Kysor/Cadillac, an Operating Division of Kysor Industrial Corporation *and* Local 545, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Case 7–CA–31823

October 15, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On January 31, 1992, Administrative Law Judge Bernard Ries issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent did not violate Section 8(a)(1) by issuing reprimands to six employees because of their concerted protected activities. The issue is whether the employees' conduct in approaching their supervisor's desk on March 13, 1991, to ask for clarification of their work assignment constituted concerted protected activity and, if so, whether the Respondent violated the Act by issuing the reprimands. For the reasons set forth below, we find that the employees' activity was protected by the Act and that the Respondent violated Section 8(a)(1) by issuing reprimands on the basis of the protected activity.

The complaint alleged the Respondent issued the reprimands ''because of its employees concerted protected activities including concertedly complaining to Respondent regarding its memorandas [sic] of March 11 and 12, 1991, in regard to job classifications and work stations.'' The evidence, as more fully set forth in the judge's decision and briefly described here, discloses that on March 13 there was a discussion in the lunchroom among employees who were confused about their work assignments. This confusion originated as a result of two apparently conflicting notices that had just been issued. A group of about 15 employees went to the foreman's desk to ask him where to work. Seeing the crowd, the supervisor asked what they were doing there and told them to get to work. Some of the employees disbursed immediately, but six others remained behind for specific instructions as to their work assignments.[1] Five of these employees were issued verbal reprimands reduced to writing and one was issued a written reprimand because he had received a verbal reprimand the previous day. The five verbal reprimands were subsequently rescinded by the Respondent at the Union's request.

The judge, in his analysis, framed the issue as one of determining whether the Respondent understood, or should have understood, that the employees were engaging in a concerted complaint about an ambiguity arising from the allegedly contradictory notices. In the judge's view, merely assembling at the supervisor's desk did not communicate to the Respondent that there was an ambiguity about work assignments stemming from its notices. The fatal flaw, according to the judge's reasoning, was that ''[t]here is no testimony in the record that anyone, at any time, indicated to Respondent that the group arrival was related to confusion about the effect of the two notices.'' Therefore, the Respondent, according to the judge, had no reason to regard this activity as protected because all the Respondent knew was that the employees had assembled ''to get the work assignment for the day.'' As noted above, the judge found the activity unprotected. We disagree.

Section 8(a)(1) is violated if the Respondent knows of its employees' concerted activity, if the activity is protected by the Act, and if adverse employment action is motivated by the employees' protected concerted actions.[2] The judge found, and we agree, that the Respondent knew of the concerted nature of the conduct. The judge found that the activity was not protected because of his restrictive focus on the Respondent's apparent lack of knowledge as to the source of the employees' confusion about their work assignments. We find that the employees' conduct was undertaken in good faith and was protected. The violation turns on the fact that the employees were reprimanded for concertedly seeking information about their work assignments, a term and condition of employment.[3] As soon as the Respondent was factually aware or put on

[1] These employees went to work immediately on receiving their assignments.

[2] *Amelio's*, 301 NLRB 182 (1991).

[3] The extent to which employee activity is protected depends on its nexus to legitimate employee concerns about employment-related matters. In other contexts, where there have been employee communications to third parties seeking assistance in an ongoing labor dispute, the Board has declared that the protected nature of employee activity depends on the extent to which it is ''*a part of and related to* the ongoing labor dispute'' (emphasis in original). *Allied Aviation Service*, 248 NLRB 229, 231 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980). The Supreme Court has stated that ''some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause.'' *Eastex, Inc. v. NLRB*, 437 U.S. 556 at 567–568 (1978). Here, the employees banded together as a group to seek clarification of their current work assignments. That clearly bears an ''immediate relationship'' to terms and conditions of employment.

notice[4] that the employees were making a concerted inquiry, the Section 7 protections of the Act attached to the employee conduct concerning their work assignment, notwithstanding the fact that the Respondent may not have been aware of the legal significance of that conduct. Thus, we find that the General Counsel has established a prima facie case that the Respondent unlawfully issued reprimands to employees for engaging in protected concerted activity. The Respondent, therefore has the burden of establishing that the reprimands would have been issued even in the absence of the protected concerted activity.[5] The Respondent has not offered any explanation for the reprimands other than that they were given to the members of the group who ''hung around and wanted specific directions.'' That was not misconduct on the facts of this case. The remaining employees of the original group received no discipline, according to the first-shift supervisor, Charles Cooper, because ''[t]hey went back to work.'' The Respondent has thus failed to meet its burden. Thus, we conclude that the Respondent violated Section 8(a)(1) by disciplining employees for engaging in the protected concerted activity of making a group inquiry as to their specific work assignments.

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 3.

''3. By issuing a written warning to its employee Kevin Gostlin on March 14, 1991, and by issuing verbal warnings reduced to writing to its employees Larry Widgren, Tim Gostlin, George Fisher, Teresa Keeler, and Kevin Lattimer on March 14, 1991, because of their protected, concerted activities, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.''

THE REMEDY

Having found that the Respondent interfered with, restrained, and coerced certain employees in the exercise of their Section 7 rights by issuing warnings to them on March 14, 1991, we shall order that the Respondent cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to remove from its records, if it has not already done so, the written warnings directed to Kevin Gostlin, Larry Widgren, Tim Gostlin, George Fisher, Teresa Keeler, and Kevin Lattimer on March 14, 1991, and to provide written notice to those employees, and to inform them that the Respondent's unlawful conduct will not be used as a basis for further personnel action concerning them. *Sterling Sugars*, 261 NLRB 472 (1982).

ORDER

The National Labor Relations Board orders that the Respondent, Kysor Cadillac, an Operating Division of Kysor Industrial Corporation, Cadillac, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing written warnings or verbal warnings reduced to writing to its employees because its employees engaged in protected, concerted activities.

(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) Remove from its files any references to the unlawful warnings issued to Kevin Gostlin, Larry Widgren, Teresa Keeler, George Fisher, Tim Gostlin, and Kevin Lattimer on March 14, 1991, and notify the employees in writing that this has been done and that the warnings will not be used against them in any way.

(b) Post at its Cadillac, Michigan facility copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 7, 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.

[4] We also find that the Respondent knew, or should have known, that the employees' conduct had a ''protected'' purpose based on the employees' statement that they had assembled to get their work assignment.

[5] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[6] 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.''

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 issue written warnings or verbal warnings reduced to writing because our employees engage in protected, concerted activity.

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

WE WILL remove from our files any references to the March 14, 1991 warnings issued to Kevin Gostlin, Larry Widgren, Tim Gostlin, George Fisher, Teresa Keeler, and Kevin Lattimer and WE WILL notify each of them that we have removed from our files any reference to these warnings and that the warnings will not be used against them in any way.

KYSOR/CADILLAC, AN OPERATING DIVISION OF KYSOR INDUSTRIAL CORPORATION

Joseph P. Canfield, Esq., for the General Counsel.
Joseph F. Martin, Esq. (Warner, Norcross & Judd), of Grand Rapids, Michigan, for the Respondent.
Kevin Gostlin, of Evart, Michigan, for the Charging Party.

DECISION

BERNARD RIES, Administrative Law Judge. This matter was tried in Cadillac, Michigan, on October 30, 1991.[1] The complaint addresses warnings given to several employees in March 1991, asserting that these warnings violated Section 8(a)(1) because they were provoked by protected concerted activities in which the employees had engaged. Although the Respondent denies material allegations of the complaint, it agrees that it is engaged in interstate commerce and that the Charging Party is a labor organization as defined in the Act.

Briefs were filed by the General Counsel and the Respondent on or about December 4, 1991. I have carefully considered the briefs, the entire record, and my recollection of the demeanor of the witnesses. Having done so, I make the following

FINDINGS OF FACT[2]

I. THE BASIC FACTS[3]

Respondent engages in the manufacture and nonretail sale of truck radiators, temperature control systems, and related products at its Cadillac, Michigan facility. It employs there about 115 employees, who are represented for purposes of bargaining by the Charging Party.

On March 11, 1991, Plant Manager Larry Payne posted the following notice:

NOTICE

March 11, 1991

To allow continuous flow from shift to shift, we require incoming/outgoing operators to overlap on their work centers where applicable. The intent is for exchange of information relative to any conditions that the incoming operator should be aware.

In that same vein beyond the 5–10 minute communication overlap of the operators, this set of condition [sic] becomes a burden for having extra persons in the area that are not on that shift. There are, of course, extraordinary circumstances that may require extra help; however, under normal operating conditions, I am requesting that employees not working on that shift remain in the lunchroom prior to their shift and do not remain on the shop floor after their shift.

If extraordinary circumstances require you on the floor other than your shift, be sure to contract the respective supervisor of that shift and department.

Kevin Gostlin, an employee who serves as the Union's deputy chief steward, testified that after the notice was posted in department 5, in which he worked on the second shift with some 22–23 other employees, a majority of his fellow second-shift employees said that they did not understand the notice and asked what it meant. Other employees also testified that the purpose of the notice was questioned and discussed.

On the evening of March 12, Assistant Supervisor Virgil Cleveland[4] handed Gostlin a handwritten notice signed by Manager Payne and dated March 12, which later that day appeared on the bulletin board in typewritten form, but bearing a date of March 13, as shown here:

NOTICE

March 13, 1991

The company is reinforcing stipulation of performance. This requires employees to remain at their work stations working until quitting time. This also requires employees to be at work at the start of their shift.

Verbal warnings will be issued March 13 and written warnings will start March 14 for anyone violating.

Larry Payne: According to Kevin Gostlin, the routine in the past for employees reporting for work was to approach their shift supervisor and ask what their assignment would be for the day.[5] Consequently, according to Gostlin, the employ-

[1] The charge was filed on April 30, 1991, and the complaint was issued on June 6, 1991.

[2] Certain errors in the transcript are noted and corrected.

After the hearing was initially closed on October 30, a discussion ensued between counsel for the General Counsel and me as to the necessity for counsel to provide copies of his final two exhibits, which had been rejected when offered in evidence. After counsel for the General Counsel decided to withdraw the exhibits, the hearing was briefly reopened to record this change of heart. When the transcript of proceedings was received, however, it did not show this final colloquy. After communication with the reporting company, the final exchange was discovered and the omission was corrected by issuance of a revised version of the last page to me and counsel for the parties. That revised page has been attached to the official transcript.

[3] That I may not specifically refer to all the testimony given at the hearing does not imply that I have failed to consider all such testimony.

[4] The answer to the complaint admits that Cleveland is a supervisor within the meaning of Sec. 2(11) of the Act, as well as an agent of Respondent.

[5] His testimony was, as we shall see, both corroborated and contradicted.

ees were assertedly confused by the notices, one of which spoke of the need to ''remain in the lunchroom prior to their shift'' and the other of which stated present policy as ''requir[ing] employees to be at work at the start of their shift.'' According to Gostlin, at the break on the March 12 shift, ''just about everybody on the second shift'' spoke to him about the matter. They also asked him where their ''work station'' was, indicating a lack of familiarity with such a concept.

Gostlin says that he asked Assistant Supervisor Cleveland for an explanation; Cleveland could not give him one. Gostlin testified that he told the inquiring employees that ''the best thing that they could do was to report to the supervisor's desk'' at 3 p.m., the beginning of the shift.

On March 13, prior to the start of the shift, Gostlin went to the breakroom, where ''just about all of the second shift'' had gathered.[6] They again discussed the postings and Gostlin told them to go to the supervisor's desk at 3 p.m. Also present in the breakroom, said employee Larry Widgren, was Assistant Supervisor Cleveland, who is, technical supervisory status notwithstanding, an hourly paid employee who is included in the bargaining unit. The employees were confused, according to Gostlin, but, as reflected by a grievance filed by him on March 20, not quite in the manner one might suppose:

> Co. posted notice 3–11–91, requesting incoming employees to remain in the lunchroom prior to their shift. Co. posted notice 3–12–91 dated 3–13–91 requiring employees to remain at their work stations working until quitting time, also requiring employees to be at work at the start of their shift. . . . Co. policy clearly states employees are assigned to depts. and classifications, not work places. Employees have not been notified that they are assigned to a work place or work station.

Just before 3 p.m. on March 13, the second-shift employees left the lunchroom in a group and walked up to the supervisor's desk. There they found Plant Manager Payne, Supervisor Charles Cooper, and Cleveland. The latter, said Gostlin and some other General Counsel witnesses, instructed people as to their work assignments for the day, and the employees went to their assigned places.

On the night of March 14, Cleveland handed Gostlin a printed form captioned, ''Notice of Employee Counseling/Warning.'' The form first indicates that Gostlin was notified and warned on ''3–13–91'' and the following boilerplate appears:

> His conduct needs to be corrected on items specified on this form. The intent of this counseling is not to punish. The purpose is to correct and maintain good conduct of all employees. A copy of this form will be issued to the employee involved. If counseling will not correct the problem, disciplinary action will be initiated by the Supervisor which will become part of his record with the Company.

Following this paragraph, 11 different potential offenses are listed. On the form given to Gostlin, two offenses are checked; they read:

> Employees shall be at their work places ready to work at the scheduled starting times. They shall remain at their respective work places, exclusive of the scheduled rest and lunch periods, during their entire shift, except for necessary personal time, and they shall not quit working until the designated quitting times.
>
> . . . .
>
> Deliberately restricting output.

The form was signed by Supervisor Cooper; written across the bottom was the following: ''Kevin—This is the second time in (2) days. Next time warrents [sic] disciplinary action.'' The testimony shows that this latter note was written by Plant Manager Payne, with whom Cooper had consulted about the issuance of this form and others, as subsequently discussed. When Gostlin asked Cleveland what the notice was for, Cleveland assertedly replied that he did not know. Gostlin testified that he knew nothing about ''a prior warning two days before.''[7]

Five other employees—Kevin's brother Tim Gostlin, Larry Widgren, Theresa Keeler, George Fisher, and Kevin Lattimer—received forms identical to that given to Kevin Gostlin. They were in the group of 15–20 employees who went to the supervisor's desk on March 13. All five wrote ''Not accepted'' or similar words on the notices and returned them to management; they were thereafter issued another copy of the notice, but with the word ''Verbal'' written at the top. The record indicates that a ''verbal warning'' is considered less significant than a ''written warning.''

Kevin Gostlin testified that after March 13, he would, each day, ask Cleveland for his work assignment, as he had done before that date, except that previously, he had gone on the floor earlier to look for Cleveland, if necessary, and after March 13, he would wait until 3 p.m. In a bargaining session on July 18, however, Respondent's counsel told the employee negotiators that they should report ''to where we last worked the day before.'' Gostlin has done so since then.

We shall initially take up the evidence relating to the ''first offense'' allegedly committed by Gostlin on March 12.

In late December 1987, when there was no bargaining agreement in effect, the Company handed out to employees a reworked copy of a proposed bargaining agreement which it implemented as ''policy.'' One of the provisions, entitled ''Stipulation Of Performance,'' begins, ''Employees shall be at their work places ready to work at the scheduled working times.''

Charles Cooper was the first-shift supervisor in March 1991. Although his shift lasted from 7 a.m. to 3 p.m., he usually remained at the plant until, at the earliest, 3:15 or 3:20 p.m.

Cooper told us that at the beginning of the second shift on March 12, he arranged for Assistant Supervisor Cleveland to have certain tasks performed, as he usually did; in the course of doing so, Cooper noticed that Kevin Gostlin was not at his machine or even in the department ''that I could

[6] Other testimony indicates that there were approximately 15 employees in the breakroom.

[7] Respondent makes no contention that the notices involved in this case could not adversely affect the recipients. See *Long Island Day Care Services*, 303 NLRB 112 (1991).

see.'' At ''approximately eighteen minutes'' after 3 p.m., he saw Gostlin ''leisurely'' making his way to his machine from the place where he had loaded his grease gun. Cooper spoke to Gostlin and ''reinforced'' the requirement that he be at his work station at the start of the shift. Cooper considered this to be a ''verbal warning,'' although he did not say so to Gostlin, and he documented the occurrence in handwriting, a copy of which is now in evidence. In his testimony, Gostlin said on cross-examination that, first, he did not ''recall'' having, and, thereafter, that he ''didn't'' have, any discussion with Cooper on March 12, and that Cooper did not ''confront'' him on that day.[8] He did not return to the stand to rebut Cooper's later specific testimony. As noted, written across the warning given to Kevin Gostlin on March 13 is a notation by Manager Payne that this was the ''second time in two (2) days'' that Gostlin had committed an offense. Given this evidence, which I do not believe to be fabricated, and my preference for Cooper's testimony over Gostlin's, I conclude that Cooper did indeed admonish Gostlin on March 12.

Although, as indicated, Gostlin and other employees testified that what happened once the group had reached the supervisor's desk on March 13 was simply that Cleveland (who had evidently dashed there from the lunchroom) gave out assignments to each employee, Supervisor Cooper gave a quite different, and more credible, account. Cooper said that as he was standing near the foreman's desk speaking to Cleveland about the work schedule, he noticed, probably 5–8 minutes after 3 p.m., a group of 15 employees standing 10 or 12 feet away from the desk. He ''didn't really know what was going on'' because it was ''bizarre'' and ''an unusual situation.'' He finished speaking to Cleveland, looked at his watch and saw that it was 10 minutes after the hour, and then ''walked into the—into the middle of the group''[9] and told them it was time to go to work. Most of the group ''faded off'' and went to work before he said anything. Cooper asked ''what are you all doing or something to that effect,'' and Kevin Gostlin replied that ''they were there to get the work assignment for the day.'' Cooper replied that everyone knew where they were supposed to be, with the exception of Larry Widgren, who had been floating from job to job for the previous few weeks. Cooper commented to Gostlin that ''he of all people knew where he was supposed to work.'' Cooper testified that he based this on the fact that employees are primarily assigned to work centers and that Gostlin, as a deputy chief steward, knew that that was where he was to work if there was work available at that location.

Cooper further testified that ''verbal'' (but recorded) warnings were given to the five members of the group who ''hung around and wanted specific directions.'' The remaining employees of the original group received no discipline because ''[t]hey went back to work.'' Gostlin received a ''written reprimand'' because it was his second offense in 2 days. The five so-called verbal warnings were, as the record shows, subsequently rescinded on April 10, after discussion between Manager Payne and union officers.

On cross-examination, Cooper recalled (although neither Kevin Gostlin nor any other of General Counsel's witnesses had so testified) that Gostlin had asked on March 13 for a meeting between Manager Payne and the ''group of people,'' which Cooper said he would try to arrange;[10] Cooper did not ''think'' that Gostlin had explained why he wanted the meeting.

Discussion and Conclusions

Despite the brevity of this hearing and, all things considered, its relatively slight practical significance,[11] the proceeding presents difficult factual and legal issues.

The complaint alleges that when Respondent issued verbal warnings and a written warning on March 12 and 14 to six employees,[12] it did so ''because of its employees' concerted protected activities including concertedly complaining to Respondent regarding its memorandas [sic] of March 11 and 12, 1991, in regard to job classifications and work stations.'' It is less than clear that the six employees were engaged in concerted activity for the purposes delineated in the statute.

In sorting out the facts here, I must say that all the witnesses generally seemed to be believable. Analysis of their transcribed testimony, however, raises some doubts. In the end, I do not think that credibility determinations play an important role in the case, but I am obliged to treat with them. The reliability of Kevin Gostlin's testimony is in some question. For example, Gostlin testified at transcript 20–21 that on March 13, there was a discussion in the lunchroom by employees who spoke of why the notices had been posted and what the employees were supposed to do, and he told ''the group as a whole'' that he would go to the supervisor's desk with them at 3 p.m. so that they would not be disciplined. But at transcript 66, when asked about his earlier testimony that he told the people ''that you'd go with them to make sure that no one was disciplined,'' Gostlin replied, ''That's not what I told them, no.'' He then went on to say that he arrived in the lunchroom with just a few minutes to go until the shift began and told the others, ''Let's go. You don't want to be late. That's all I said.'' (See also Tr. 77.) Larry Widgren, on the other hand, testified that, on March 13, he engaged in ''small talk'' in the breakroom with both Kevin and Tim Gostlin ''and then the situation of this notice come up,'' at which time Kevin mentioned that ''the best idea would be to go to the supervisor's desk for direction,'' a version which contradicts Kevin's description of his ''few minutes'' in the lunchroom.

Theresa Keeler got to the lunchroom only ''a minute before three'' and had no conversations with anyone. Still, at 3 p.m., she went to the foreman's desk with approximately 15 other employees, presumably in accordance with Kevin's

[8] The document in evidence, dated March 12 and signed by Cooper, reads:

> Kevin Gostlin was given a verbal warning on 3–12–91 at 3:20 p.m. for not being at his work station at proper time. Start of shift is 3:00 p.m.

[9] To some extent, Gostlin confirmed this testimony on cross-examination when he said, on being asked about the positions of Cooper and Cleveland, ''They were among us.''

[10] The General Counsel inadvertently errs on brief in stating that ''Cooper said no'' to Gostlin's request. See Tr. 195–196.

[11] As indicated, five of the six warnings have been rescinded; no 8(a)(3) violation is alleged.

[12] Although Kevin Gostlin denied receiving a verbal admonition on March 12 for being away from his work station, and the General Counsel argues on brief that Gostlin ''credibly denies'' receiving one, I note that the complaint itself specifically alleges that ''[o]n or about March 12, 1991, Respondent, by its agent Charles Cooper, issued a verbal warning to its employee Kevin Gostlin.''

suggestion of the previous day that the best thing for her to do was to go to the foreman and ask him where to work. This would not, however, be at all unusual for Keeler because, according to her testimony, she ''always asked foremen where to go,'' and what Kevin was suggesting was ''the same as I always have [done].''

In relevant part, Section 7 of the Act provides that employees have the right ''to engage in other concerted activities for the purpose of . . . other mutual aid or protection.'' The employees who together approached the supervisor's desk on March 13 were doing so, of course, in physical concert. It is not so clear that this concertedness would have had any particular significance. Keeler, like the Gostlins, testified that she was doing what she always did: ask the foreman where to work; she also testified, however, that she had a companion purpose—that she ''didn't want to get wrote up.'' It is hard to understand why she would have feared reprisal if she continued performing as she always had; the notices of March 11 and 13 did not convey any such connotation.[13]

There are other problems in the testimony of General Counsel's witnesses. Larry Widgren testified, after only naming Kevin Gostlin, that Gostlin was ''one of them'' who suggested going to the foreman's desk—''[I]t was a group idea.'' After first denying that Cleveland had suggested that Widgren go to the supervisor's desk (Tr. 129–130), Widgren then acknowledged the accuracy of his pretrial affidavit statement that Cleveland had indeed made the suggestion (Tr. 133).

Despite these and other testimonial defects, it is true that 15 or so employees, in a group, did approach the supervisor's desk shortly after 3 p.m., and I accept that they (or some of them) did so because of confusion about the effect of the notices posted on March 11 and 12.[14] Was this ''concerted activity for the purpose of . . . mutual aid or protection?''

It does seem probable that the concerted activity should be regarded as being within the contemplation of the statute. Most, if not all, of the employees were acting collectively in an effort to avoid potential discipline as a result of possible misunderstanding of the notices. Presumably, they foresaw a diminution of the chance of discipline by acting in conjunction with one another. Although I think the question is not open and shut, I cannot reasonably distinguish the facts here from those in *Squier Distributing Co*., 276 NLRB 1195 (1985), cited by the General Counsel.

However, there is no showing that Respondent's agents had the slightest idea that the group of employees were even trying to clarify, much less protest, whatever ambiguity may be said to have arisen from the two notices.[15] Cooper, who struck me as the most personally impressive witness of all, testified that when he questioned what the group was doing, Gostlin ''spoke up and said that they were there to get the work assignment for the day.'' There is nothing in this statement to imply that, as the complaint alleges, the employees were ''concertedly complaining to Respondent regarding its memorandas [sic] of March 11 and 12, 1991, in regard to job classifications and work stations.'' Cooper, who regarded this massing of employees as ''just a bizarre thing,'' replied that ''everyone knows where they're supposed to be'' with the exception of Widgren, who had been floating between jobs for a few weeks. There is no testimony in the record that anyone, at any time, indicated to Respondent that the group arrival was related to confusion about the effect of the two notices.

In *Meyers Industries*, 268 NLRB 493, 497 fn. 23 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), reaffd. 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), the Board held:

> Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.[23]

I must confess my uncertainty about the Board's use of the phrase ''absent special circumstances like *NLRB v. Burnup & Sims*.'' The cited case involved an organizational effort, concerted and, on its face, ''protected'' activity. The Supreme Court held, in essence, that, in such a context, an employer must be cautious in disciplining an organizer for asserted misconduct, because if the organizer is found not to have engaged in such misconduct, then the employer's good-faith belief that he did would be no defense. Because it would appear that the Board's reference in *Meyers Industries* to ''special circumstances like *NLRB v. Burnup & Sims*'' must extend beyond organizing efforts, does it apply here as well?

[13] In fact, I am inclined to believe that for the most part, as Plant Manager Payne and Supervisor Cooper testified, employees were assigned to particular jobs and did not request assignments from Assistant Supervisor Cleveland every day. The uncertainty of the testimony to the contrary is exemplified by that given by Tim Gostlin. At Tr. 104, he said he would ''normally'' ask Cleveland for a daily assignment. At Tr. 108, he stated, ''*I guess it wouldn't be that unusual* for me to ask my foreman where to work,'' but then he immediately answered, ''Yeah'' to the question, ''You did that everyday?'' Two pages later, Gostlin reverted to ''I myself did [ask] *most* of the time.'' In the circumstances, which show that Cleveland, although technically a statutory supervisor, was an hourly employee and a member of the bargaining unit, I do not find appropriate the General Counsel's request that an adverse inference be drawn against Respondent for not calling Cleveland as a witness.

[14] There may have been other agendas. Kevin Gostlin, the deputy chief steward, later filed a grievance which, he testified, protested the postings because they indicated that employees had ''work stations'' rather than ''classifications.'' Plant Manager Payne testified that higher union officers told him that the other employees had been ''led down the primrose path'' by Gostlin as a result of ''an internal Union power struggle.''

[15] Unlike, e.g., the situation in *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 15 (1962), where the evidence showed ''a running dispute between the machine shop employees and the company over the heating of the shop on cold days.''

[23] . . . . Under this standard, an employee ''may be discharged by the employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated.'' *NLRB v. Condenser Corp. of America*, 128 F.2d 67, 75 (3d Cir. 1942). Thus, absent special circumstances like *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), there is no violation if an employer, even mistakenly, imposes discipline in the good-faith belief that an employee engaged in misconduct.

I think not. Whatever the final sentence of footnote 23 may mean, it seems clear that before the *Burnup & Sims* gloss on the statute comes into play, the employer must be aware that the *context* in which the alleged misconduct occurred was activity which was both concerted and protected, qualifications which were present in *Burnup & Sims*. As the Court stated in *Burnup* at 23, ''In sum, § 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, *that the employer knew it was such*, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct'' (emphasis added).

There is no doubt that Respondent viewed the conduct here as concerted, but there is also no reason to believe that Respondent should have regarded it as protected. As support for the first proposition, the warnings which were handed out regarding the March 13 incident went only to those six employees who did not immediately disperse when so ordered by Cooper, including Widgren who, as Cooper testified, did need to be assigned. I infer from this and other aspects of the record that Respondent understood that this ''group'' was making a deliberate joint appearance. I cannot conclude, however, that Respondent did understand, or should have understood, that the employees were engaging in a concerted complaint about an ambiguity arising from the allegedly contradictory notices posted on March 11 and 12.[16]

The General Counsel also argues on brief an alternative theory with respect to Kevin Gostlin which is not alleged in the complaint. The evidence shows that union officials took up the cause of the five other employees, telling Plant Manager Payne that Gostlin had misled them into believing that their activity would not result in adverse consequences and also mentioning to Payne an ''internal power struggle.'' Contrary to the General Counsel's contention, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), does not apply here, because there is no evidence that Respondent reprimanded Gostlin ''either because employees sought advice from him or because he was held to a higher standard because he was a union official'' (G.C. Br. 10). Furthermore, it is not ''clear that, at the behest of the Union, Kevin's reprimand was not rescinded because of an internal union power struggle.'' Although Plant Manager Payne testified that the union officials had made such a reference, he reasonably asserted that Gostlin's written reprimand had not been rescinded for the reason that Gostlin had committed two violations in 2 days. The General Counsel offers one argument which could reflect on Respondent's credibility. It may be worth examining, although the only potentially important credibility conflict here relates to the incident regarding Gostlin's first reprimand.

The ''reprimands'' received by the other five employees on March 14 were handed to them by Virgil Cleveland. The employees wrote on the forms that they did not accept the admonitions and returned the forms to Cleveland. On the following day, the documents were returned to the five by Cleveland; this time they had the word ''verbal'' written at the top. Payne testified that this addition had been made because of his understanding from Cooper that the five recipients thought that they were receiving a ''full warning,'' and he wanted to allay their fears.

Cooper had earlier testified that, ''with a verbal warning, the employee doesn't necessarily have to get a copy.'' In fact, said Cooper, the instant case is the only one in which Cooper has issued to employees copies of verbal warnings. The General Counsel argues that ''what is more likely is that Cooper intended to issue written reprimands to all six employees over the events of March 13th, and in fact did issue written reprimands to all employees, but later decided to reduce five of the reprimands to verbal because his actions were contrary to Respondent's own rules, and because of the manner in which the reprimands were received by the employees. Since Cooper was particularly angry with Kevin over the events of March 13th, he fabricated the reprimand of March 12th to justify not reducing the written reprimand issued to Kevin.''

I do not think, to begin with, that Cooper fabricated the March 12 reprimand; anything is possible, of course, but the Cooper I saw did not appear to be a person who would manufacture evidence. I am not sure that I understand the claim that the issuance of written reprimands to all six employees would be ''contrary to Respondent's own rules.'' Those rules (R. Exh. 3, p. 4) state that *either* a ''Verbal reprimand or warning'' or a ''Written reprimand or warning'' may be meted out for ''Less Serious Offenses.''

The problem I find here, to which the General Counsel may be referring, is the unique issuance to employees of written reprimands intended only to be verbal in character. As noted, Cooper testified that normally, employees do not receive documentation of verbal warnings. Cooper attempted to explain this departure by saying, ''Now, if the plant manager gets involved, that's a little different situation.'' That is not an ineluctable distinction, but it cannot, on the other hand, simply be dismissed out of hand.

The most difficult problem I have with Cooper's testimony is his statement, in describing the events of March 13, that when five or six people had still not left to go to work, ''Virgil was there, also, be he [*sic*], you know, I told him where—where the people—I wanted them to go.'' Read one way, this seems to fly in the face of Cooper's contention that all the employees but Widgren had a specific assignment. However, it could be that the wording is ambiguous—that Cooper simply meant to say that he told Cleveland that he ''wanted them to go.'' At another juncture on the same point in his testimony, Cooper is asked, with respect to the remaining five employees, ''And then Mr. Cleveland gave them their work assignments and then they left, too, isn't that right?'' He answered, ''After I talked to Kevin, they did.'' Is Cooper agreeing with one of the factual premises of the question, that *Cleveland* gave them their work assignments, or is he simply responding to the question ''they left, too, isn't that right?'' (''After I talked to Kevin, they did.''). He goes on to say that he told Kevin ''that they all knew where they was supposed to be working'' and that ''Then they—finally, they all went back to work.''

[16] On brief, the General Counsel advances an arguendo theory that even if most of the employees knew where they were supposed to work, they were nonetheless protected because they were acting in concert with Widgren, who Respondent concedes did not know what work he was supposed to do. Such an argument, of course, would require a finding that Widgren's need to be assigned was an objective entertained by one or more of the other employees, an unproven premise, and also that Respondent understood this purpose, an equally dubious proposition.

In the end, I believe, chasing these will-o'-the-wisps is not productive. The facts which can be made the subjects of contention are not the facts that really count here. It is the General Counsel's burden to make a prima facie case, supporting all the elements of an 8(a)(1) violation; that, in my view and as discussed above, he has failed to do.

Having so concluded, I need not resolve the claim advanced by Respondent that the affected employees would be required to exhaust any ''complaint'' that they had through the channel of the grievance procedure unilaterally adopted by Respondent. In passing, I might say that it seems unlikely that the Board would approve such an argument.

CONCLUSIONS OF LAW

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

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]