

Bartlett Nuclear, Inc. and International Brotherhood of Electrical Workers, Local Union 1500.
Case 31-CA-18203

June 6, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, BROWNING, AND COHEN

On September 30, 1992, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed an answering brief.¹

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

¹The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

Pursuant to counsel for the Respondent's second request, the time to file exceptions was extended to December 4, 1992. Timely exceptions and brief in support were filed by the Respondent. At the request of counsel for the General Counsel, the time to file answering briefs was extended to January 8, 1993, and timely answering briefs were filed by the General Counsel and the Charging Party.

On February 18, 1993, on receipt of the Respondent's motion for leave to file a reply brief, the Executive Secretary's office advised the Respondent's counsel that Sec. 102.46 of the Board's Rules had been revised in October 1991 to automatically provide for the filing of reply briefs without the need to seek special leave from the Board, but that reply briefs were limited to 10 pages, that no extensions of time would be granted, and that the last date for filing a reply brief was January 22, 1993. The Respondent's counsel was further advised of her right to seek relief under the excusable neglect provisions of Sec. 102.111(c).

On February 24, 1993, the Respondent filed a revised motion for leave to file a reply brief, supported by a requisite affidavit. The Respondent's counsel states that on receipt of the General Counsel's answering brief, she consulted the Board's Rules and determined that Sec. 102.46(g) required special leave from the Board to file a reply brief, and that although it did not set forth a specific time limit, counsel intended to submit the motion and brief within a reasonable amount of time. However, a family emergency necessitated an out-of-state trip which delayed the filing of the motion and brief and it was not until February 18, 1993, that counsel became aware of the revised Rules. The Respondent counsel argues that no prejudice will result from acceptance of its reply brief and requests the Board to accept its reply brief under Sec. 102.111(c).

Having considered the matter, the Board finds that Respondent counsel's proffered reasons for failing to file a timely reply brief do not rise to the level of excusable neglect. A family medical emergency would ordinarily excuse a late filing, but the medical emergency invoked here occurred 6 days after the date on which the brief was due to be filed under the operative rule, which has been in effect since 1991. The Office of the Executive Secretary and the Regional Offices are always available for consultation in the event counsel is unsure of due dates under current rules. If the Board were to excuse a failure to ascertain the requirements of applicable rules, then the rules would become a nullity. See *NLRB v. Washington Star Co.*, 732 F.2d 974, 977 (D.C. Cir. 1984) (declining to uphold Board's enforcement of filing deadline because of prior inconsistent enforcement). Accordingly, the Respondent's request to file reply brief out-of-time is denied.

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,² and conclusions and to adopt the recommended Order.³

The Respondent is engaged in the business of radiation protection and supplies temporary employees to augment the work forces of utility plants during "out-ages," the time when a plant is shut down for repairs or refueling. The Respondent began providing employees to Pacific Gas & Electric (PG&E) at Diablo Canyon, California, in February 1990.⁴ On March 26, the Union called a strike against the Respondent and similar employers as a part of a nationwide organizing effort. Marc Shackelford, the Respondent's site coordinator at Diablo Canyon, told the Respondent's striking employees that if they did not return to work by March 29, their "positions were going to be filled by PG&E employees, and that their jobs would be abolished." During the afternoon of March 29, Shackelford handed out final paychecks to strikers on the picket line, stating that "if they wanted to accept the checks, that their positions had gone away, the utility had replaced them and that their positions had been abolished."

The Respondent argues that it was merely conveying to its employees a decision reached by PG&E. Assuming, without deciding, that the Respondent did not participate in that decision with PG&E, we nevertheless agree with the judge that, by the above actions, the Respondent violated Section 8(a)(3) and (1) of the Act. The striking employees retained the right to make unconditional offers to return to work to the Respondent, not to PG&E, and to be reinstated if positions were available, and if positions were not available to be placed on a preferential hiring list.⁵ We acknowledge that the Respondent could not have forced PG&E to take the strikers back after the positions were lawfully filled. Neither the Respondent nor PG&E, however,

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³The judge incorrectly stated that on March 28, 1990, Site Coordinator Marc Shackelford spoke to 35 to 40 strikers at a hotel near the site, and thereafter the strikers voted not to return to work. Shackelford testified that he spoke to employees on the picket line, apparently on March 28, 1990. Russell Gray of PG&E also met with two of the strikers at a nearby restaurant. The striking employees later that evening met at the hotel where they voted not to abandon the strike. The judge also stated that striker Carl Stewart was told before the strike began that because he admitted involvement in the strike, the Respondent could not confirm that his resume had been sent to another utility for consideration. The appropriate timeframe for this occurrence was after the strike began but before the strike ended. These inadvertent errors do not affect the results.

⁴All dates are in 1990 unless otherwise specified.

⁵See *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969).

had the right to abolish the nonreturning strikers' Laidlaw rights as employees of the Respondent. The Respondent was the striking employees employer. The Respondent had a continuing obligation to accept the striking employees' unconditional offers to return to work and to reinstate those employees if positions were available, or if positions were not available, to place the strikers on a preferential hiring list. See *Laidlaw Corp.*, supra. Instead, the Respondent told the striking employees that their jobs were "abolished." The Respondent thereby violated the Act.⁶

Further, Site Coordinator Shackelford's statements, coupled with his giving the nonreturning strikers their final paychecks, could reasonably have been understood by the nonreturning strikers to mean that the Respondent was abolishing the chance of future employment with the Respondent at other sites. Indeed, after March 29, nonreturning strikers who inquired about work with the Respondent at other outages were told that they were not eligible for rehire for a year because they had not completed the outage at Diablo Canyon. The Respondent contends that it acted in accordance with its longstanding policy that any employee who, except for compelling personal reasons, did not complete an outage, was ineligible to work for the Respondent for 1 year.⁷ The Respondent's president, Bruce Bartlett, testified, however, that he was not aware of any reason these employees did not complete their assignments at Diablo Canyon except that they refused to abandon the strike, and their positions were therefore eliminated. Thus, the Respondent imposed its 1-year probationary rule on the nonreturning strikers solely because they remained on strike. "The law is clear that when an employer disciplines an employee because he has engaged in an economic strike, such discipline violates Section 8(a)(3) and (1) of the Act." *General Telephone Co. of Michigan*, 251 NLRB 737, 738-739 (1980). That is this case. Accordingly, we agree with the judge that by telling strikers that their jobs were abolished when they refused to abandon the strike, by refusing to hire these employees for other outages, and by telling them they were ineligible for work with the Respondent for a period of 1 year, the Respondent violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

⁶We are not suggesting that Respondent was responsible for PG&E's decision to abolish the jobs at PG&E. Rather we hold that Respondent violated the Act by making a decision to abrogate its employees' rights to reinstatement, as employees of Respondent, to jobs at other locations served by Respondent.

⁷Later, the Respondent rescinded the application of its probationary policy to the nonreturning strikers. Thus, the Respondent notified most of the nonreturning strikers, by letters dated April 30 and May 1, that the probationary policy would not apply to them.

orders that the Respondent, Bartlett Nuclear, Inc., Diablo Canyon, California, and Plymouth, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Raymond M. Norton, Esq., for the General Counsel.

Reed E. Schaper, Esq. (Pepper, Hamiston & Scheetz), of Los Angeles, California, for the Respondent.

Richard P. Crawshaw, of Greenwood, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Los Angeles, California, on October 29 and 30, 1991,¹ and is based on a charge filed by International Brotherhood of Electrical Workers, Local Union 1500 (the Union) on April 9, 1990, alleging generally that Bartlett Nuclear, Inc. (Respondent) committed certain violations of Section 8(a)(1)² and (3)³ of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act). On October 17, 1990, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(1) and (3) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for Respondent, and the Charging Party⁴ and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is a Massachusetts corporation with an office and principal place of business in Plymouth, Massachusetts, where at all times material herein it has been engaged in the

¹Unless otherwise stated, all dates refer to the calendar year of 1990.

²Sec. 8(a)(1) of the Act provides that, "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Sec. 7 of the Act provides that, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

³Sec. 8(a)(3) of the Act provides that, "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

⁴Charging Party's motion to accept brief is hereby granted.

business of providing radiation protection services to nuclear powerplants throughout the United States, including California; that during the course and conduct of its business operations, Respondent annually sells and ships goods or services valued in excess of \$50,000 to customers located outside the State of California.

Accordingly, as Respondent admits, I find and conclude that Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. General Background and Labor Relations History

As stipulated, Respondent's business, as concerns this case, consists of supplying temporary employees to augment the work forces of various utility companies during their "outages," for example, when the affected utility company is, from time to time, shut down for repairs or refueling. Respondent does not employ workers except during times in which utilities with which it contracts are shut down for maintenance, such as repairs or refueling.

Utility companies routinely increase their work forces, more than double, during "outages." They do so by adding temporary employees of their own, plus temporary employees of various employers who perform security services, maintenance, construction, and radiation protection.

Respondent, from its Massachusetts headquarters, is one such employer which supplies employees to utilities during outages. Its work is in the field of radiation protection. It hires employees who are dosimetry technicians, decontamination technicians, and health physics technicians. Respondent keeps a roster of approximately 1200 to 1900 persons who it employs throughout the United States.

Respondent hires its employees for fixed temporary assignments at whatever powerplant is involved in the shutdown by the utility company with which it contracts. The periods of employment offered to employees by Respondent vary from 2 weeks up to a year. At the Diablo Canyon site outages typically last about 60 days, and are repeated at 18-month intervals.

Approximately half of the people hired by Respondent work only for it, with the other half also working for other employers, competitors of Respondent, which provide temporary radiation protection services to utilities. This last group travels from plant to plant, though many return to the same plant repeatedly. The duration of each period of employment varies greatly, as shown above, due to the variations in the duration of the outages at the various plants. Plants typically undergo an outage about once each year.

Employees are typically hired through a process of sending resumes to Respondent and other employers prior to the completion of their work on whatever outages they happen to be working on. Indeed, they generally simply ask Respondent to send their resumes on to prospective employers where Respondent has an upcoming contract. They are hired

only if the affected utility approves of their resume. Once approved, employees are hired by Respondent, the terms of employment are agreed upon, and the employees are then sent to the affected plant for a 2-week training session, conducted by the affected utility. Present at the training session are employees of Respondent, as well as any new permanent or temporary radiation protection employees hired by the affected utility. Security checks are completed during the training periods, following which the employees are assigned to perform duties conforming to the utility's scheduling of outage tasks.

Respondent does not have a collective-bargaining relationship with the Union. PG&E employees performing radiological protection services at the site were, however, organized and represented by Local Union 1485 of the IBEW.

B. The Facts Relating to this Case

Respondent began providing radiation protection services under a contract with Pacific Gas & Electric (PG&E) the Diablo Canyon, California site operated by PG&E in February. Respondent's president has been Bruce Bartlett. Its site coordinator at Diablo Canyon has been Marc Shackelford.

The primary function of the site coordinator's job is to act as liaison between Respondent and the utility operating the affected plant concerning administrative duties connected with Respondent's employees at the site. The site coordinator does not act on a daily basis in a supervisory capacity in this job, but he is admitted to have supervisory authority. Respondent paid the employees, though day-to-day scheduling, supervision, and training were done by PG&E.

On March 26, during the period in March and April when about 185 of Respondent's employees were working on an outage at Diablo Canyon, the Union called a strike against Respondent and similar employers, as part of a nationwide organizing effort.⁵

Forty of Respondent's employees at the Diablo Canyon site of PG&E went out on strike in response to the Union's request. A number of them thereafter participated in picketing the site's front gate with signs reading "Bartlett refuses to recognize Local 1500 IBEW."

Respondent contends that a couple of days after the strike began, Respondent was advised by PG&E, through one Russell Gray, that if the strikers didn't return to work by March 29, their jobs would be assumed by PG&E's employees and the remainder of Respondent's employees. Respondent further contends that this decision by PG&E effectively removed Respondent from any possible liability for the fate of the strikers, since it had no part in the decision to "abolish" their jobs.

Moreover, during this discussion Gray rejected a proposal by Respondent to have Respondent bring in additional workers to replace those who were striking, noting that the train-

⁵I do not regard the record as clear on the question of whether or not the Union sought to establish a unit of employees in one nationwide unit involving employees of Respondent and its competitors, or in nationwide units of each individual employer, or, simply, to drum up employee support nationwide. Thus, I do not find that I can conclude that the strike and picketing constituted unprotected activity, as recognitional picketing or for an illegal purpose.

In any event, Respondent has conceded at trial that the picketing was protected activity under the Act.

ing of such workers would take all of the remaining time in the outage, and by the time training was completed they would be already in the process of laying off workers in order to wind down the outage. Thus, Grey regarded Respondent's proposal in this respect as a futility.

However, it is also true that Bruce Bartlett testified, contrary to his testimony at trial, in an investigatory affidavit that during this discussion,

Between the three of us (Bruce Bartlett, Gray, and Shackelford), we decided that those pickets who wanted to return to work by Thursday March 29 (apx 40 employees were then on strike) could return to their jobs, but those who chose not to return would be given their final paychecks & their jobs would be reassigned between our employees and qualified PG&E employees. I instructed Shackelford to inform the strikers of this decision. About 17 strikers returned to work by Thursday afternoon, & the rest were given their final paychecks. When they later inquired about their jobs after the strike, we could not put them back to work because the work had been reassigned by PG&E, who does all scheduling, & because we were already in the process of laying people off.

Respondent argues that Bruce Bartlett's use of the term "we" in the affidavit is ambiguous and, moreover, merely the product of the writing of an investigating Board agent.⁶

Gray also consulted with other PG&E managers, but not with Respondent, about arranging to borrow 10 employees from the chemistry department who had been cross-trained in radiation protection job duties. After determining that such a plan would be feasible, he decided to carry it out.

According to Respondent's argument, it was solely PG&E's plan which established the elements of:

- (1) March 29 as the deadline for returning to the strikers' jobs; and,
- (2) All who wished could return by that date; and,
- (3) Eliminate the position of those who didn't return by that date, and cover those job functions with existing PG&E employees.

It is uncontradicted that the deadline was arrived at after consideration of the critical path of the outage, making it necessary that it be established in order to meet the previously decided on deadline for completion of the outage.

Respondent admits that, at the least, it agreed with Gray that those employees who failed to return to work by Thursday, March 29, were to be given final paychecks. Respondent, however, argues that it had no choice but to grant its agreement. Accordingly, as shown above, Bruce Bartlett instructed Shackelford to inform the striking employees of this decision.

Setting about complying with his instructions, on Tuesday, March 27, Shackelford talked to employees on the picket line. One of them, Jim Hancock, was clearly known by Respondent as well as strikers as a leader of the strike effort

⁶I cannot agree, because the affidavit shows on its face that Bruce Bartlett participated greatly in its wording and exercised complete control over its contents. This is demonstrated by the numerous changes, corrections, additions, and deletions made in the affidavit.

and as a conduit of information between Respondent and the strikers. After their talk, Hancock immediately reported to other employees that Shackelford had told him that the position Respondent was taking was that, if the strikers didn't return to work by the end of their shift on March 29, their positions would be "abolished."

On Wednesday, March 28, Shackelford spoke to a group of about 35-40 strikers at a hotel near the site. Afterwards, the strikers voted by a small majority not to return to work.

On Thursday morning, March 29, Shackelford admittedly told a group of picketers that they could go back to work by Thursday or "the jobs they filled now, after that Thursday, would go away, so the positions would be abolished."

That same day, about 4 or 5 p.m., Shackelford again went to the picket line and handed out final checks to the 23 strikers remaining on the line, 17 employees having by then returned to their jobs. He first told them that if they accepted the checks, their positions were "gone away," that the utility had replaced them, and their positions had been abolished. All of the pickets present accepted the checks.

Respondent admits that Shackelford went out to the picket line to advise the picketing employees of the situation. There, Shackelford told Jim Hancock that they were free to return to work by Thursday but, failure to return would result in PG&E abolishing the positions which Respondent had previously had pursuant to its contract with PG&E. Respondent argues that Shackelford told picketing employees that PG&E had imposed a deadline on it which Respondent was powerless to alter, that employees who failed to return by March 29 would have their jobs assumed by PG&E employees and remaining employees of Respondent, leading to a situation wherein their former positions would no longer be available during the short time remaining in this outage.

Picketing continued for a few days, before being discontinued permanently around April 4 or 5.

Until about April 30 or May 1, Respondent informed strikers who inquired about employment with Respondent at other locations where there were, or were about to be, outages that they were not eligible for consideration since they were on probation for a period of a year.

For example, one employee, Carl Stewart, credibly testified that he had called Respondent before the strike began and, in accordance with usual practice, asked that his resume be sent to another utility for consideration for employment. He had been assured that it would be done immediately by express mail. However, still before the strike began, but several days later, he again called to check to see if his request had been carried out, and was told that, since he admitted that he was involved with the strike, he couldn't be told whether or not his resume had been sent. Still later, on March 30, he called again, and was informed by a recruiter that he was no longer eligible for any job with Respondent, and was on 1-year probation for failure to fulfill his contract at Diablo Canyon.

Another striking employee, John Ware, admittedly unable to recall much detail but nonetheless credible in what he did recall, testified that he was told much the same thing as Stewart had been told in a conversation he had with the home office in about mid-March, when he sought to be placed in work at the WPPSS.⁷ But, upon rechecking on

⁷Washington Public Power Supply System.

March 30, Ware was told that his resume was not under consideration by the utility he'd requested it be sent to, and that, instead, he was on probation for a year.

As noted above, 17 of the strikers abandoned the strike and returned to work before the deadline. Twenty-three did not, and are alleged to have been illegally discharged and placed on probation for a 1-year period. Their names are:

William Armstrong	Lief Linden*
Michael Bennett*	John Miller*
Leonard Buntele*	James Moscarella
Walter Cathcart*	James Nelson*
Katherine Cooper	Steven Reed*
Leslie Easley*	Donald Schelb*
Mark Hanke*	Mary Ann Schelb*
David Hatch*	Charles Stewart*
David Jones	Frank Vargas
Susan Kellar*	John Ware*
Thomas Kellar*	Dawn Woods*
Rhonda King*	

Then, apparently realizing that legal problems might result from its imposition of "probation" upon strikers, Respondent rescinded its "probation" policy and so notified at least the great majority of employees it had been applied to. However, by that time, it is clear that some may well have been caused to miss out on job opportunities, such as at WPPSS.

About April 30 and May 1 Respondent sent a form letter to 18 of the strikers who had refused to return.⁸ The letter stated that:

As you know, [Respondent] has you on a preferential recall list for Diablo Canyon Nuclear Plant.

However, we are also interested in obtaining immediate work for you at any of our other locations. Please call our personnel department at your earliest convenience for details.

You may have been told that you were not eligible for rehire for up to a year. As you know, this is our normal policy for personnel who have not completed an outage (except for compelling personal reasons). We believe this policy does not apply to your situation and you are in fact eligible for rehire at any of our work locations.

General Counsel admits that Respondent thereafter offered and/or placed a number of the nonreturning strikers in positions at plants other than the one referred to above as the one where employment had been sought, as well as that Respondent had by then completed its staffing at the affected utility.

General Counsel contends that Respondent's failure to provide striking employees with bonuses and travel allowances, in accord with its past practice, amounts to an independent discriminatory action by Respondent. Respondent contends that such matters were controlled only by PG&E.

Respondent admits that it placed the employees who failed to return to work by the deadline on "probation," but argues that, since it almost immediately reconsidered and rescinded

this action, any violation found in this regard should be determined to be de minimis.⁹

C. Findings and Conclusions

The first issue to be addressed is whether the activity engaged in by employees is the sort of activity which is protected by the Act, under Sections 7 and 8(a)(1). That activity consisted of resorting to a strike and picket line in order to demonstrate support of the Union and/or its international affiliate.

Through the years the Board has balanced the rights of employees to organize, and to publicize their organizational desires by striking and/or picketing, against the legitimate property right of employers to have their workplaces meet legitimate business needs, such as an obligation to meet a contractual or fiscal deadline. It should go without saying that employee rights to strike, or picket, are among those which rank at or near the top of any litany of employees' rights. Accordingly, they are among those ordinarily protected by Section 7 of the Act.

The Board will not find picketing which does not proceed for an unreasonable length of time to be unlawful, even if it could be argued that it was for recognition in a unit which is contrary to Board policy (which I have found unsupported by this record), *Teamsters Local 115*, 157 NLRB 588 (1966), so long as the picketing is not for the purpose of securing a statutorily prohibited unit, which no party even claims to be the case here. *Teamsters Local 71 (Wells Fargo)*, 221 NLRB 1240 (1975); *Dunbar Armored Express*, 211 NLRB 687 (1974).

Here, as shown above, Respondent had conceded that the activity of the employees in this respect was protected by the Act.

Accordingly, I find and conclude that the activity of employees in striking and picketing Respondent's Diablo Canyon jobsite was protected activity, and within the penumbra of Sections 7 and 8(a)(1) of the Act. It follows that the employer's motivation must be examined in order to determine whether or not it was unlawful.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation.

First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision.

Second, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

I find that this case is one to which *Wright Line* has application, contrary to Respondent's position, inasmuch as the motivation of Respondent is clearly in question. Respondent seeks to limit the inquiry about motivation solely to the issue of whether or not Respondent controlled the question of

⁸These employees are indicated by an asterisk in the list just preceding.

⁹I disagree with both these contentions. The effect on employees was substantial, and the rescission carried with it no assurances against repetition, as is afforded employees by this Order.

whether or not the job was to be continued or finished by resort to replacement workers, arguing that Respondent had no such control. I find that focus too narrow. The true issue is whether or not Respondent's motivation in acting to advise employees that their jobs were "terminated" or had "gone away," or that employees who failed to abandon the strike by March 29 were on probation for 1 year (and thereafter failing and refusing to forward their resumes for consideration by prospective sources of employment) was solely business related.

Here the circumstantial background for Respondent's decision includes its failure to confine itself carefully to a lawful response to its employees protected activities. Instead it advised them that their continuation would necessitate imposition of a punishment simply not required by the circumstances, i.e., abolition of their jobs and placement upon probation. Respondent could and should have resorted to less harsh and inherently threatening statements and actions, i.e., advising strikers, truthfully and legally, that they could be replaced if they persisted in striking past a date where business needs would require the employment of alternative means of completing the work which was then underway, and then doing so.

As found above, employees credibly testified to statements made to them by Shackelford about the fact that their jobs would be abolished if they failed to return to work, abandoning their protected activity of striking and picketing, by a date certain. These statements are not protected by Section 8(c) of the Act, because they go too far and, to that extent, are not truthful. The Board and I are bound to follow the standard set by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), where the Court stated that, in determining whether an employer's statements constitute lawful predictions or unlawful threats, "the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control."

I find that Respondent failed to abide by this rule. Instead of advising that employees' jobs would be subject to replacement it simply stated that the jobs would be abolished, or would go away.

I do not find the distinction so trivial as is urged by Respondent. Employees such as those involved here are clearly interested in, and routinely do, find employment for short periods of time. That the time remaining for them to complete the work on the outage was short, and would have, had the strike persisted, disappeared entirely within 2 or 3 weeks at the most, does not mean that employees would have no legitimate interest in whatever work there might have been, if any, remaining to be done whenever they chose to abandon their strike. Certainly, that interest on the part of such workers is not de minimis.

Neither I nor anyone else can demonstrate that PG&E was not in control of the decision to utilize replacement workers and revise schedules in order to ensure the timely completion of the work on its outage. That is its right, just as in any strike situation the employer has the option of securing replacement workers in order to continue with its business. But, the fact that nature (in this case, PG&E) was about to take its course could have been communicated to employees by the use of "carefully phrased" words, without at the same time threatening employees with the loss of the entirety

of their rights connected with the jobs. I find and conclude that the failure to do so, and the chosen utilization of inherently threatening words concerning those residual job rights amounted to coercion, and is therefore violative of Section 8(a)(1) of the Act.

In this case, given the close proximity in time of the violations of Section 8(a)(1) to the engagement in the protected activities, and the animus demonstrated thereby, I conclude that the General Counsel has made a prima facie case that employees were given "final" paychecks, with the understanding that their jobs were "terminated," and that employees were placed on probation for a 1-year period (and, therefore, denied referral or forwarding of their resumes, which were needed for consideration as prospective employees at other utility outages) because they had engaged in the protected activity of striking and picketing Respondent's jobsite at Diablo Canyon.¹⁰

The question of whether or not Respondent has succeeded in rebutting the prima facie case of General Counsel is answered in the negative simply by looking at the same facts set out above.

PG&E was doubtless possessed of full authority to determine to press forward with its completion of work on the outage of the Diablo Canyon plant. And Respondent was doubtless as free of influence upon the making of that decision as it portrays itself to be. The fact remains that Respondent could have and, under the guidelines in *Gissel*, should have done far less than it chose to do. That is the distinguishing factor between this case and the case cited by Respondent's brief, *Power Plant Maintenance Co.*, 286 NLRB 205 (1987).

I find and conclude that Respondent's actions in presenting employees with final paychecks, in "abolishing" their jobs when they failed and refused to abandon their protected activity of participation in the strike and picketing, and in placing them on probation for such failure and refusal by them, all constitute violations of Section 8(a)(3) and (1) of the Act. I so find and conclude.

Accordingly, I find and conclude that counsel for the General Counsel has proven each of the allegations of illegal actions made and contained in the complaint against Respondent, and I shall order an appropriate remedy for all such illegal actions.

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 violated Section 8(a)(1) of the Act by threatening to abolish the jobs of employees if they did not

¹⁰The record is inadequate to determine whether or not employees were in fact deprived thereby of benefits such as travel pay and/or bonuses in this case. However, I should note that I believe Respondent was given adequate notice of the possibility of such questions being injected into this case, simply because whenever a violation of Sec. 8(a)(3) is found it follows that a make-whole remedy should be considered appropriate. Accordingly, while the record here is inadequate to determine just who, if anyone, is actually entitled to be made whole in these specific respects, I wish to be clearly understood as deciding that such matters are among those to be considered in the compliance stage of these proceedings, along with any other appropriate "make whole" issues as may exist.

abandon their strike and return to work for Respondent by a certain date.

3. Respondent violated Section 8(a)(3) and (1) of the Act by discharging and abolishing the jobs of, and by placing on probation, its employees, William Armstrong, Michael Bennett, Leonard Buntele, Walter Cathcart, Katherine Cooper, Leslie Easley, Mark Hankel, David Hatch, David Jones, Susan Kellar, Thomas Kellar, Rhonda King, Lief Linden, John Miller, James Moscarella, James Nelson, Steven Reed, Donald Schelb, Mary Ann Schelb, Charles Stewart, Frank Vargas, John Ware, and Dawn Woods because they had participated in a strike and picketing of Respondent, each of which is an activity entitled to protection under the Act.

4. The above unfair labor practices have an effect on commerce as defined in the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the above-named employees were unlawfully discharged, that the jobs of the above-named employees were abolished, and that the above-named employees were placed on probation, Respondent is ordered to offer each of them immediate reinstatement to his or her respective former position, displacing if necessary any replacement or, if not available, to a substantially equivalent position without loss of seniority and other privileges. It is further ordered that each of the employees named above be made whole for lost earning resulting from the unlawful actions taken against him or her, by payment to him or her of a sum of money equal to that she would have earned from the date of discharge, to the date of a bona fide offer of reinstatement, less net interim earnings during that period. Backpay shall be computed in the manner prescribed by *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).¹¹ Interest on any such backpay shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is further ordered that the Respondent expunge from its records any references to the unlawful actions it took against each of the employees named above, and provide each of them with written notice of such expunction, and inform him or her that the Respondents's unlawful conduct will not be used as a basis for further personnel actions against him or her.¹²

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Bartlett Nuclear, Inc., Diablo Canyon, California, and Plymouth, Massachusetts, its officers, agents, successors, and assigns, shall

¹¹ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

¹² See *Sterling Sugar*, 261 NLRB 472 (1982).

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Advising, warning, threatening, or otherwise imparting to employees that their jobs will be abolished if they do not abandon their engagement in a strike and picketing, or other activities protected by the Act.

(b) Discharging, placing on probation, or abolishing the jobs of employees, or otherwise restraining, coercing, or interfering with their exercise of rights guaranteed by Section 7 of the Act, because they have engaged, together with other employees, in a strike and/or picketing, or have joined or supported any labor organization, or otherwise joined with other employees in attempts to better or retain their rates of pay, wages, hours of work, or other terms and conditions of employment.

(c) 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) Offer the above-named employees immediate and full reinstatement to their respective former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed, and make each employee whole for any loss of earnings and other benefits suffered as a result of the discrimination against him or her, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges, abolishment of jobs, or placement on probation of the above named employees, and notify each employee in writing that this has been done and that the actions taken against them will not be used against them in any way in the future.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Plymouth, Massachusetts, and mail to each affected employee, named above, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be mailed to each affected employee (with proof of mailing provided to the Regional Director), and 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.

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

¹⁴ 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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, place on probation, or abolish the jobs of employees because they have engaged in activities protected by the Act, including striking and/or picketing.

WE WILL NOT advise, threaten, warn, or otherwise let employees know that they are subject to having their jobs abol-

ished or discharged if they do not abandon their engagement in activities protected by the Act.

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

WE WILL offer William Armstrong, Michael Bennett, Leonard Buntele, Walter Cathcart, Katherine Cooper, Leslie Easley, Mark Hankel, David Hatch, David Jones, Susan Kellar, Thomas Kellar, Rhonda King, Lief Linden, John Miller, James Moscarella, James Nelson, Steven Reed, Donald Schelb, Mary Ann Schelb, Charles Stewart, Frank Vargas, John Ware, and Dawn Woods, and each of them, immediate and full reinstatement to their respective former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make each of them whole for any loss of earnings and other benefits resulting from the actions we took against them, less any net interim earnings, plus interest.

WE WILL notify each employee named above that we have removed from our files any reference to any action we took against him or her, and that no such action will be used against him or her in any way in the future.

BARTLETT NUCLEAR, INC.