picked up by a laborer.

When the jug had not returned after an hour or two went by, Ayers mentioned that to General Foreman Burks. Burks told him there was a water jug over near the steps but that jug was empty, according to Ayers. Ayers testified that to take off his gear and climb down to get water was inconvenient. On cross-examination Ayers estimated the distance down was some 20–25 feet. Ayers pointed out that the jug near the steps was empty and Burks pointed out another jug. Ayers told Burks that was not their jug but that their jug had been picked up. Burks argued that the jug he pointed out was theirs. When Ayers pointed out they needed a jug up top Burks told him to get the jug up there the best way he could. Ayers had a crane lift the water jug up to their work area on top of the slasher machine.

On Tuesday, July 13, according to Superintendent Eaches, Ayers complained about lack of water. Eaches testified there were three containers of water on the slasher and that was more than required under the collective-bargaining contract. Eaches testified that they had assigned a laborer, Michael Sturgill, to supply water and tools on the job. Sturgill made constant runs all that day.

Michael Sturgill maintained three water containers at the slasher job. He testified that he kept those containers full. Sturgill denied that he ever found that all three containers were empty. He also ran tools for that job including welding gloves. Sturgill testified that there were always sufficient welding gloves on the site. Sturgill also testified there were several gangboxes at that site.

Ayers admitted there were two containers of ice water on Tuesday but he complained because there wasn't any water on either the first or the second level on the slasher.

After lunch Rocky Gibson told Ayers that he had been cut back from foreman to journeyman. Ayers understood that the contract required a foreman for eight workers. Ayers asked Steward Don Pitsbarger about Gibson being cut back.

Later when Ron Eaches came up to where Ayers was working Ayers asked Eaches what was his job title. Eaches told him superintendent. Ayers asked about Bill Burks' job and Eaches replied, ''general foreman.'' Ayers asked about Rocky and Eaches replied that he was the foreman. Ayers replied that Rocky wasn't the foreman any more because Respondent could not afford to pay him foreman wages. Eaches replied that was not right and Ayers told him that he needed to get with Burks and Rocky and find out what was going on. Eaches left with Rocky Gibson and when Gibson returned 15 or 20 minutes later he told Ayers that he again was foreman.

Ayers testified that at noon on July 13 Eaches told the employees that he was short men and did not know if they would get the job done with the men he had. Ayers told the employees that Eaches was trying to say they were not going to be able to get that job done but they would if Respondent supplied them with tools and welding gloves.

On the next morning, July 14, Ayers mentioned to Union Steward Pitsbarger they needed welding gloves. Ayers also told a laborer they needed gloves and later, when at the job, he told Eaches they needed gloves. Eaches replied, ''yeah, they're on the way.'' Eaches then told Ayers that he needed for Ayers to go over to the other side and do some welding for him—that he was a man short. Ayers told Eaches that he liked it there but Eaches told him no, he needed him over there. Eaches drove Ayers over to the other job. There were two men on that job.

After Eaches left, Ayers told the two employees that he was not going to be able to work because he had flash burn from the day before. Ayers told the men, ''I wanted to come over and to tell you guys that I wasn't going to be able to weld and I'm going to tell Ron so he can get somebody over here that can weld and do this job for him, ''cause he said he needed a welder.''

Ron Eaches recalled that he reassigned Ayers to another job on Wednesday because he was over staffed on the slasher. That job was winding down. Eaches testified that he had gone to school with Ayers and knew that Ayers could weld. He assigned Ayers to go to another job at Mead that needed a welder. Eaches testified that Ayers was not replaced on the slasher. On cross-examination Eaches testified that he transferred several employees during the course of that job at Mead. The job on the slasher varied and would be down a man or two depending on the demands of the job. Eaches recalled there were about six different locations at Mead they were working at that time.

Ayers testified that he left his assigned job and walked over toward the slasher looking for Ron Eaches. Ayers testified that about a half hour after he arrived back at the slasher, Eaches pulled up. Ayers told Eaches that he had a flash burn and was not going to be able to weld. Eaches replied that he would just go and get Ayers' money. Ayers asked if this was going to be a layoff or was he being fired. Eaches replied that he was going to lay off Ayers. Ayers said, ''Ron, I didn't say I couldn't work.'' Ayers said that he just couldn't weld for a couple of days to let his eyes heal. Eaches got in his truck and drove off. Ayers looked for and found Union Steward Pitsbarger.

Eaches testified that he returned to the slasher on July 14 and Ayers ''was standing at the gangbox twiddling a welding rod.'' When Eaches walked past Ayers, Ayers said, ''hey man, I can't weld.'' Eaches questioned Ayers and Ayers told him he had a flash burn.

Eaches testified that he asked, ''Jeff, why didn't you explain that to me before I had you get your welding hood and'' go on the job. Ayers replied that he forgot. Eaches testified that all the jobs on the slasher were assigned and had started. He suggested that Ayers could fire watch without a cut in pay but Ayers refused to accept that job. By then the job had shut down and about 20 men were standing there with the job completely stopped. Eaches asked the other men if it was fair for Ayers to fire watch and some of the men told Ayers to go back to work but Ayers said, ''No, I can't do it.'' The other men then started up the welding machines and went back to work.

On cross-examination Ayers admitted that he had not reported the flash burn on Tuesday, the day it occurred, and he did not report it to anyone on Wednesday until he walked away from his new assignment. He did not report to supervision until he told Eaches of his flash burn after returning to the slasher.

After finding Pitsbarger and again returning to the slasher, Ayers went to tell his two riders that they would have to find another ride home. When he again returned to the slasher, Don Pitsbarger was talking with General Foreman Burks. The other employees stopped working and said that if Eaches

was going to write 1 check he would have to write 20. Eaches pulled up 10 minutes later.

Ayers testified that Eaches went over and talked with Burks and Pitsbarger. Ayers was called over. Pitsbarger asked Eaches if he was getting Ayers' money and Eaches replied that he was because Ayers would not work. Pitsbarger replied that Ayers did not say he could not work but that he couldn't weld for a couple of days while his eyes healed. Eaches asked Ayers how he got the flash burn. Ayers replied that he was assisting welding down plates the prior day. Eaches told Ayers that his eyes weren't red, how could he have flash burn. Ayers told Eaches that he put potato peals on his eyes the night before and that pulled the pain out. Ayers proposed to Eaches that he put one of the other welders on the other job and let Ayers stay there and work and everything would be fine. Eaches said no and Ayers asked Eaches if he was just trying to get Ayers away from that area. Eaches replied that was right. That he wanted Ayers out of there. Eaches then said that everyone knows that fire watch is the easiest job here. The fire watch would check that nothing caught fire while there was welding overhead. Eaches told Ayers to go over and fire watch.

Ayers testified that he commented to Eaches, ''Ron, I said, you didn't ask—you didn't say that you needed a fire watch. You said that you needed a welder. I said, you said you were short of men and you needed a welder to get this job done and now you're saying that you just want a fire watch. I said, you just saying anything now.''

Eaches replied that was right that he just wanted Ayers over there to fire watch and if Ayers did not fire watch he would get his money. Ayers told Eaches that he was not there to fire watch. One of the employees said, ''Jeff why don't you just go ahead, I know it ain't right.'' Ayers replied, ''No, I just can't do that.'' Ayers told the guys to go ahead and go back to work.

Eaches then told Ayers that he would have to let him go if he didn't go to work. Ayers told him to get his money. On cross-examination Eaches agreed that Ayers did tell him that he would work on the slasher. He also admitted that he put Ayers on the other job for the benefit of everybody. He thought Ayers would be happier on the other job. Eaches said that he needed a welder on the other job and because of the way the complaints were coming he felt Ayers was unhappy and that he may do better on the other job. Eaches also admitted that Ayers told him that ''he didn't like the way things were being run and that you [Eaches] didn't want to go by the contract rules and provide everything the contract provided for.''

Eaches brought Ayers' check to him and told Ayers that he was not going to be a blank about it but he was going to terminate Ayers' employment.

Ayers admitted on cross-examination that he would have received the same pay if he had taken the fire watch assignment.

General Foreman Burks testified regarding the incident on July 14. He recalled that Ron Eaches told Ayers to go to another job where they needed a welder. Ayers went to the job but returned to the slasher. Burks called Eaches on the radio and told him that Ayers was back at the slasher. Burks confirmed Eaches' recollection of the events that followed. He recalled Ayers told Eaches that he forgot to tell Eaches that he had a flash burn. Even though Eaches agreed to have Ayers fire watch, Ayers refused to accept the job. No one disagreed when Eaches said there was no easier job than fire watch.

Also on cross-examination, Ayers admitted that he wrote L-O-R-A-T-S in chalk on the slasher machine. He also admitted that when asked he denied that he had written Lorats on the slasher. Ayers admitted that after Eaches said he was going to transfer Ayers, he commented that he was going to work on the slasher job or he wasn't going to work at all.

Ron Eaches admitted that while on the job, Ayers complained about many things. Eaches denied that he transferred Ayers because of Ayers' union activity.

A. *Discussion*

Undisputed testimony shows that from his employment on July 12, 1993, Jeffrey Ayers complained about many matters regarding his job. For example Ayers complained about his being referred to Respondent and that he did not want to stay on the job over 8 days; he complained about water and its position away from some of the employees' work areas. Ayers complained about the employees not being given Gatorade and picnic tables for lunch. Ayers complained about Respondent's reduction of Rocky Gibson from foreman. Ayers complained about Respondent not having gangboxes available for the employees. Ayers complained that there were not enough welding gloves.

I was particularly impressed with the demeanor of Superintendent Ron Eaches. Eaches, General Foreman Burks, and all employees were referred to Respondent by the Union. Eaches testified under direct examination that Ayers originally said he did not want to remain on that job longer than 10 days. On cross-examination Eaches recalled that it was 8 rather than 10 days. General Counsel contended that mistake evidenced that Eaches was untruthful. I disagree, it appeared to me that Eaches was nervous at the beginning of his testimony and his testimony regarding the 10 days' statements by Ayers, was early in his testimony. After considering the matter, Eaches corrected his early error. I credit the testimony of Ron Eaches and, to the extent there are conflicts between Eaches and witnesses for General Counsel, I credit the testimony of Eaches. I am convinced that Eaches was truthful in his testimony including his testimony as to his reasons for transferring and discharging Jeffrey Ayers on July 14, 1993.

B. *Findings*

As to the alleged violation of Section 8(a)(1) by transferring and discharging Jeffrey Ayers because of his protected activities, I shall first examine whether General Counsel proved a prima facie case. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

C. *The Layoff*

Under the conditions outlined in *Electromedics*, 299 NLRB 928 (1990), in order for General Counsel to establish a prima facie case it is necessary to prove that Ayers was laid off due to protected activities.

General Counsel argued that Ayers was first transferred and the transfer was motivated by Ayers' protected activities. As shown herein, Ayers complained to Respondent regarding

several matters during the short time he worked for Respondent. The issues included in some of Ayers' complaints were mentioned in the collective-bargaining agreement. Those factors led General Counsel to argue that since Respondent transferred Ayers to another job location on July 14 because of Ayers' complaints, it proved a prima facie case of discriminatory transfer.

General Counsel went on to argue that Ayers was terminated because he would not accept an illegal transfer and, for that reason, Ayers' layoff was illegal.

I find that the record evidence illustrated that Ayers' was not laid off because he refused to accept an illegal transfer.

General Counsel's only witness to the circumstances surrounding the layoff was Jeffrey Ayers. Ayers testified that after being transferred to another location at the Mead plant, he recalled that he had suffered a flash burn the day before. For that reason Ayers left his assignment and returned to the slasher where he told Superintendent Eaches that he could not weld because of flash burn.

At that point Eaches left to get Ayers' money in order to terminate Ayers. As shown above, however, when Eaches returned he was persuaded to offer Ayers a nonwelding position in view of Ayers' assertion that he could not weld because of flash burns. Eaches offered Ayers the job of fire watching. Despite Ayers' assertion that he was not refusing to work but was refusing to weld, he rejected Eaches' offer of a job fire watching.

In view of the above evidence it is apparent that Ayers' alleged protected activities had nothing to do with his layoff. Before July 14 Ayers had worked as a welder on the slasher. On July 14 Ayers told Superintendent Eaches that he could not weld. Obviously, if Ayers was telling the truth, he would have been unable to weld anywhere including on the slasher. All the evidence in the record shows that Ayers was laid off when he refused to accept the job of fire watch. That refusal followed Ayers telling Eaches that he could not weld on July 14 because of flash burn he received the day before July 14 and Eaches' agreement to honor Ayers request and offer Ayers a job other than welding.

Regardless of whether Ayers was truthful, the record shows that he told Respondent that he could not weld because of flash burn. Respondent's superintendent took Ayers at his word and offered him the job of fire watch. It was because of Ayers' refusal to accept the job of fire watch that he was laid off.

The record shows that Ayers was not laid off because he refused to accept his July 14 transfer. Ayers did refuse to accept the transfer but not because it was an illegal transfer. Instead Ayers told Respondent that he could not weld. He had been welding before July 14 and his contention that he could not weld meant that he could not weld at his new assignment and his old assignment on the slasher. Superintendent Eaches agreed to give Ayers a job other than welding but when that job was offered, Ayers turned it down.

In view of the above, I find that General Counsel failed to prove a prima facie case in support of the contention that Ayers was laid off because of his protected activities.

Moreover, Respondent proved that Ayers would have been terminated in the absence of his protected activities. The evidence illustrated that Ayers told Superintendent Eaches that he could not weld on July 14 because of flash burns he received on July 13. Eventually Eaches agreed to assign Ayers to a nonwelding job. Because Ayers refused to perform that job, the job of fire watch, he was discharged.

General Counsel argued that it was because of Ayers' transfer on July 14 that he was eventually terminated. I find that was not the case. Ayers told Eaches that he was unable to weld because of flash burn. Both on his job on the slasher and on his new assignment, Ayers was expected to weld. Regardless of the transfer, Ayers would have had the same problem, i.e., he could not weld because of flash burn. The transfer had no impact on Ayers refusal to weld. It was because Ayers refused to perform either his welding assignment or the job of fire watch which did not involve welding, that he was terminated. Ayers' refusal to work on July 14 had nothing to do with contractual rights or with any protected activity. I find that Ayers would have been terminated in the absence of any protected activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

D. *The July 14 Transfer*

General Counsel argued that during his employment on July 12, 13, and 14 Ayers complained; some of those complaints were arguably over matters covered in the collective-bargaining agreement; and Respondent transferred Ayers because of his complaints.

The record established that Ayers did complain extensively to Respondent about numerous matters on the job. Respondent was aware of those complaints which were made to admitted supervisors.

General Counsel cited, among other cases, *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), for the proposition that an employee who is attempting to enforce contract provisions under the Act is engaged in protected activity.

Some of the Ayers' complaints did touch upon matters covered by the collective-bargaining agreement. Unlike the situation in *City Disposal*, however, it was not shown that Ayers in disagreement with Respondent, tried to enforce one or more provisions of the collective-bargaining agreement. The records shows that Ayers did say that Eaches was failing to go by the terms of the contract. There was, however, no showing that was a fact. In truth, it was shown that Ayers was often mistaken as to what the contract provided. For example, the agreement provides that the employer must provide a locked room for tool storage and the employer must provide drinking water. Ayers argued that Respondent was obligated under the contract to provide gangboxes and water near each work station. The contract did not support Ayers' positions as to those matters.

As to other complaints, several did not involve matters covered in the bargaining agreement. For example, there was oxygen available even though some of the oxygen bottles may have been empty. Respondent failed to provide Gatorade and picnic tables. Ayers testified that it was inconvenient to stop work and walk to where water was located during some of his 2-plus days on the job.

The record evidence illustrated that in his 2-plus days on the job, Ayers continually complained. Some of the matters complained about touched on matters included in the collective-bargaining agreement and other complaints did not touch on matters included in the collective-bargaining agreement. Respondent's superintendent decided to move Ayers to an-

other location because of Ayers' continuing complaints. Superintendent Eaches testified that he moved Ayers because it was apparent Ayers was not happy at the slasher job. The question here is did Respondent by moving Ayers, violate Section 8(a)(1) of the Act.

Is an employee protected in complaining, if some of his actions include complaints about matters mentioned in the collective-bargaining agreement and other complaints are about matters that are not mentioned in the collective-bargaining agreement. Cf. *NLRB v. City Disposal Systems*, 465 U.S. 989 (1984).

In *NLRB v. City Disposal Systems*, there was a direct relationship between the employee's refusal to drive and the applicable collective-bargaining agreement. The agreement specified that unit employees should not be required to drive unsafe vehicles. And the employee was required to drive a vehicle he felt was unsafe. Here the record shows no direct connection between Ayers' reluctance to transfer to another Mead location and the collective-bargaining agreement. Moreover, there was no connection between Ayers' refusal to work at the new location and the collective-bargaining agreement.

General Counsel cited *Spann Maintenance Co*., 289 NLRB 915 (1988), in arguing that an employee does not lose protection if the employee's interpretation of the contract is incorrect. In *Spann Maintenance Co*., the administrative law judge found that the employee made a reasonable and honest attempt to persuade a supervisor to honor her job seniority under the collective-bargaining agreement.

Here the evidence failed to provide an issue of contract interpretation as in *Spann Maintenance*. The record shows nothing more than a general broad claim by Ayers that Respondent was not following the contract. The question never did reach the issue of whether Ayers was wrong about the interpretation of a provision or provisions of the contract. In those complaints that touched on matters mentioned in the contract, as well as those complaints which do not appear to involve the contract, Respondent consistently tried to satisfy Ayers. There never was a confrontation regarding any interpretation of the contract.

There was no showing that Ayers based his actions on matters which were protected by the contract and there was no showing that Respondent transferred Ayers to the other job location because Ayers had or was complaining about matters protected in the collective-bargaining contract.

As shown above I credit the testimony of Superintendent Ron Eaches. Eaches admitted that from the time Jeffrey Ayers arrived, Ayers expressed displeasure with his assignment to Respondent's job at Mead. As shown above there was testimony that from his arrival in the parking area, Ayers voiced displeasure at being on the job. Superintendent Eaches testified that during the safety meeting at the beginning of the job, Ayers repeatedly commented that he did not want more than 8 days on the job. If Ayers accepted an assignment and worked in excess of 8 days he would lose his position on the Union's referral roster. After the safety meeting the employees were assigned to jobs at various locations at Mead. Ayers was assigned to a job on the slasher. Ayers complained about various matters including water, Gatorade and picnic tables for lunch, oxygen bottles, gloves, and a possible demotion of the foreman.

Ayers continued to complain about various matters, on July 12, 13, and 14, 1993.

At the beginning of the workday on July 14, Eaches assigned Ayers to another job location at Mead. Ayers rode over to his new job location with Superintendent Eaches.

Eaches admitted that he felt Ayers was unhappy on the slasher. There was no showing of animus toward union activities.

In order for General Counsel to establish a prima facie case it is necessary to prove that Ayers was transferred due to protected activities. *Electromedics*, 299 NLRB 928 (1990).

General Counsel alleged that Respondent transferred Jeffrey Ayers because Ayers engaged in complaints about matters covered in the collective-bargaining agreement and in order to discourage employees from engaging in similar or other concerted activities.

The evidence showed that Ayers was not well versed as to the collective-bargaining agreement. For example Ayers argued to Respondent's supervisors that the contract required Respondent to have gangboxes available for the employees. The contract, however, does not require gangboxes. Instead it requires that the employer must have a locked room available for the storage of employees' tools. (See collective-bargaining agreement, art. IV, sec. H.) Nevertheless, Respondent tried to satisfy Ayers by bringing in an extra gangbox.

The record evidence does not show that it was any particular complaint or complaints by Ayers that resulted in his July 14 transfer. The testimony of Superintendent Eaches shows that it was the total of Ayers' complaints that convinced Eaches that Ayers might be happier at another location.

Additionally, there was no showing that Ayers resisted the July 14 transfer in an effort to protect contractual rights or for any reason regarding protected action. As shown above, Ayers testified that he did not accept the transfer because he had received flash burns on the previous day.

From General Counsel's position it appears that at most, the record shows that Ayers complained to Respondent about many things and some of those matters were discussed in the collective-bargaining agreement.

Ayers objected to his transfer but when he got around to telling Respondent's supervisors why he had refused to work at the new location, his grounds had nothing to do with his earlier complaints. Moreover, after hearing Ayers' grounds for refusing to work at the new location, Respondent as it had in other complaints by Ayers, tried to satisfy Ayers by assigning him to a job that did not involve welding.

Unlike *NLRB v. City Disposal Systems*, supra, where the employer and the alleged discriminatee were in disagreement over an issue covered in the collective-bargaining contract, here, there is no evidence to show that Respondent transferred Ayers because of any specific complaint or complaints. Nor was there a showing that Ayers complained about anything which may have constituted a breach of the terms of the collective-bargaining agreement. The record illustrates, and I find, that Ayers refused to accept the transfer because of matters which are not protected. See *Nicola's*, 299 NLRB 860 (1990).

In *NLRB v. City Disposal Systems*, supra, there was no doubt as to the reason for the discharge. The employee refused to drive a truck he felt was unsafe and the collective-bargaining agreement provided that the employer shall not require employees to operate vehicles that are not in safe op-

erating condition. The Supreme Court upheld the Board's finding that the employee was discharged because he refused to drive a truck on his assertion that the truck was unsafe, and his refusal was protected by the collective-bargaining agreement.

In view of the above findings and the full record, I find that General Counsel failed to prove, prima facie, that Respondent was motivated by Ayers' protected concerted activity to transfer Ayers to another job location on July 14, 1993.

Additionally, I find that Respondent proved that it would have transferred Jeffrey Ayers on July 14, 1993, in the absence of Ayers' protected concerted activity. Respondent proved that it transferred Ayers because of his continuing complaints without regard to whether those complaints involved matters discussed in the contract. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

CONCLUSION OF LAW

Respondent did not violate provisions of the Act by transferring or by discharging its employee Jeffrey H. Ayers because of his protected concerted activities.

[Recommended Order for dismissal omitted from publication.]