L & BF, Inc. *and* Charles Murnahan. Case 9–CA–35052

February 8, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND WALSH

On July 2, 1998, Administrative Law Judge George Carson II issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering 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 briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

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

Theresa Donnelly, Esq., for the General Counsel.
Charles M. Roesch and *Darryl M. Kates, Esqs.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Ironton, Ohio, on April 29 and 30 and May 1, 1998. The charge was filed on June 24, 1997,[1] and the complaint issued on November 14. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act by discharging seven employees because they engaged in protected concerted activity. Respondent's timely answer denies any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, L & BF, Inc., a corporation, provides maintenance and construction services valued in excess of $50,000 to Dow Chemical at Hanging Rock, Ohio. Dow Chemical annually sells and ships products valued in excess of $50,000 directly to points located outside the State of Ohio. The Respondent admits, and I conclude and find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] All dates are 1997 unless otherwise indicated.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Lawrence Fields has provided maintenance and construction services to Dow Chemical for over a decade. Prior to 1996, those services were provided by Fields Excavating. In 1996, Lawrence Fields and his wife Brenda established L & BF, Inc., the Respondent, and since then the Respondent has provided the same services that Fields Excavating had provided. Fields is semiretired. Respondent's employees at the Dow facility are supervised by Gary Sherman.

Dow's Hanging Rock facility consists of three plants that, respectively, produce Styrofoam, Ethafoam, and Styron. Dow's production processes use chemicals, some of which are hazardous. Acrylonitrile, referred to as AN, is toxic and classified as a cancer hazard by OSHA. Dow employees whose job duties involve regularly working around hazardous chemicals receive extensive annual physical examinations.

L & BF employees, except for the employee who lubricated machinery at all three plants, perform no regular job duties in which they risk exposure to any hazardous chemicals. On occasion, L & BF employees are assigned to perform the final cleanup after a chemical spill. On these occasions, the initial cleanup is performed by Dow employees who neutralize the chemical and monitor the air to assure that it is within acceptable standards. Before any work begins, a safe work permit must be issued. The permit designates what safety equipment, such as respirators, must be worn. Typically, as in February when L & BF employees were assigned the task of digging up soil upon which ethylbenzine had spilled, no safety equipment is required.

Respondent's employees are also assigned to perform maintenance work during periods in which Dow shuts down a plant for major maintenance. This occurs about once a year. During a shutdown, Respondent's employees will, among other tasks, remove pipes that are to be replaced and remove, and then replace, safety relief valves after they have been tested to assure that they are working properly. Prior to Respondent's employees performing any such work, Dow employees flush the pipes and check the air to discern the presence of any dangerous chemicals. No employee is permitted to begin work until a safe work permit is issued. When working in certain areas, even after air monitoring reflects that detectable fumes are at an acceptable level, all persons present are required to wear a chemical respirator to assure that there is no accidental exposure to a known hazardous chemical. If, after Dow employees have prepared an area for entry by L & BF employees, a problem develops, the L & BF employees are immediately removed from the area. This occurred in the early 1990's when Respondent's employees detected fumes while removing a safety relief valve and in 1996, when Ed Carmon was sprayed when loosening bolts on a safety relief valve. As soon as Dow personnel were notified, Respondent's employees were removed. There is no evidence establishing the chemicals involved in either of these incidents, and the employees involved continued to perform their assigned duties after the incidents. There is no evidence that any employee of L & BF has ever been exposed to AN.

Respondent's contract with Dow provides that Respondent "must require each of its employees to comply with the rules, terms, and conditions of the safety and security manuals and procedures" specified by Dow. Included among those rules is standard 102 relating to respiratory protection which requires that employees wear respirators "where potential exposure to respiratory hazards cannot be removed." Both the standard and a regulation of the Occupational Safety and Health Administration, codified as 29 CFR 1910.134 and set out in Respondent's contract with Dow, require employee medical evaluations and fit testing. The medical evaluation consists of a breathing capacity test and check of blood pressure and heart rate to assure that the employee may safely wear a respirator. The fit testing assures that the employee knows how to wear and operate the respirator, and that the respirator has no leaks.

The record is unclear regarding the extent of compliance with the foregoing requirements prior to 1995. Respondent required all of its employees to be tested and fit in 1995. In 1995, no one asserted that the respirators for which the employees had been tested and fitted provided insufficient protection for the work they were performing. The card issued when an employee is certified to wear a respirator reflects that it is valid for 1 year.

In April, Dow requested that Respondent submit a bid for performing work involving AN. Respondent did so on May 12. In its bid, Respondent noted the increased medical cost for compliance with the acrylonitrile health surveillance program, a program suggested by Dow if Respondent's employees were going to perform work involving AN. In August or September, Dow advised the Respondent that its bid had not been accepted.

B. Facts

1. The Events of April

The only employee of Respondent who regularly worked in the vicinity of chemicals was Tim Wissman, who oiled and greased machinery at all three plants. The only area in which he was required to wear a respirator was the D-16 area of the Styron plant in which a tank containing acrylonitrile was located. Wissman's job duties did not involve contact with AN but did place him in the vicinity of this tank once every 2 weeks. There is no evidence that Wissman was ever exposed to AN. He was tested and fit for a respirator in 1993 and 1995.

In late April, Wissman ceased performing the lubrication function in the D-16 area, and, therefore, had no need for a respirator. Although this change in Wissman's job duties is uncontradicted, the testimony regarding what was communicated to employees when this occurred in late April is contradictory. Wissman testified that foreman Gary Sherman told him that Respondent's employees were not to wear respirators. Although Wissman thereafter referred to Respondent "taking" the respirators, he acknowledged that this did not occur. He stated that he turned in his respirator, but there is no evidence that any other employee did so. Employee Scott Neal testified that Sherman told the employees that they were not to perform any more jobs that required using a respirator. Tom Woods, Dow's construction representative, denied making any statement regarding taking away the respirators of L & BF employees. When asked if he ever indicated that L & BF employees would not be doing work requiring respirators, Woods testified, "After this thing about the AN, Mr. [Ralph] Pons, who is my boss, decided they [L & BF employees] wouldn't do any . . . AN type [work], be around it or anything." Woods was not asked to elaborate upon this answer. Thus, the record does not establish to what he was referring when he mentioned "this thing about the AN." In view of the change in Wissman's job duties, it would appear that Pons learned that L & BF employees were regularly performing lubrication work that involved potential exposure to AN and directed that this cease.

Whatever the circumstances surrounding the decision, I credit Woods' testimony and find that Pons directed that any potential contact with AN in the course of the normal job duties of L & BF employees cease. Woods was not asked how he communicated the directive from Pons to foreman Gary Sherman. Sherman, when informing the employees whatever Woods had told him, did not specify that employees were not to perform any job duties in which there was potential exposure to AN. Rather, as Neal testified, Sherman made a broader statement. He told the employees that they were not to perform any jobs that required using a respirator. There is no probative evidence that Respondent took away the employees' respirators. I do not credit the testimony of employees Charles Murnahan and Mack Boles that Sherman stated that Dow was taking the respirators away. I find that their testimony reflects Wissman's references to "taking," not a statemant by Sherman. Sherman did not deny stating that L & BF employees were not to perform jobs that required wearing a respirator.

In the course of a discussion after Sherman spoke with the employees, Wissman testified that Sherman told him that he did not have the "right physical," but Sherman denies making such a comment. Even if the comment were made, the record does not establish whether Sherman was referring to a need for more thorough physicals or the fact that Wissman needed a current breathing capacity evaluation since his respirator certification had expired in 1996. Regardless of any comment that Sherman may have made, Wissman was aware that Dow employees whose job duties involved potential exposure to chemicals received more extensive physical examinations than the breathing capacity, blood pressure, and heart rate check that L & BF employees received when being certified to wear a respirator.

Ed Carmon testified to having conversations with Sherman and Dow employees regarding the different examinations that Dow employees received. He had these conversations over a period of years, from 1993 until 1997. At some point, Carmon questioned Ralph Pons, Woods' superior, regarding his understanding that some Dow employees received more extensive physicals and training than L & BF employees. Pons assured Carmon that L & BF employees had the proper physicals and training for the work they were doing. Prior to May 27 no L & BF employees had demanded more extensive physical examinations or training regarding handling chemicals, nor had any L & BF employees refused to take respirator testing.

2. The events of May

During the week of May 18 construction representative Woods requested that Sherman assure that all L & BF employees had current respirator certification cards so that they could

work during a shutdown scheduled for the end of the summer. All of the employees' certifications had expired in 1996. Sherman announced this on Friday, May 23, stating that any employee who did not want to be respirator certified would be laid off.

On the morning of Tuesday, May 27, following the Memorial Day holiday, the employees returned to work. Sherman stated that he had four appointments for employees to take the breathing test that was a prerequisite to being fitted for a respirator. Contrary to the statement he had made on Friday, Sherman stated there would be no layoffs, that everyone needed to be tested and fitted; anyone who refused would be terminated. The employees questioned whether the physical examination was the same as they had taken in the past, and Sherman replied that it was. The employees then began arguing with Sherman, with Carmon stating that the physical the employees had taken in 1995 was not the right one. Wissman referred to Sherman's "taking" his respirator, stating that it was because the employees did not have the proper physicals to be wearing respirators in the chemicals. Sherman, who was completely surprised by this outburst, left the meeting and called Fields. Thereafter, he advised the employees that if they were unwilling to be tested, they should speak with Fields.

Following the meeting with Sherman, the employees spoke together. Although they did not work with chemicals, the employees did risk potential exposure to chemicals during a shutdown. The hazards of exposure had been explained to them in Respondent's monthly safety meetings, and several employees were aware that AN had been identified as a cancer hazard. The lack of clarity and explanation in Sherman's April announcement of no work requiring respirators caused several employees to conclude that his May directive that they be respirator certified was inconsistent and contradictory. Seven of Respondent's 10 employees decided that they would not take the respirator testing and thereby be qualified to work during the shutdown, unless Respondent agreed to provide them with additional physical examinations and training, the same physical examination and monitoring and training as Dow provided for its employees whose regular job duties involved potential exposure to hazardous chemicals.

On the afternoon of May 27, the seven employees, Tim Wissman, Ed Carmon, Charles Murnahan, Scott Neal, Mack Boles, Roy Payton, and Jerrod Robinson met with Fields in the parking lot at his office, which is located at his home. Fields said he did not understand what the problem was, and Murnahan stated that the employees did not feel safe getting in the chemicals. Fields responded that they were just going back for the same physical as before, to be fitted for what he understood to be dust respirators. The employees pointed out that the respirators were also chemical respirators, and Fields noted that was even better protection. Wissman referred to what he considered to be Sherman's contradictory behavior in "taking" his respirator and telling him that they did not have the "right" physical. Fields responded that he did not see why the employees were upset with being asked to be tested, because "we haven't put you in anything yet." The shutdown was scheduled for August or September. Carmon told Fields that the employees would wear the respirators if they got "proper physicals and proper training." Fields told the employees to take the next day off, that he would go talk with Dow.

Fields went to the Dow facility on the following morning. Prior to this, he had reviewed Respondent's contract with Dow which provides that Respondent "must require each of its employees to comply with" Dow's safety rules. Wissman, despite Fields' direction to take the day off, had begun his lubrication rounds. He was paged and reported to Respondent's office where he met with Fields and Sherman. Fields showed Wissman the contract, pointing out the section that required employees to be respirator fit. Wissman responded that he did not have any problem with taking the respirator test "as long as we got the same physical . . . and the training to be in the chemicals that the Dow people had." Wissman questioned whether any work would involve AN. Fields initially responded affirmatively, and then modified his response, stating that it had not been determined. Fields explained that the employees were going for the respirator test they had before, that this had nothing to do with AN. Wissman stated that if he was being sent for the same physical that he had before, that Fields was firing him. Fields stated that if Wissman took the fit test and respirator exam he could continue to work. Wissman stated that he would not take the test. Fields stated that Respondent could no longer use him.

Mack Boles and Roy Payton, both of whom worked in the tow motor shop where they repaired Dow equipment, also reported to work. After Wissman was terminated, Fields went to the tow motor shop. He asked Boles and Payton why they were there, and they responded that they had contacted the Dow employee who oversaw their work, and he told them to come in. Fields stated that was fine. He then asked if they were willing to take the respirator fitness test, and they said no. Fields then showed them the contract, and Payton made a copy of it. Fields explained that Respondent could not abide by the contract if they did not take the test. Payton and Boles expressed their concern about potential exposure to chemicals, and Fields noted they would "be working in a safe environment as Dow has provided for you." In the course of the conversation, it was noted that both employees had worked during shutdowns in the past. In response to a question regarding working in AN, Fields replied that it was "more than likely," but that it had not been determined. Payton asked if the employees were going to receive additional training, and Fields showed him the contract, stating that it said nothing about additional training. Boles asked whether the employees would receive a raise, and Fields responded, "No." Both Boles and Payton refused to take the respirator fitness test. They asked if they were fired; Fields told them no, they were firing themselves. Boles and Payton responded that they were not firing themselves. Fields stated that they were terminated.

Thereafter, Fields met with Dow's construction representative Tom Woods. Woods confirmed that the contract with Dow required that Respondent comply with OSHA and Dow safety regulations and that Respondent's employees had to be certified to wear respirators.

On the afternoon of May 28, Murnahan, Carmon, Neal, and Robinson again met with Fields in the parking lot at his home and office. Fields had Robinson read aloud the portions of his

contract that related to the requirement for respirator fitness of Respondent's employees. Neal and others stated that they were not going to take the respirator test unless given the same training and physical as Dow employees. In the course of the discussion, Fields stated that, although Respondent was requesting that the employees undergo the respirator fitness testing, "[l]ater on, we might discuss something else," that there "might be a possibility of getting a different physical later on." Someone raised the issue of potential contact with AN, and Fields responded that the final word had not come down on whether they were going to be doing AN work. He then pointed out that, at that moment, the issue was compliance with the contract regarding respirator fitness, "AN is not an issue right now." The employees continued to demand the same physicals and training as that given to Dow employees whose regular job duties involved potential exposure to hazardous chemicals. Fields suggested that, if the employees did not want to perform work involving potential contact with chemicals, they take the test and go ahead and continue to work for him while hunting for another job. He stated that "we can argue about it [the respirator test] for two weeks and it will still be the bottom line. It's in the contract. We've got to abide by it or we're not going to be out there at Dow anymore." He then individually asked each employee if he would take the respirator test. Each refused and was terminated. Respondent's three remaining employees and Foreman Sherman took the respirator fitness test.

C. Analysis and Concluding Findings

The complaint alleges that the discharged employees engaged in protected activity "by concertedly refusing to work around dangerous chemicals unless they received proper training and physical examinations." The record does not establish any actual failure to perform work around dangerous chemicals, thus, there is no Section 502 issue in this case.[2] Rather, in support of their concerted demand that Respondent provide them with more extensive testing and training, the employees refused to participate in the respirator testing and fitting that was required by Dow and was a prerequisite for assignment of work during the upcoming shutdown.[3]

The General Counsel argues that the employees' refusal to take the respirator fitness testing, a refusal made in support of their demand that they receive additional testing and training before being assigned shutdown work, was protected and that Respondent's discharge of the employees for this protected refusal violated Section 7 of the Act. Respondent argues that Respondent's contract with Dow required all employees to be respirator fit, that the employees' refusal to take the respirator fitness testing was the sole reason for termination, and that the refusal was a partial refusal to work, activity that is not protected by the Act.

The General Counsel, in arguing that Respondent was not privileged to terminate those employees who refused to take the fitness testing, cites various cases including *Sargent Electric Co.*, 237 NLRB 1545 (1978), and *Union Boiler Co.*, 213 NLRB 818 (1974). In each of those cases the employees refused to perform work due to what they perceived, at the time of refusal, to be unsafe working conditions. The employees were discharged for refusal to obey the order to perform the very work that was the subject of their concerted protest. The employees had no option but to abandon their protected concerted activity or risk termination. The Board, in those circumstances, found that the concerted refusal to perform the work was protected activity and that termination for that activity violated the Act. In the instant case, the employees had not been assigned any work to which they objected. The employees were not contending that they should not receive respirator fitness testing, nor were they claiming that such testing was unnecessary. Rather, in support of their demand that Respondent provide additional testing and training, they refused to take respirator fitness testing. They refused that testing in an effort to compel Respondent to agree to the demand that they receive additional testing. Complying with the Respondent's demand that they take the respirator fitness testing would not have precluded the employees from continuing to demand additional testing. They could comply with Respondent's request and continue to press their demand. Thus, I find the case authority cited by counsel for the General Counsel to be inapposite.

In her brief, counsel for the General Counsel acknowledges that the employees' actions were anticipatory, that they had not actually been assigned to work in chemicals. Nevertheless, she characterizes the refusal to undergo respirator fitness testing as a refusal "to work in chemicals without the proper physical and training." The record does not support this characterization of the facts. Although the employees' statements threatened a refusal to work at the time of the shutdown, there was no refusal to work in May. There was no mention of a strike, and Wissman, Boles, and Payton reported to work on May 28. Contrary to the statement in counsel for the General Counsel's brief, respirator testing was not "inextricably linked" to the employees' threatened anticipatory refusal to work. This statement ignores the credible testimony, which is not set out in the brief, that, on May 27, when the employees initially met with Fields, he told them that "we haven't put you in anything yet." On May 28, Fields told the remaining employees who were refusing to be tested that the issue of more extensive testing could be addressed in the future. He even suggested that the employees could take the respirator test and continue to work for him while seeking other employment. The Respondent never requested the employees to perform the work in chemicals that they stated concerned them.

The health concerns expressed by the employees here, were neither feigned nor unreasonable, and they were advanced in subjective good faith. *Modern Carpet,* 236 NLRB 1014 (1978), enfd. 611 F.2d 811 (10th Cir. 1979); *Du-Tri Displays, Inc.*, 231 NLRB 1261 (1977). They resulted from miscommunication. Sherman, in April, had directed that the employees cease performing work requiring the wearing of respirators. Thus, from the employees' point of view, the demand that they be respirator certified appeared contradictory. At no prior time had the employees demanded the same testing as that received by Dow

[2] Sec. 502 provides, inter alia, that the "quitting of labor . . . in good faith because of abnormally dangerous conditions . . . [shall not] be deemed a strike . . . ."

[3] The evidence that some of the employees were unaware of the specific nature of the physicals received by Dow employees does not alter the concerted character of their action.

employees. Thus, from Respondent's point of view, the unprecedented refusal of its employees to take the same respirator test that they had taken in the past was incomprehensible. Respondent was placed in the position of responding to the demand for "proper physicals and training," the same as the Dow employees received. Although Fields did not understand the unprecedented refusal of the employees to undergo respirator fitness testing and did not agree with the employees' concerns, Respondent did not retaliate against the employees for acting concertedly. Respondent did not request that the employees abandon their demand for more extensive testing and training, nor did it take any action that would have compelled them to do so. Respondent simply requested that the employees undergo the testing necessary to assure that they met the minimum OSHA requirement, as set out in its contract with Dow, to assure they were fit to perform the work that Respondent was going to be assigned in 3 or 4 months.

Employees, under the Act, are privileged to seek to change their terms and conditions of employment by concertedly requesting a change, concertedly protesting their employer's failure to grant a specific request or demand, and, ultimately, by engaging in a work stoppage or strike. When employees strike, the strike must be complete. The employees must withhold all their labor. "They cannot pick and chose the work they will do or when they will do it." *Audubon Health Care Center*, 268 NLRB 135, 137 (1983). They cannot decide for themselves "which rules to follow and which to ignore." *Bird Engineering*, 270 NLRB 1415, fn. 3 (1984).

On May 27, the employees chose to use the circumstance of the Respondent's need to have them tested and fit for respirators as the occasion to make a demand for more extensive medical testing. Respondent refused to grant this demand. On May 28, Fields impressed upon the employees the requirement for respirator fitness testing as set out in his contract with Dow. Wissman repeated his demand for additional testing. Fields referred to the contract and explained that his request that employees be respirator fit had nothing to do with concerns regarding possibly working in AN, a work assignment that had not been made. Fields also pointed out the requirements of his contract with Dow to Boles and Payton. When he met with the remaining employees who were refusing to be tested, he specifically stated that the employees' demand could be addressed in the future. Fields never required that any employee abandon the demand for more extensive medical testing; he sought only to have the employees comply with his request to take the respirator testing.

Dow, in May, requested Respondent to assure that all of its employees were respirator certified. Respondent advised its employees of this requirement. Seven employees refused to comply with the testing requirement in an attempt to compel Respondent to agree to their concerted demand that they receive additional testing. Respondent discharged the employees for the refusal to take the required respirator fitness test. In arguing that this violated the Act, the General Counsel is effectively arguing that Respondent was obligated either to accede to the demand of the employees for more extensive testing and training or cease demanding that the employees comply with its requirement that they take the respirator test. I find no case authority for this proposition. When employees concertedly make a demand that is resisted by their employer, just as when a labor organization makes a demand on behalf of employees that it represents, the employees can either strike in support of their demand or continue to work in accordance with their employer's rules while arguing their position. They are not privileged to set their own terms and conditions of employment by deciding for themselves what work they are going to perform and which orders of their employer they are going to obey. The employees did not strike. They refused to comply with the order that they take the respirator fitness test.

Respondent took no action against any employee for participation in the concerted presentation of the demand for more extensive physicals and additional training. The terminations occurred only after each employee refused to undergo the respirator fitness test. In refusing the demand to undergo testing, the employees were attempting to remain on their jobs while refusing to work on terms lawfully prescribed by Respondent. *Bird Engineering*, supra. "It is well established that a partial refusal to work constitutes unprotected activity. Both the Board and the courts have repeatedly condemned employees' refusal to work on the terms lawfully prescribed by the employer while remaining on their jobs. As the Board has said, to countenance such conduct would be to allow employees 'to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment.'" *Highlands Medical Center*, 278 NLRB 1097 (1986). See also *Cambro Mfg. Co.*, 312 NLRB 634 (1993). The employees refused to obey their employer's lawful request. In so doing, they were attempting to set their own terms and conditions of employment, activity that is not protected by the Act.

CONCLUSION OF LAW

The Respondent, by discharging those employees who refused its lawful request to undergo respirator fitness testing, did not violate the National Labor Relations Act.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[4]

ORDER

The complaint is dismissed.

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