Alleluia Cushion Co., Inc. *and* Jack G. Henley. Case 21–CA–13457

December 4, 1975

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS JENKINS AND PENELLO

On August 28, 1975,[1] Administrative Law Judge William J. Pannier, III, issued the attached Decision in this proceeding. Thereafter, the Acting General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that Respondent threatened Jack Henley with discharge, refused to grant a wage increase to Henley, and discharged and refused to reinstate Henley because he "engaged in protected concerted activity for the purpose of collective bargaining or other mutual aid or protection" in violation of Section 8(a)(1) of the Act. The Administrative Law Judge dismissed the complaint on the ground that Henley's conduct did not constitute protected concerted activity. We disagree.

Respondent is engaged in the manufacturing and wholesale distribution of carpet cushioning at facilities in Carson and Commerce, California. Since Respondent's employees are not organized, there is no collective-bargaining agreement in effect.[2]

Jack Henley began maintenance work at Respondent's Carson facility in June 1974, and shortly thereafter began complaining about safety conditions, including the lack of instruction regarding chemicals used in production, the absence of protective guards on machines, his inability to communicate safety instructions to the majority of employees who were Spanish-speaking, and the absence of first aid stations, eyewash stations, and an overall safety program.[3] At that time Henley was told that Respondent intended to close the Carson facility and did not want to invest in safety features at that plant.[4] Shortly thereafter Henley was transferred to the Commerce facility. He encountered a similar lack of safety measures there and accordingly reiterated his complaints. In early March, dissatisfied with Respondent's response and its failure to correct the problems, Henley wrote a letter of complaint to the California OSHA office, with a copy to Respondent's home office in Forth Worth, Texas. There is no evidence that at any time prior to complaining to Respondent or sending this letter Henley discussed the safety problems with the other employees, solicited their support in remedying the problems, or requested assistance in the preparation of the letter.

Henley testified that on March 11 Operations Manager Singh reprimanded him for sending a copy of the California OSHA letter to the Fort Worth office, and stated that if so ordered by the home office Henley would have to be fired. Henley further testified that other supervisors informed him that he would not receive a promised raise since the money allotted for the raise would be expended for safety improvements.

On March 14, Henley received a letter from California OSHA acknowledging receipt of his letter and advising him that many items complained of had been cited in earlier OSHA inspections of the Respondent in December 1974 and February 1975.[5] He was further informed that Respondent was required to post the citations that California OSHA had previously issued. According to Henley, when he asked Singh why the citations had not been posted, Singh replied that it was none of his business, and that Respondent did not intend to comply with the posting requirement.

On March 26, at the request of an OSHA inspector, Henley accompanied the inspector on a tour of the plant in order to point out the alleged safety violations. During the course of inspection, the OSHA representative was asked whether Henley could be discharged. He responded that Henley could not be terminated for filing the complaint, but that he could be dismissed for not doing his work. The following day Henley was discharged.[6]

[1] All dates hereinafter refer to 1975, unless otherwise indicated

[2] Since no collective-bargaining agreements exist, this case is distinguishable from cases where individual action has been found to be concerted activity on the theory that it is merely an extension of the concerted activity which culminated in the collective-bargaining agreement See *Merlyn Bunney and Clarence Bunney, partners, d/b/a Bunney Bros Construction Company,* 139 NLRB 1516, 1519 (1962); *Interboro Contractors, Inc*, 157 NLRB 1295 (1966), enfd 388 F 2d 495 (C.A 2, 1967)

[3] While some of the safety complaints Henley registered with Respondent and later with the California OSHA office (Occupational Safety and Health Administration) would benefit him personally, a majority of the complaints would primarily improve safety conditions of other employees and benefit him only indirectly, since they involved aspects and areas of Respondent's operations with which he was only tangentially involved.

[4] Henley testified that subsequent to his complaints an eyewash station was installed

[5] An OSHA complaint form was enclosed for Henley to complete if his complaints did not coincide with the subject of the earlier OSHA citations. Three days later Henley returned the completed form, with copies to the Respondent in Fort Worth and Commerce

[6] The Acting General Counsel alleges that the discharge was prompted by Henley's protected concerted activity of processing a complaint with

(Continued)

The Administrative Law Judge found that Henley was acting merely on the basis of his individual concern for safety. He emphasized the total absence of any evidence that Henley was acting in conjunction with other employees, that his action was an outgrowth or extension of previous employee discussions, or that the other employees even shared Henley's concern for safety.[7] In addition, he pointed out that there was no evidence that Henley purported to represent the other employees or that Respondent believed that he was acting as their representative. The Administrative Law Judge noted that, if placed in the context of group action, Henley's presentation of the complaint to OSHA would be protected activity. Nonetheless, relying on the total absence of any evidence of efforts by Henley to seek his fellow employees' aid in pursuing the complaints, the Administrative Law Judge concluded that Henley's actions herein did not constitute concerted activity within the meaning of Section 7. Accordingly, he dismissed the complaint in its entirety.

The Acting General Counsel takes exception to the Administrative Law Judge's conclusion. He asserts that Henley sought to achieve safe working conditions, a matter of such obvious mutual concern to all of Respondent's employees that verbal communication or other outward manifestation of mutual interest was unnecessary. The Acting General Counsel emphasizes that Henley's safety complaints related to conditions affecting all employees and, in fact, resulted in the installation of eyewash stations benefiting employees throughout the plant. He asserts that Henley merely sought Respondent's compliance with health and safety standards with which it was already under a legal obligation to comply. Further, the Acting General Counsel contends that Henley's discharge on the day following the OSHA inspection would indicate to the other employees the danger of seeking assistance from Federal or state agencies in order to obtain their statutorily guaranteed working conditions, and would thus frustrate the purposes of such protective legislation.

We find merit in the Acting General Counsel's exceptions. While it is undisputed that Henley acted alone in protesting Respondent's lack of safety precautions, the absence of any outward manifestation of support for his efforts is not, in our judgment, sufficient to establish that Respondent's employees did not share Henley's interest in safety or that they did not support his complaints regarding the safety violations. Safe working conditions are matters of great and continuing concern for all within the work force. Indeed, occupational safety is one of the most important conditions of employment. Recent years have witnessed the recognition of this vital interest by Congress through enactment of the Occupational Safety and Health Act,[8] and by state and local governments through the passage of similar legislation. The National Labor Relations Act cannot be administered in a vacuum. The Board must recognize the purposes and policies of other employment legislation, and construe the Act in a manner supportive of the overall statutory scheme.[9]

Section 7 provides that employees have the right to engage in concerted activities for the purpose of mutual aid and protection. Henley's filing of the complaint with the California OSHA office was an action taken in furtherance of guaranteeing Respondent's employees their rights under the California Occupational Safety and Health Act. It would be incongruous with the public policy enunciated in such occupational safety legislation (i.e., to provide safe and healthful working conditions and to preserve the nation's human resources)[10] to presume that, absent an outward manifestation of support, Henley's fellow employees did not agree with his efforts to secure compliance with the statutory obligations imposed on Respondent for their benefit. Rather, since minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.

The circumstances of this case bear out such an implication. The complaint filed by Henley sought to compel Respondent to comply with a state statute concerning occupational safety. While his own personal safety may have been one motivation, it is

California OSHA. Respondent contends that Henley was discharged for insubordination in that Henley uttered profanity at a supervisor, and for failure to perform assigned work. Because the Administrative Law Judge concluded that Henley's complaint to OSHA was not concerted activity, he did not consider the merits of the alleged 8(a)(1) violations

[7] The Administrative Law Judge concluded that the prior OSHA inspections were not sufficient to establish that Respondent's lack of safety precautions was of interest to the employees

[8] 29 U S C. § 651-678

[9] As was stated by the Supreme Court in *Southern Steamship Company* v *N L.R.B.*, 316 U S. 31, 47 (1942)

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task

[10] 29 U.S.C. § 651(b).

clear from the nature and extent of the safety complaints registered that Henley's object encompassed the well-being of his fellow employees. Most of the conditions he sought to remedy, i.e., live electrical wires in work areas, lack of instruction regarding chemicals used in production, and inadequate ventilation, involved work areas and potential hazards that Henley was unlikely to encounter. In fact, the one specific safety improvement the protests accomplished—the installation of eyewash stands—directly benefits the employees within the rebonding process and only marginally affects Henley.

In light of the above, we find Henley was engaged in protected concerted activity when he filed the complaint with the California OSHA office. Accordingly, we reverse the Administrative Law Judge's finding to the contrary, and shall remand this proceeding to the Administrative Law Judge for consideration of the merits of the alleged 8(a)(1) violations and issuance of a Supplemental Decision.

ORDER

It is hereby ordered that this case be, and it hereby is, remanded to the Administrative Law Judge in order that he shall prepare and serve on the parties a Supplemental Decision containing findings of fact, conclusions of law, and recommendations in accordance with this Decision and Order and that, following service of such Supplemental Decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

DECISION

I. STATEMENT OF THE CASE

WILLIAM J. PANNIER, III, Administrative Law Judge: This matter was heard by me in Los Angeles, California, on June 19, 1975.[1] On April 22, the Regional Director for Region 21 of the National Labor Relations Board issued a complaint and notice of hearing based on an unfair labor practice charge filed on March 12 and a first amended charge filed on April 2, alleging violations of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs filed on behalf of the General Counsel and the Respondent, and on my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

II. JURISDICTION

It is undenied that Alleluia Cushion Co., Inc., herein called Respondent, is a corporation engaged in the manufacture and wholesale distribution of carpet cushioning, with facilities located at 7316 Gage Avenue, city of Commerce, California, and at 450 East Gardena Boulevard, Carson, California. During the past calendar year, in the normal course and conduct of its business operations, Respondent sold and shipped goods, materials, and supplies valued in excess of $50,000 directly to customers located outside the State of California. Therefore, I find that Respondent has been at all times material herein an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

III. COMPLAINTS CONCERNING SAFETY MADE BY JACK G. HENLEY

The complaint alleges that Respondent threatened Jack G. Henley, failed and refused to grant a wage increase to Henley, and discharged and refused to reinstate Henley because Henley "engaged in protected concerted activities for the purpose of collective bargaining or other mutual aid or protection." There is no evidence that Respondent's employees are represented by a labor organization or that Henley engaged in any activity designed to secure representation for Respondent's employees.

What the record does disclose is that shortly after he commenced working at Respondent's Carson facility, in June 1974, Henley began complaining about safety conditions to Operations Manager Gurki Singh, to Western Division General Manager Don Callaway, and to Maintenance Foreman Ernest Richard Oates. Thus, on a number of occasions, Henley complained concerning such matters as his lack of knowledge concerning the chemicals used in the rebonding process; the lack of protective safety guards to protect against injury on machinery pinch points; his inability to communicate with the Spanish-speaking employees so that they would be aware that he was working on machinery and not turn it on;[2] and the absence of a safety program so that, when an employee was injured, other employees could be alerted to what had taken place in order to avoid a similar injury.[3] While these complaints concerned matters of general interest to employees at the Carson facility, there is no evidence that Henley had spoken with other employees concerning these matters or that other employees adopted his conduct in making these complaints.

[1] Unless otherwise stated, all dates occurred in 1975

[2] In this connection, Henley testified:

> We had — majority of the people spoke Spanish I didn't speak Spanish and a lot of times I would catch myself having to work on a piece of equipment I could not flag out To flag out meaning that you couldn't shut the power off of it
>
> It had to be energized and subsequently not being able to communicate with the Mexican speaking employees, they would subsequently turn it on while I was there and so this constituted a hazard in my estimation.

[3] In this regard, Henley testified

> If an employee got injured, then the other employees had no knowledge of this In order if they got in the same set of circumstances They were totally ignorant as to what had happened previously. There was no follow-up on the accident. No safety program

Henley testified that he did not pursue the matter of his complaints further at that time because he was told by Respondent's officials that Respondent was in a transition period, with its operations being transferred to the city of Commerce facility, and that Respondent did not want to spend the money improving matters at Carson which was being shut down. In February, Henley was transferred to the city of Commerce facility and, upon discovering that safety problems similar to those at Carson also existed at the newer facility, he again began to complain about the situation. These complaints were voiced to Singh, Oates, and Maintenance Supervisor Donald Lee Clark. According to Henley, he was told that, as Respondent was in a construction phase, money was tight and that Respondent would correct the safety problems eventually. Dissatisfied with this response, in early March, Henley authored a letter of complaint to the California Occupational Safety and Health Administration (herein Cal OSHA) with copies being transmitted by Henley both to Respondent's home office in Fort Worth, Texas, and to Respondent's city of Commerce facility. This letter, which was prepared and mailed by Henley without any discussion with any other employee, so far as the record discloses, opens with the statement: "I wish to file a complaint against my employer, Alleluia Cushion Company, in respect to State safety and health codes. The following conditions are unsafe, unhealthy and in violation of State and Federal statutes." The letter then lists a number of items alleged by Henley to be unsafe such as *"Employees not informed of dangers,"* "Employees burning chemicals, creating toxic fumes without adequate ventilation," "No adequate eating facilities for employees," and "No Company safety program — poor safety practices encouraged by management — complete disregard from [sic] employee safety and health."

Henley testified that on March 11, Singh came to where he was eating lunch with Clark, Oates, Production Supervisor Dave Jensen,[4] and mechanical employee Tom Stewart, and reprimanded Henley for sending a copy of the Cal OSHA letter to Respondent's Fort Worth office, accusing Henley of being a troublemaker and stating that Henley would have to be fired if a directive to that effect was received from Fort Worth. Following lunch, testified Henley, Clark said that, because of the letter, Henley might not receive the raise which Henley testified that he had been promised earlier that month. In fact, Henley did not receive a raise in March, although he was told, ultimately, by Clark that the reason was that money was tight and that Henley had not worked at the city of Commerce a sufficient length of time for Clark to evaluate his work. That same afternoon, according to Henley, Jensen told Henley that Singh had said that money that would normally have been accorded to the employees would have, instead, to be spent on updating equipment because of Henley. Henley testified that a similar comment was made to him by Production Supervisor Chuck Bohannon[5] that same afternoon and that, as he was leaving the plant that day, Clark told him, "off the record," that he had not received the raise because of the letter. There is no contention or evidence to support a contention that "employees" were denied raises because of Henley's letters to Cal OSHA.

During the afternoon of March 11, Henley testified that he had sought permission from Oates to be excused for the remainder of the day. When this was denied, he continued working, but later that day told Oates and Clark that he intended to be absent on the following day. Initially, Henley testified that he had told them only that he had to have the next day off as "I was going to be out the next day," and that one of them had simply said, "Okay." Subsequently, he testified that he had also told them that he intended to use the time off to "see if his civil rights had been violated" and that he was going to the National Labor Relations Board. Oates, who was called as the General Counsel's witness, testified that, when Henley had said that he intended to take the following day off, he had replied that he needed Henley and could not authorize the absence, although, "You are 21. You know I can't stop you." Oates was uncertain whether Clark had been present when Henley had said that he intended to be absent on March 12. Though called as a witness, Clark did not testify concerning this incident, although he did testify that at some point, when the subject of Henley filing unfair labor practice charges was mentioned, he had suggested to Singh that Henley be discharged. He testified that he was immediately told that this was unlawful and there is no contention, or evidence to support a contention, that Henley's discharge was for this reason.

Henley did take the day off on March 12 and during the day, when Clark asked Oates if he had authorized the absence, Oates reported that Henley had asked for the time off and that he (Oates) had told Henley that he could not be spared. Thus, on March 13, Henley was issued a warning notice for "Unreported absence." The warning notice also listed a prior verbal notice on March 3 and when Henley pursued the matter, he was told that this referred to the "confrontation in the lunch room" when Singh had accused Henley of being a troublemaker. At the same time, Henley was told that the warning notice would be changed from "unreported" to "unauthorized" absence.

By letter dated March 14, Cal OSHA advised Henley, *inter alia:*

> An inspection was made of Alleluia Cushion Company on December 13, 1974; and a resultant Citation was issued alleging certain violations to California Safety Codes on February 28, 1975.
>
> The substance of the noted Citation contains recognition of the majority of items contained in your subject letter. This Citation is required to be posted by the Employer for a minimum of three days or until the last item thereon has been abated, whichever is longer. Similarly, an inspection of Alleluia was also made on February 6, 1975, by the Industrial Hygiene Section of

[4] While Respondent denied that Jensen was a supervisor within the meaning of Sec. 2(11) of the Act, it did not deny Oates' testimony that Jensen could schedule employees to work overtime and grant employees permission to take time off

[5] Although denying that Bohannon was a supervisor within the meaning of Sec 2(11) of the Act, Respondent did not deny Oates' testimony, in essence, that he possessed the same powers as Jensen

> the State of California Department of Health; and, an additional Citation extending the scope of the aforementioned Citation of February 28, 1975, is being issued. The Employer, as of this date, is within the abatement period of the additional Citation. Accordingly it appears your complaint is coincidental with the two prior aforementioned inspections. Should this not be the case, however, please complete the enclosed complaint form and return it to this office; whereupon the Division of Industrial Safety will take the required appropriate action.

On March 17, Henley transmitted the completed form to Cal OSHA, renewing his earlier complaints concerning Respondent's alleged safety violations. Henley testified that he had done this because, upon receipt of the Cal OSHA letter, he had inquired of Singh concerning the absence of a posting of the citations and had been told by Singh that it was none of his business and that Respondent did not intend to comply with the posting requirement.[6] Again, there is no evidence that Henley showed his correspondence with Cal OSHA to any other employee or that he conferred with any other employee concerning the matter before transmitting the form to Cal OSHA. He did, however, mail copies of the completed form to Respondent's chairman of the board, president, executive vice president, and executive administrator, as well as to the city of Commerce facility.

On March 18, Henley mailed a letter expressing his feelings to Respondent's chairman of the board, Jack B. Morris. Again, there is no evidence that he spoke with any other employee concerning the transmission of this letter, which states, in relevant part:

> . . . At the time I was employed I emphasized that working conditions were just as important, if not more so, then [sic] the monetary aspect of employment. Upon working there (at Carson) I observed that Safety was non-existent to the point that nothing was being done by management to implement any form of safety program, training or education to alert the employees of hazards, both physical injuries and the danger of toxic chemicals being exposed to the employee and members of his (her) family.

In the letter, Henley then explained the chronology of events which had followed his transfer to city of Commerce, culminating with the warning notice which he had received: "The week of 3–9–75 maintenance was scheduled to work 6 days. On 3–11–75 I informed my supervisor, E. Oates, that I would not be able to work on 3–12–75 because of personal business . . . . The reason I had to be off 12 March was to protect my civil rights. I went to the National Labor Relations Board . . . ." Henley then concluded the letter:

> The purpose of this letter is to try one more time with the thought that somewhere along the upward chain of command I might possibly get some relief from the unfortunate situation I today find myself in. It is non-productive for the company and for myself. The sooner this situtation can be cleared the more productive it will be for all concerned.

On March 25, Henley was dispatched back to the Carson facility to perform certain tasks for a temporary period of time. During the day on March 25, Singh notified Henley to call Complaince Officer Boyle of Cal OSHA and, when Henley did so and explained Singh's comments concerning the posting of the notice, Boyle said that he would come to Respondent's facility on the following day. At mid-morning of the following day, Clark drove Henley from Carson to the city of Commerce facility where Boyle was waiting with, according to Henley, Singh and a Spanish-speaking employee named Nicolas who "was there so he could communicate with the non-English speaking employees." The remainder of the day was spent touring the Carson facility and during the course of the tour, Henley pointed out several items which he viewed as safety violations. Also during the tour, testified Henley, Clark asked if Henley could be fired and Boyle replied that he could be fired, but not for filing the complaint with Cal OSHA. Clark testified that it had been Henley who had raised the subject of termination by asking if he could be discharged to which Boyle had replied that he could not be fired and that when Clark questioned this answer, Boyle amplified it by explaining that Henley could not be terminated for filing the complaint, but could be terminated for not doing his work. Henley also testified that when he was showing Boyle some live 440 volt wires, Singh passed by, saying "This is enough. You have done enough," but walked away before Henley could answer.

On the following day, Henley fell through the rebonding roof while attempting to disconnect a roof vent exhaust fan. This brought Clark to Carson and Henley testified that, prior to granting Henley's request to go to the clinic for treatment, Clark accused Henley of having been at Carson for 3 days without doing "a damn thing." When he returned from the clinic, testified Henley, Clark told Henley that he was discharged and then walked away without answering Henley's question concerning the reason. Though he then met with Clark, Singh, and Callaway, Henley testified that he did not pursue the matter of the reason for the termination further as he felt it "was obvious to me." By contrast, Clark testified that Henley had been discharged because when Clark had pointed out that Henley had not completed cleaning the liqua-bin, Henley had responded, "F— you. I am no G— d— Mexican. Clean the f—ing thing yourself." Henley denied making such a statement to Clark.

IV. ANALYSIS

Under Section 7 of the Act, employees are guaranteed the right ". . . to engage in other concerted activities for the purpose of . . . other mutual aid or protection . . . ." It is to this portion of the Act that Counsel for the General Counsel points when she states in her brief:

[6] Singh was not called as a witness by Respondent and the only explanation for not doing so was that he had been terminated by Respondent 2 or 3 weeks prior to the hearing, although there was no assertion that he was unavailable as a witness to Respondent.

> . . . Henley, by contacting a governmental agency which enforces industrial safety about Respondent's safety violations and by participating in a compliance investigation of Respondent's facility with that agency, was engaged in concerted activity for the mutual aid and protection of all Respondent's employees affected by Respondent's violations.

The defect to this argument is that, in the circumstances of this case, it fails to differentiate between elements inherent in that portion of Section 7 on which the General Counsel relies. For in order to rely on this portion of Section 7, it must be shown not solely that the individual employee engaged in activity aimed at mutual aid or protection. It must *also* be shown that, in pursuit of that goal, the individual employee engaged in activity which was concerted. The distinction between these two elements of Section 7 was addressed in *Joanna Cotton Mills Co.* v. *N.L.R.B.,* 176 F.2d 749, 752 (C.A. 4, 1949):

> The words "concerted activities" are limited in meaning by the words with which they are associated (noscitur a sociis), which have relation to labor organization and collective bargaining, and by the purpose of such "concerted activities", which is expressly limited by the immediately succeeding language to concerted activities "for the purpose of collective bargaining or other mutual aid or protection."

If the words "concerted activites" are modified by the subsequent words "mutual aid or protection" in Section 7, then the converse must also be true — the words "mutual aid or protection" must be "limited in meaning by the words with which they are associated," i.e., "concerted activities." This, in fact, was stated recently by the Board in *Eggo Frozen Foods, Division of Fearn International, Inc,* 209 NLRB 647 (1974): "In order for employee activity to come within the protection of the Act, it must be, among other things, concerted."

This being the case, the focus of inquiry must turn to consideration of whether Henley was engaged in concerted activities. A review of the cases discussing the matter discloses that for activity to be "concerted," there must be some form of or relationship to group action. *Indiana Gear Works* v. *N.L.R.B.,* 371 F.2d 273, 276 (C.A. 7, 1967). ("However, in order to prove a concerted activity under Section 7 of the Act, it is necessary to demonstrate that the activity was for the purpose of inducing or preparing for group action to correct a grievance of complaint.") *Mushroom Transportation Company, Inc.* v. *N.L.R.B.,* 330 F.2d 683, 685 (C.A. 3, 1964). (". . . [B]ut to qualify as [a concerted activity], it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees."). *Joanna Cotton Mills, supra.* For example, concert of action had been found where an employee attempted to secure compliance with the terms and conditions of a collective-bargaining agreement. *B&M Excavating, Inc.,* 155 NLRB 1152, 1154 (1965), enfd. 368 F.2d 624 (C.A. 9, 1966). (". . . [T]he individual action so taken in implementation of the collective-bargaining agreement is but an extension of the concerted activity that gave rise to the agreement."); *Merlyn Bunney and Clarence Bunney, partners, d/b/a Bunney Bros. Construction Company,* 139 NLRB 1516, 1519 (1962); *Interboro Contractors, Inc.,* 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (C.A. 2, 1967).

Absent a collective-bargaining agreement, activity of an individual employee has likewise been held concerted in certain circumstances. Most obviously, where that employee is joined by his colleagues or acts in conjunction with another employee, his activity has been held concerted. *N.L.R.B.* v. *Washington Aluminum Co.,* 370 U.S. 9, 14–15 (1962); *Texas Natural Gasoline Corporation,* 116 NLRB 405, 406 (1956), enforcement denied 253 F.2d 322 (C.A. 5, 1958). (". . . Hood's picketing in conjunction with Henley was for this reason alone not individual action but concerted activity within the meaning of the Act.") *Indiana Gear Works,* 156 NLRB 397, 399 (1965), enforcement denied 371 F.2d 273 (C.A. 7, 1967). Beyond this, an employee who engages in individual action based on prior consultation with other employees has been held to have been engaging in concerted activities. *Texas Natural Gasoline Corporation, supra* at 414. (". . . [T]his action of Hood stemmed out of, was directly due to, and constituted a continuation of the group action of the night before.") *Gibbs Die Casting Aluminum Corp.,* 174 NLRB 75, 78–79 (1969). So also has the test of concerted activities been held satisfied where other employees approve the action being taken by the individual employee, *Walls Manufacturing Company, Inc,* 128 NLRB 487, remanded on other grounds 299 F.2d 114 (C.A.D.C., 1962), 137 NLRB 1317, and where an individual employee had appealed to other employees for their participation in activity designed to benefit their mutual aid or protection, notwithstanding the fact that those appeals may have been unsuccessful. See *Detroit Forming, Inc.,* 204 NLRB 205, 212–213 (1973).

In the instant case, one searches the record in vain for similar activity by Henley to establish that his conduct resulted from concerted activities. Yet, so far as the record discloses, Henley was acting, as he stated in his March 18 letter to Morris, purely on the basis of his individual concern with safety. There is, of course, no bargaining representative and, therefore, no collective-bargaining agreement the terms of which Henley can be said to have been attempting to implement. *Snap-On Tools Corporation,* 207 NLRB 238 (1973); cf. *C & I Air Conditioning, Inc., et al.,* 193 NLRB 911 (1971), enforcement denied 486 F.2d 977 (C.A. 9, 1973). There is no evidence that Henley was acting in conjunction with any other employee in protesting to Respondent and to Cal OSHA, or that his activity had been an outgrowth or extension of discussions with other employees. *Continental Manufacturing Corp.,* 155 NLRB 255, 257–258 (1965); *Gunnels Industrial Painters, Inc.,* 197 NLRB 599, 600 (1972). Indeed, it appears highly unlikely that Henley would have discussed the problem with other employees in light of his testimony that the majority of Respondent's employees spoke a language which he could not speak.

While both Cal OSHA and the industrial hygiene section of the State of California Department of Health had made inspections prior to Henley's March correspondence, there

is no evidence that these inspections resulted from employee complaints and, accordingly, these prior inspections by state agencies are not, of themselves, sufficient to establish that safety was of interest to other employees. Nor is there other evidence that would support a conclusion that employees other than Henley were interested in Respondent's failure to take safety precautions. Cf. *Hugh H. Wilson Corporation,* 171 NLRB 1040 (1968), enfd. 414 F.2d 1345 (C.A. 3, 1969); *Oklahoma Allied Telephone Company, Inc.,* 210 NLRB 916 (1974). While employee Nicolas did participate in the Cal OSHA compliance investigation of March 26, Henley described Nicolas' presence as being for the purpose of enabling Complaince Officer Boyle to "communicate with the non-English speaking employees." Thus, so far as the record discloses, Nicolas' presence, unlike that of Henley, appears not to have been occasioned by prior conduct regarding safety, but rather by an ability to serve as a conduit for communications between Boyle and Respondent's employees. It was thus Cal OSHA which sought out Nicolas — not Nicolas who sought out Cal OSHA. At no point is there evidence that Nicolas, or for that matter any other employee, had spoken to Henley about safety or had ratified Henley's communications with Respondent and Cal OSHA. Cf. *Walls Manufacturing Company, supra.*[7] In fact there is no evidence that safety had ever been even a topic of conversation among Respondent's employees. Conversely, there is no evidence that Henley had ever made even an effort, even one which proved unsuccessful, to appeal to employees concerning safety or that, despite his references to "employees" in his complaints to Respondent (fns. 2 and 3, *supra)* and in his correspondence with Cal OSHA *(supra),* Henley was either acting as or holding himself out as the representative of other employees. Cf. *Guernsey-Muskingum Electric Cooperative, Inc.,* 124 NLRB 618, 623–624 (1959), enfd. 285 F.2d 8 (C.A. 6, 1960).[8] Instead, as admitted in his letter to Morris, Henley was pursuing his own individual interest in an individual manner when he made these complaints. This does not satisfy the statutory requirement of "concerted activities."

To support her above-quoted argument that Henley was engaging in concerted activities, Counsel for the General Counsel cites *G.V.R., Inc.,* 201 NLRB 147 (1973). At first blush, this decision does appear to support her argument, for the Board states:

> We also find, in addition to these reasons, that an employee covered by a federal statute governing wages, hours, and conditions of employment who participates in a compliance investigation of his employer's administration of a contract covered by such a statute, or who protests his employer's noncompliance with the contract, is engaged in concerted activity for the mutual aid and protection of all the employer's employees similarly situated.

Yet, a careful reading of that Decision precludes the conclusion that it supports the proposition that an individual employee, acting alone and without relation to his co-workers, can engage in concerted activities within the meaning of Section 7 merely by invoking the protection of a statute other than the Act. Rather, the Board appears to have used the term "employee" generically and to have been addressing the "mutual aid or protection" facet of Section 7 in doing so.

That this is the case is shown by several factors. First, prior to making the above-quoted statement, the Board recites the activities of Glace and Curry which led to the former's termination (the only discharge issue presented as Curry had withdrawn his charge pursuant to a private adjustment with the employer), setting forth the discussion between the two men regarding the conditions of employment giving rise to the dispute. Thus, these discussions gave rise to concerted activity in that case which is absent in the instant case. Second, in response to the dissenting opinion that there was no concerted activity, the majority opinion points out specifically, in the very sentence which follows that quoted above: "Further, since no exceptions have been filed to the Administrative Law Judge's findings of concerted activity, we cannot, in accordance with our well-defined procedures, entertain the merits of this issue as our dissenting colleague would have us do." Absent consideration of this issue, it can hardly be maintained that the case supports the proposition that otherwise individual activity becomes concerted activity when the protection of a statute is invoked.

That *G.V.R.* does not support the General Counsel's argument is best illustrated by the only case in which it has been cited as authority. In *White's Gas & Appliance, Inc.,* 202 NLRB 494 (1973), the Board stated (at 495, footnote 3):

> See *Thurston Motor Lines, Inc.,* 159 NLRB 1265, 1306–07, in which the Board enunciated the principle that it would be contrary to public policy to hold that the making of complaints to public authorities *in the*

[7] A similar conclusion follows from the presence of mechanical employee Stewart on March 11 when Singh accused Henley of being a troublemaker and reprimanded him for sending to Respondent's Fort Worth headquarters a copy of the undated letter to Cal OSHA. There is no evidence that Stewart ever discussed with Henley either the letter to Cal OSHA or safety in general, and there is no evidence that Stewart had any interest in the matter of safety.

In this regard, I have considered the effect of Singh's reprimand of Henley in light of the effect which it might have should Stewart ever become interested in safety and attempt to secure correction of safety problems. However, I do not feel that a violation can be predicated on such a theory in the circumstances of this case. Even under Henley's version of Singh's comments, they were not directed to the sending of the letter to Cal OSHA, but were concerned with the fact that, in transmitting a copy of that letter to Fort Worth, Henley had gone over the head of local management. More significantly, as I am finding that Henley's activities were not concerted, Singh's reprimand was directed to activity not protected by Section 7 and, consequently, this is not a situation where an employee is restrained and coerced by virtue of an employer's comments of retaliation against another employee because of the latter's exercise of rights protected by the Act. See e.g., *New Castle Lumber and Supply Co.,* 203 NLRB 937, fn 1 (1973); *Carolina Quality Concrete Co.,* 193 NLRB 463, 469 (1971). Rather, the situation is one where Stewart overheard Singh reprimanding Henley for individual activity. Absent some evidence of concurrence by Stewart or some other employee in Henley's conduct, Stewart's presence cannot convert the activity from that which is individual to that which is concerted.

[8] Nor is there evidence that would show that Respondent believed that Henley was engaged in concerted activities or that would support an argument that Respondent discharged Henley to prevent his activity from becoming concerted. See *Henning and Cheadle, Inc.,* 212 NLRB 776 (1974); *Detroit Forming, Inc., supra* at 212–213.

> *course of concerted activity* removes the protection of the Act from concerted activity. *G.V.R., Inc.*, 201 NLRB No. 2. [Emphasis supplied.]

Therefore, I find that *G.V.R., Inc., supra,* does not support the General Counsel's theory that, by complaining to Respondent and to Cal OSHA about the general safety conditions of Respondent's facilities, Henley converted his individual activity to that which was concerted, thereby garnering the protection of Section 7 of the Act.

Lending support to my conclusion in this regard are several other cases posing essentially the same issue. In *Hunt Tool Company,* 192 NLRB 145 (1971), the Board held not concerted an employee's act of filing a claim under the Jones Act and/or the Longshoremen's and Harbor Workers' Compensation Act. Though the General Counsel advanced to support his allegation an analysis similar to that which has long been applied to individuals filing grievances under collective-bargaining agreements — that the employee's claim was ". . . but an extension of the concerted activity that gave rise to the agreement." *B & M Excavating, supra; Bunney Bros. Construction, supra* — the Board rejected the argument, pointing out (at 146): ". . . the filing by a single employee of a purely personal claim . . . is far different from his filing a claim under a collective-bargaining agreement and it is not the Board's position that all activities, no matter how remote, rising out of concerted activity are protected."

It might, however, be argued that *Hunt Tool* is distinguishable from the instant case on the ground that, if remedied, Henley's complaints, unlike that in *Hunt Tool,* would have an immediate beneficial effect upon the conditions of employment of other employees by virtue of the improvement in safety at Respondent's facilities. However, the Board has never formulated a rule that individual activity becomes concerted merely because the remedy for a single employee's complaint would benefit other employees who have shown no interest in the subject of that complaint. Indeed, there are cases reaching a directly contrary result. Thus, in *Continental Manufacturing Corp., supra,* an employee was terminated for submitting a letter to her employer. Among the matters listed in that letter was "majority of the employees are disgusted with the treatment they are receiving." The letter then went on to recite several items which the employee, herself, considered "bad," such as favoritism by the supervisor among employees and locked restrooms. Clearly, these were matters of import extending beyond the purely personal situation of the employee who authored the letter; their correction would benefit other employees as well. Yet, the Board held (at 257):

> The letter, which was directed only to the Respondent, was prepared and signed by Ramirez acting alone. She did not consult with Rodriguez, any other employee, or the Union about the grievances therein stated or her intention of sending the letter to DeSantis. There is no evidence that the criticisms in the letter reflected the views of other employees, nor is there evidence that the letter was intended to enlist the support of other employees.

With appropriate substitution of names, these sentences would apply precisely to the circumstances presented in the instant case.

Of more recent vintage is the situation presented in *Northeastern Dye Works, Inc.,* 203 NLRB 1222 (1973), where the Board found that the single employee's complaints about, *inter alia,* the failure of a fellow employee to, in essence, work while the other employees were working hard were not concerted, because, ". . . we are not convinced by this record that Bertholdt registered these complaints on behalf of anybody but himself," at 1223. Again, there is a striking similarity between this reasoning and the situation with Henley inasmuch as the latter's complaints appear to have admittedly arisen solely because of personal convictions regarding safety. The fact that other employees might benefit from correction, as was true in *Northeastern Dye Works, supra,* was merely an indirect effect of the goal of satisfying a personal objective. As the Board stated in *Northeastern Dye Works, supra* at 1223:

> . . . in order for his complaints to have been protected, they must have related to the correction of working conditions which were of concern to the group of employees allegedly being represented by him and he must have been speaking for the benefit of the interested group, not merely for himself.

One point should be added. The result which I reach may appear harsh in light of Henley's laudatory, though personal, object and in view of the fact that his complaints appear to have been meritorious. Yet, I am bound by the statute. When it held that it lacked authority to certify bargaining units consisting of but one employee, the Board pointed out that, ". . . the principle of collective bargaining presupposes that there is more than one eligible person who desires to bargain." *Luckenbach Steamship Company, Inc., et al.,* 2 NLRB 192, 193. Similarly, Henley seeks protection under a section of the Act requiring "concerted activities," and, as shown above, that presupposes that there be more than one employee involved where "mutual aid or protection" is sought.[9] However, it does not appear that Henley was totally without protection, for Boyle pointed out that Respondent could not fire Henley for lodging these complaints and, accordingly, protection is seemingly afforded under the state statute.

Therefore, I find that Henley did not engage in concerted activities and that his activities were, accordingly, not protected by Section 7 of the Act. In these circumstances, Singh's threat, Respondent's failure to grant Henley a wage increase, and Henley's discharge on March 27, assuming they were caused by Henley's activities, cannot constitute violations of Section 8(a)(1) of the Act.

[9] While Henley testified that he had told Oates and Clark that he intended to visit the Board at the time that he requested time off on March 11, I do not find that the warning notice issued on March 13 was in reprisal for seeking protection under the Act. This had not been alleged by the General Counsel *Medicine Bow Coal Company,* 217 NLRB No. 152, fn. 2 (1975). Moreover, I do not credit Henley's testimony that he told this to Oates and Clark on March 11. Only when it was suggested to him did Henley so testify and it appeared to me when he did so that he was attempting to improve his position. Moreover, his testimony in this regard was not corroborated by Oates, who was called as a witness by General Counsel.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent has not violated the Act in any manner within the meaning of the National Labor Relations Act, as amended.

On the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

It is hereby ordered that the complaint be, and it is hereby, dismissed in its entirety.

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided, in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes