Cook Family Foods, Inc. ***and*** **International Brotherhood of Firemen and Oilers, AFL–CIO.** Cases 9–CA–32153, 9–CA–32163, 9–CA–32479, 9–CA–32677, 9–CA–33299–1, and 9–CA–33299–2

April 9, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On June 26, 1996, Administrative Law Judge Steven M. Charno issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order only to the extent consistent with this Decision and Order.

The Respondent's employees went on strike in November 1993. During the course of this lengthy and sometimes violent strike, the Respondent devised standards to determine whether to discharge any employee, whether striker or nonstriker, accused of strike misconduct. The Respondent determined not to discharge any employee accused of strike misconduct unless either the employee admitted the misconduct or there was "indisputable" evidence of the misconduct, such as videotapes, a court determination of culpability, or corroboration by a wholly disinterested eyewitness. Following this standard, the Respondent declined to discharge a number of strikers and nonstrikers who were reported to have engaged in strike misconduct. The Respondent did, however, discharge nine strikers for strike misconduct.

In determining whether the discharge of these nine strikers violated Section 8(a)(3) and (1) of the Act, the judge found that the Respondent possessed an honest belief that each of the nine engaged in misconduct. The judge further found that each actually had engaged in misconduct. Strikers Estep, Smith, and Berry set up or threw nails on the road leading to the Respondent's facility. Lowe placed caltrops—devices with four projecting spikes—in front of vehicles entering the Respondent's plant. Hogan placed nails and caltrops on the road leading into the Respondent's facility. Barker and McDavid placed nails on the road and kicked a vehicle. Dixon slashed the tires on a nonstriking employee's vehicle. Clere attempted to run a car occupied by three nonstriking employees off the road. The judge found that this misconduct was sufficiently serious to justify denial of reinstatement. No party excepts to these findings.

The judge further found, however, that the misconduct on which all of the discharges except that of Clere were based was less serious than the misconduct of two supervisors, Hall and Skinner, whom the Respondent did not discharge. The judge therefore concluded that the Respondent's refusal to reinstate all of the strikers other than Clere was discriminatory and violated Section 8(a)(3) and (1).

Contrary to the judge, we find that Hall's and Skinner's misconduct was not of equal or greater severity than that of the eight strikers and that, therefore, the Respondent did not act discriminatorily in refusing to reinstate the strikers.

Hall's and Skinner's misconduct, as found by the judge, was as follows.[2] At about 9:30 a.m. on December 14, 1994, at which point the strike had been in progress for more than 12 months, Hall and Skinner went to a car in the Respondent's parking lot during a work break to examine a high-powered rifle that one of the Respondent's employees had for sale. From the car, the Union's picket line, maintained by four strikers, was about 140 yards to the southwest, and the trailer that the Union used as its strike headquarters was about 155 yards to the northwest. Hall and Skinner took the rifle from the car. Standing next to the car, each examined the rifle and sighted through its telescopic sight on a target to the northeast. The pickets witnessed Hall's and Skinner's actions and called the police. The Respondent subsequently issued written warnings to both Hall and Skinner for "using poor judgment in displaying a gun in front of pickets."

In determining that Hall's and Skinner's misconduct was more serious than that of eight of the strikers, the judge noted that the Board, in *Gibson Greetings, Inc.*, 310 NLRB 1286 (1993), characterized a nonstriker's display of a gun for all strikers to see as "the implicit threat of the use of deadly force," 310 NLRB at 1313. The judge further noted that the Board, in *Chesapeake Plywood, Inc.*, 294 NLRB 201 (1989), held that "the threat of physical harm is by its nature more serious than a threat to property," 294 NLRB at 205 (footnote omitted). The judge reasoned that the misconduct of the strikers other than Clere constituted threats to property or acts of vandalism not shown to have resulted in bodily injury and, therefore, was less serious than the misconduct of Hall and Skinner, which the judge implicitly found to be a threat of bodily injury.

We find that the cases on which the judge relied do not support his conclusion. Both cases cited by the judge concerned nonstrikers displaying guns to pickets while crossing picket lines. In *Gibson Greetings*, a supervisor stopped or slowed his vehicle while driving through a picket line and showed the pickets his gun, while on another occasion a striking employee drove through the picket line with a gun displayed on her car

[1] We find it unnecessary to pass on the accuracy of the judge's description of the law in fn. 41 of his decision.

[2] No exceptions were filed to the judge's findings of fact.

dashboard. Thus, it was the "possession of a gun while crossing the picket line by a supervisor and another [nonstriking] employee" that the Board found to constitute the "implicit threat of the use of deadly force employed by the nonstrikers who displayed their guns for all striking employees to see." 310 NLRB at 1313. Similarly, in *Chesapeake Plywood*, a nonstriking employee drove across the picket line with a shotgun on the front seat of his car and told the pickets "if you mess with me, you have to answer to this," or words to that effect. 294 NLRB at 203. In this context the Board found the employee's display of the shotgun, accompanied by his threatening statement, to constitute a threat of physical harm to the pickets.

In the present case, unlike those on which the judge relied, Hall and Skinner were not crossing the picket line or engaged in any interaction with the pickets when they were holding the rifle. Nor were Hall and Skinner even in the vicinity of the picket line. Rather, they were in the Respondent's parking lot 140 yards away from the pickets and 155 yards away from the Union's trailer, distances greater than the length of a football field.[3] Moreover, they did not point the rifle in the direction of the pickets or the Union's trailer. Rather, with the pickets to the southwest and the trailer to the northwest, they sighted the rifle at a target to the northeast. Finally, Hall and Skinner examined the rifle because an employee was offering it for sale and they were considering purchasing it. Thus, unlike the individuals in *Gibson Greetings* and *Chesapeake Plywood*, whose display of firearms while crossing the picket line clearly was intended to intimidate the pickets, Hall's and Skinner's reason for handling the rifle was unrelated to the pickets or the strike.[4]

It is beyond dispute that Hall and Skinner displayed poor judgment in choosing to examine a rifle in the Respondent's parking lot at a time when striking employees were picketing the Respondent's facility. Indeed, the Respondent issued them written warnings for their actions. Unlike the judge, however, we do not find that their actions were the equivalent of displaying firearms to pickets while crossing picket lines. As noted above, their handling of the rifle occurred a considerable distance away from the picket line, involved no interaction with the pickets, and was for a purpose unrelated to the picketing. We do not find that Hall's and Skinner's errant actions, undertaken solely for the purpose of examining a rifle that was for sale, were of equal or greater severity than the strikers' misconduct, which was intended to cause property damage. We, therefore, do not find that the Respondent's failure to discharge Hall and Skinner for this conduct rendered the Respondent's discharge of the strikers for strike misconduct discriminatory. Accordingly, we conclude that the Respondent's discharge of the strikers did not violate Section 8(a)(3) and (1) of the Act.[5]

[3] We find inaccurate the judge's characterization of Hall and Skinner as "in close proximity to the picket line."

[4] We similarly find this case distinguishable from *Keco Industries*, 301 NLRB 303 (1991), in which a striker's discharge for carrying a gun in the vicinity of a gate used by nonstrikers was found not to violate the Act. In the present case, nonstrikers Hall and Skinner were not in the vicinity of strikers when examining the rifle.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cook Family Foods, Inc., Grayson, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) and reletter paragraph 1(c).
2. Delete paragraphs 2(a), (b), and (c), and reletter the subsequent paragraph.
3. Substitute the attached notice for that of the administrative law judge.

[5] We agree, however, with the judge's finding that Hall's and Skinner's examining of the rifle within the sight of the pickets violated Sec. 8(a)(1) of the Act, as it might reasonably tend to interfere with the pickets in the exercise of their rights guaranteed by the Act. No improper motive is necessary to establish a violation of Sec. 8(a)(1).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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 coercively display firearms to peaceful picketing employees.

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

COOK FAMILY FOODS, INC.

Deborah Jacobson, Esq., for the General Counsel.
Kelvin C. Berens, Esq. and *Mark McQueen, Esq. (Berens & Tate, P.C.)*, of Omaha, Nebraska, for the Respondent.
Paul L. Styles, Esq., of Atlanta, Georgia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN M. CHARNO, Administrative Law Judge. In response to charges timely filed by the International Brotherhood of Firemen and Oilers, AFL–CIO (the Union), complaints were issued on April 10, 1995, and January 9, 1996, which alleged that Cook Family Foods, Inc. (Respondent) had unlawfully discharged nine employees and had refused to bargain in good faith with the Union in violation of the National Labor Relations Act (the Act). Respondent's answers denied the commission of any unfair labor practice.

A hearing was held before me in Grayson, Kentucky, on October 24–26, 1995, and March 25–27, 1996. The parties submitted simultaneous posthearing briefs under an extended due date of May 31, 1996.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the processing and nonretail sale of meats at Grayson, Kentucky. During the 12 months ending October 31, 1994, Respondent, in the course of its business sold and shipped goods valued in excess of $50,000 to points outside Kentucky. It is admitted, and I find, that Respondent is an employer within the meaning of the Act.

The Union is admitted to be, and I find is, a labor organization within the meaning of the Act.

II. ALLEGED UNLAWFUL CONDUCT

A. *Background*

The Respondent began operating its Grayson facility in 1990. A campaign by the Union to organize Respondent's employees led to a representation election in 1991. In September 1993, the National Labor Relations Board (the Board) certified the Union as the exclusive bargaining representative of Respondent's production and maintenance employees. At the end of November 1993, the Union went on strike to protest Respondent's refusal to bargain. During the strike, Respondent employed security guards to videotape picket line activity. From its outset, the strike engendered violent behavior. In mid-December 1993, the trailer used by the Union as its strike headquarters was penetrated by rifle bullets and shotgun blasts which did not physically injure the five occupants.[1] During the same period, a nonstriking employee who got out of his car carrying a baseball bat was brutally beaten by a large number of strikers.[2] Between the beginning of December 1993 and the end of July of the following year, striker activity on the picket line included the following misconduct: (1) injuring nonstriking employees, (2) threatening the lives of nonstriking employees, (3) blocking the road into Respondent's facility on many occasions, and (4) damaging the vehicles of nonstriking employees by (a) placing nails and caltrops[3] in the road, (b) hitting the cars with projectiles, boards and metal objects, and (c) breaking their windshields.[4] In response to Respondent's unfair labor practice charges, the Board issued complaints against the Union for picket line violence, and the Union ultimately entered formal settlement agreements. Respondent also obtained state court injunctions limiting the Union's picket line activity, and the Board's General Counsel ultimately secured restraining orders against the Union from the United States District Court. In February 1995, the United States court of appeals overturned the Board's certification of the Union, and the strike ended in late April of that year.

Toward the outset of the strike, Respondent's plant manager, Tim Messick, formulated the following standards to determine whether to discipline employees accused of strike misconduct. In any situation where an employee was accused of strike misconduct by one or more other employees and the former did not admit the conduct attributed to him, Respondent would not discharge the accused employee in the absence of "indisputable" evidence of guilt. Such evidence might consist of videotapes, a court determination of culpability, or the eyewitness account of a wholly disinterested witness.[5]

B. *Refusal to Reinstate Striking Employees*

Absent legitimate business reasons, an employer must reinstate striking employees at the termination of certain strikes. *General Chemical Corp.*, 290 NLRB 76, 82 (1988). A refusal to reinstate may be justified by showing that an employee was guilty of serious picket line misconduct. *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986). Initially, the employer has the burden of demonstrating the existence of an honest belief that a striking employee engaged in such misconduct. *General Chemical Corp.*, supra. Once such a belief has been demonstrated, the burden shifts to the General Counsel to prove that the employee was not engaged in the alleged misconduct or that the misconduct was not sufficiently serious to forfeit the Act's protection. *Axelson, Inc.*, 285 NLRB 862, 864 (1987). Misconduct which "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act" is sufficiently serious to justify a refusal to reinstate. *Clear Pine Mouldings*, supra.

1. Gary Estep

The Respondent terminated Estep on March 3, 1994, on the grounds that, at the outset of the strike, he (1) set up nails on the road leading into Respondent's facility and (2) threw nails on the road. Messick personally witnessed both

[1] Gregory Wilburn, Grayson's chief of police, so testified without controversion.

[2] Respondent's videotapes depict this incident.

[3] A caltrop is a device with four projecting spikes so arranged that, when the device is placed on the ground, one of the spikes is always pointed upward. Caltrops were referred to during the hearing as "jackrocks" and "booby traps."

[4] These findings concerning picket line violence and misconduct appear undisputed and are drawn from Judge Long's September 1, 1994 judgment and order in Civil Action File 93–CI–309 in the Carter Circuit Court.

[5] Messick so testified without controversion.

incidents,[6] and Estep's misconduct was recorded by Respondent's videotape camera operators.[7] I therefore find that (1) Respondent possessed an honest belief pursuant to its "indisputable" evidence standard that Estep engaged in the alleged misconduct and (2) Estep actually engaged in that misconduct. Throwing nails on the road constitutes misconduct sufficiently serious to justify an employer's refusal to reinstate a striking employee. *Certainteed Corp.*, 282 NLRB 1101, 1118 (1987).

2. Kevin Smith

The Respondent terminated Smith on March 3, 1994, on grounds identical to those on which it refused to reinstate Estep. Messick personally witnessed Smith, in concert with Estep, setting up and throwing nails on the road leading into Respondent's facility,[8] and Smith's misconduct was recorded on videotape.[9] Accordingly, I find that (1) Respondent possessed an honest belief pursuant to its "indisputable" evidence standard that Smith engaged in the alleged misconduct and (2) Smith in fact engaged in that misconduct.

3. Tim Barker

The Respondent terminated Barker on April 27, 1994, on the grounds that Barker (1) placed nails on the road leading into Respondent's facility on December 20, 1993, (2) kicked the vehicle of a nonstriking employee the same day, and (3) tried to run two nonstriking employees off the road on December 9, 1993. Messick observed Barker placing nails and caltrops on the road,[10] and Respondent's videotapes show Barker repeatedly engaging in such misconduct on December 20. Barker was identified to Respondent by the driver of the vehicle which Barker kicked,[11] and that misconduct was also captured on videotape. When Barker "substantially admitted" during a state court contempt hearing that he "drove his vehicle so as to follow and intimidate two working Cooks employees," he was held in contempt for violating the court's injunction which limited the Union's strike activities.[12] Barker did not testify in the instant proceeding, and there is no probative evidence that he was innocent of any of the misconduct described above. Accordingly, I find that (1) Respondent possessed an honest belief pursuant to its "indisputable" evidence standard that Barker engaged in serious misconduct[13] and (2) Barker in fact engaged in that misconduct. Kicking a car constitutes misconduct sufficiently serious to justify an employer's refusal to reinstate a striking employee. *GSM, Inc.*, 284 NLRB 174 (1987).

4. Myron Hogan

Respondent terminated Hogan on April 27, 1994, on the grounds that he threw nails and placed caltrops on the road leading into Respondent's facility. Hogan's misconduct, which was reported to Respondent by a security guard and a supervisor,[14] was also displayed on Respondent's videotapes. Hogan did not testify in this proceeding, and there is no probative evidence that he did not engage in the misconduct relied on by the Respondent. Accordingly, I find that (1) Respondent possessed an honest belief pursuant to its "indisputable" evidence standard that Hogan engaged in the alleged misconduct and (2) Hogan in fact engaged in that misconduct.

5. Pat McDavid

Respondent terminated McDavid on April 27, 1994, on the grounds that he (1) kicked a vehicle and (2) threw nails on the road leading into Respondent's facility.[15] Messick personally witnessed both instances of misconduct,[16] and both were recorded by Respondent's videotape camera operators.[17] I therefore find that (1) Respondent possessed an honest belief pursuant to its "indisputable" evidence standard that McDavid engaged in the alleged misconduct and (2) McDavid actually engaged in that misconduct.

6. Wes Lowe

The Respondent terminated Lowe on May 16, 1994, on the ground that he placed caltrops in front of vehicles entering the plant. Two instances of such misconduct by Lowe were personally witnessed by Messick,[18] and both were captured on Respondent's videotapes. Lowe did not testify in this proceeding, and there is no probative evidence that he did not engage in the misconduct relied on by Respondent. I therefore find that (1) Respondent possessed an honest belief pursuant to its "indisputable" evidence standard that Lowe en-

[6] Messick credibly so testified.

[7] Estep was stipulated to be one of the individuals shown on the video of the alleged nail throwing incident, but he maintained under oath that he was throwing rocks he had found next to the road. The videotape shows that the thrown objects were shiny and metallic, appeared to be of uniform size and bounced erratically when they hit the road. I therefore find that those objects possessed the characteristics of and were nails, rather than rocks. For the foregoing reasons and based on their demeanor while testifying, I credit Messick over Estep on the question of whether Estep engaged in strike misconduct.

[8] Messick credibly so testified.

[9] Smith admitted that he was the individual identified by Messick in the video of the alleged nail throwing incident but testified that he too was only throwing rocks. Given my finding concerning the objects depicted on the videotape (see fn. 7, above) and based on their demeanor on the stand, I credit Messick over Smith on the question of whether Smith engaged in strike misconduct.

[10] Messick credibly testified to this effect without controversion.

[11] Messick credibly so testified without controversion.

[12] The contempt hearing before Judge Long took place on August 1, 1994, and the judge's September 1, 1994 judgment and order is the basis for the findings in text.

[13] Although Respondent could not have relied on the September 1, 1994 judgment and order to meet its "indisputable" evidence standard with respect to an April 27, 1994 discharge, I find that Barker's termination was justified by Respondent's honest belief that he engaged in serious misconduct on December 20, 1993.

[14] Messick credibly testified to this effect without controversion.

[15] Messick was unsure whether McDavid had also been discharged for throwing objects at vehicles.

[16] Messick credibly so testified.

[17] McDavid testified that (1) he was on the picket line approximately 5 days each week for 15 months, (2) he saw nails being thrown by groups, (3) he saw nails on the road, (4) he never saw an identifiable individual throwing nails, and (4) he never threw nails. Messick's identification of McDavid as one of the individuals pictured on the videotape throwing nails and caltrops was uncontroverted. For the foregoing reasons and based on their demeanor while testifying, I credit Messick over McDavid on the question of whether McDavid engaged in strike misconduct.

[18] Messick credibly so testified without controversion.

gaged in the alleged misconduct and (2) Lowe in fact engaged in that misconduct.

7. James Berry

The Respondent terminated Berry on September 14, 1994, on the ground that he set up nails on the road leading into Respondent's facility. Berry's alleged misconduct, which was reported to Respondent on December 8, 1993, by a nonstriking employee,[19] was denied by Berry during Respondent's investigation. Respondent took no disciplinary action with respect to Berry until Judge Long, after a hearing, found that Berry "threw nails out onto the roadway in front of Cooks facility" and held Berry in contempt for violating the court's injunction.[20] Berry died before commencement of the hearing in this proceeding.[21] I therefore find that (1) Respondent possessed an honest belief pursuant to its "indisputable" evidence standard that Berry engaged in the alleged misconduct and (2) Berry actually engaged in that misconduct.

8. Albert Clere

The Respondent terminated Clere on April 24, 1995, on the ground that he followed three nonstriking employees from the plant and attempted to run their car off the road during August 1994. The three employees, Mark Breeding, Timothy Breeding, and James Daniels reported Clere's alleged misconduct to Respondent and filed criminal charges with the police. Clere declined to cooperate with Respondent's investigation in the absence of his attorney, and Respondent took no disciplinary action until Clere entered a plea of guilty to a reduced criminal charge of reckless endangerment in the second degree based on the August 1994 incident.[22] In response to his plea, Clere was given a suspended sentence of 1 year in jail on December 21, 1994. At the hearing in this proceeding, Clere's innocence of misconduct was not established by a preponderance of the credible evidence.[23] I therefore find that (1) Respondent possessed an honest belief pursuant to its "indisputable" evidence standard that Clere engaged in the alleged misconduct and (2) General Counsel did not meet his burden of demonstrating that Clere was innocent of the alleged misconduct. See *Axelson, Inc.*, supra. Attempting to cut off a nonstriking employee's vehicle constitutes misconduct sufficiently serious to justify an employer's refusal to reinstate a striking employee. *General Chemical Corp.*, supra.

9. Duane Dixon

The Respondent terminated Dixon on April 24, 1995, on the ground that he slashed the tires of a nonstriking employee, Bruce Church, at the latter's home on a night in mid-January 1994. The incident was observed by one of Church's neighbors, Virginia Clevenger, who described the perpetrator to Sergeant Ron Lindeman, the investigating officer, and later that night identified Dixon as the individual who slashed Church's tires. Immediately after the identification, Dixon was arrested. Learning of the arrest, Respondent interviewed Lindeman and secured an affidavit from Clevenger. There is no evidence that Clevenger was anything other than a wholly independent eyewitness who had no relationship with either the Respondent, Dixon or the Union. After Dixon had been terminated, he was tried criminally in a state court for vandalizing Church's car and was acquitted by the jury after a hearing in which Clevenger testified.[24] At the hearing in this proceeding, Dixon's innocence of misconduct was not established by a preponderance of the credible evidence.[25] For the foregoing reasons, I find that (1) Respondent possessed an honest belief pursuant to its "indisputable" evidence standard that Dixon engaged in the alleged misconduct, and (2) the General Counsel did not meet his burden of demonstrating that Dixon was innocent of the alleged misconduct.

C. *Respondent's Alleged Condonation of Misconduct by Nonstriking Employees*

In *Aztec Bus Lines*, 289 NLRB 1021, 1027 (1988), the Board articulated the following rule:

> Although an employer does not violate the Act by refusing to reinstate strikers who have engaged in serious misconduct, it is not free to apply a double standard. It may not knowingly tolerate behavior by non-strikers or replacements that is at least as serious as, or more serious than, conduct of strikers that the employer is relying on to deny reinstatement to jobs.

Except as discussed below, Respondent's standards for determining whether to discharge an employee accused of strike misconduct were shown to have been uniformly administered and evenly applied to both striking and nonstrik-

[19] Messick credibly testified to this effect without controversion.

[20] See fn. 12, above.

[21] I find Berry's affidavit denying misconduct to be entitled to less weight than Judge Long's determination of Berry's culpability.

[22] The motion filed by Clere to enter a guilty plea contains the following language: "I do not admit guilt but I believe the evidence against me strongly indicates guilt and my interests are best served by a guilty plea." There is no evidence that Respondent was aware of the qualified nature of Clere's plea at the time of the discharge.

[23] Timothy Breeding testified as to Clere's misconduct, while Clere admitted entering a guilty plea but denied engaging in any type of misconduct. Clere initially testified on cross-examination that he had never thrown cigarettes at or spit on nonstrikers' cars while he was picketing. When videotapes were played showing Clere spitting and throwing cigarettes at vehicles, Clere became argumentative, equivocated as to whether he was the individual shown on the tapes and ultimately admitted that he was the depicted individual and that he had spit on and thrown cigarettes at the nonstrikers' vehicles. Given Clere's demonstrated penchant for mendacity, his obvious lack of respect for his oath and his demeanor while testifying, I do not credit his denial of misconduct during August of 1994.

[24] I find the jury's determination concerning Dixon's alleged misconduct to be less than persuasive given the "reasonable doubt" burden of proof applicable in criminal cases.

[25] Dixon testified before me that he did not slash Church's tires and, on the night of his arrest, he went from his home to a gas station two blocks from Church's house where he waited alone in his car for over an hour with the expectation that a friend would join him. Lindeman credibly testified that (1) the officers who first stopped Dixon saw an unconcealed knife in the latter's car, (2) the knife had been concealed by the time Lindeman arrived, (3) Dixon told the arresting officers that he had been on the picket line before being dropped off at the gas station to pick up his car, and (4) Clevenger positively identified Dixon. Clevenger's affidavit supported Lindeman's account of the identification. Based on the foregoing facts and on Dixon's demeanor on the stand, I do not credit his denial of culpability.

ing employees. Thus, Respondent rejected allegations by nonstriking employees that strikers had engaged in serious misconduct in the absence of "indisputable" corroborative evidence.[26] Similarly, union allegations of misconduct by nonstriking employees,[27] when those allegations were denied by the alleged perpetrator and were unsupported by "indisputable" corroborative evidence, did not cause Respondent to terminate the accused nonstrikers.[28]

The only arguable exceptions to Respondent's even handed application of its disciplinary standards consist of three separate instances where (1) a nonstriking employee was alleged to have been in possession of an unconcealed firearm, (2) Respondent conducted an investigation during which the accused nonstriker admitted possession of the firearm but denied pointing it at anyone, and (3) Respondent did not discharge the nonstriker. The question which must be answered with respect to each incident is whether the undisputed facts established by Respondent's investigation indicate the existence of misconduct requiring the alleged malefactor's termination.[29]

The first situation involved Lois McKenzie and Karen Bear, who were driving to work in the former's car on August 28, 1994. McKenzie stopped at a red light, and her car was surrounded by four male strikers. Because she feared strike violence, McKenzie had a handgun in the middle of the front seat of the car. Neither McKenzie nor Bear picked up or pointed the handgun. After experiencing verbal abuse from the strikers, McKenzie ran the light and entered the half-mile stretch of road[30] leading to the plant.[31] During the confrontation, the strikers saw the gun in McKenzie's car.[32] McKenzie feared for her safety because (1) she had been struck by a projectile and hospitalized at the outset of the strike, (2) she had been publicized by the strikers as "Scab of the Month" in February 1994, and (3) she had been followed on various occasions during the strike, including one where she was followed to work by three men who were waiting outside her home.[33] McKenzie was not disciplined by Respondent for carrying a firearm in her vehicle. Based on the foregoing facts, I conclude that McKenzie's possession and unintentional display of a firearm was "defensive in nature" and was not misconduct serious enough to warrant her dismissal. See *Cabot Corp.*, 223 NLRB 1388, 1390–1391 (1976), affd. 561 F.2d 253 (D.C. Cir. 1977); *Chesapeake Plywood, Inc.*, 294 NLRB 201, 203–204 (1989).

The second situation involved Tim Wilson, a supervisor, who left the plant on the second night of the strike behind a car driven by another supervisor, Paul Tussey. The latter acquired a flat tire while passing through the picket line and pulled into a parking lot approximately 185 yards[34] beyond the pickets. Tussey and Wilson had jacked up the former's car to change the tire when they were approached by a large number of rapidly moving pickets. A state trooper, who pulled his car between Tussey's car and the approaching strikers, yelled at the strikers to stand back and at the nonstrikers to "get out of there." Tussey and Wilson kicked the car off the jack and drove off. During the confrontation, Wilson admittedly had a handgun tucked into the waistband of his trousers, but he did not touch the gun at any time. He had the gun on his person because he feared assault by the strikers.[35] During the confrontation, Linda Justice, one of Tussey's passengers, repeatedly screamed "we're going to die."[36] Wilson was not disciplined by Respondent for openly carrying a firearm. Based on the foregoing facts, I conclude that Wilson's possession and display of a firearm "was defensive in nature" and was not misconduct serious enough to warrant his dismissal. See *Cabot Corp.*, supra; *Chesapeake Plywood, Inc.*, supra.

The final situation involved two supervisors, Cass Hall and David Skinner, who went to Respondent's parking lot at approximately 9:30 a.m. on December 14, 1994, to examine a firearm which one of Respondent's employees had for sale. The two supervisors went to a vehicle which was located approximately 140 yards northeast of the picket line manned by four strikers and 155 yards southeast of the trailer used by the Union as its strike headquarters.[37] Hall and Skinner removed a high-powered rifle with a telescopic sight from the car. Each of the men examined the rifle and sighted it on a target to the northeast of their position, but both denied

[26] Specific examples of Respondent's refusal to terminate striking employees in the absence of corroborative evidence include its rejection of the following allegations: (1) Union Steward Virgil Adams broke a vehicle window, (2) Union Steward Lewis Baier attempted to overturn a vehicle, (3) Union Shop Committeeman J. C. Collins threw a rock at a vehicle, (3) Jerome Hunter used a slingshot, and (4) Joe Trimper threw nails under vehicles. Messick credibly testified that, during the strike, Respondent received over 1000 incident reports alleging striker misconduct.

[27] Respondent cannot be found guilty of disparate treatment when it was not notified of alleged nonstriker misconduct, such as the allegation that Tim Wilson swerved his vehicle at strikers. See *Garrett Railroad Car & Equipment v. NLRB*, 683 F.2d 731, 740 (3d Cir. 1982).

[28] Specific examples of Respondent's refusal to discharge nonstrikers in the absence of corroborative evidence include its rejection of the following allegations: (1) Paul Tussey's passenger brandished a firearm, (2) Lois McKenzie pointed a firearm at strikers, (3) Cass Hall and David Skinner pointed a firearm at strikers, (4) Brian Stevens and Eddie Locke dumped nails in a parking lot, (5) Arcus Lawhorn and Tony Zigler swerved their vehicles at pickets, and (6) unidentified individuals swerved their vehicles at pickets. Parenthetically, videotape evidence refuted, rather than corroborated, the following alleged nonstriker misconduct: (1) Brian Stevens swerved his vehicle at pickets and (2) the driver of the guard van intentionally battered a striker.

[29] Except as noted, the findings concerning these incidents are limited to the facts which were admitted to Respondent by the accused nonstriking employees.

[30] A map prepared by Respondent indicates that the intersection where McKenzie stopped is 2370 feet from Respondent's property line and the property line, approximately 180 feet from the plant.

[31] The credited, uncontroverted testimony of McKenzie and Bear that they so described the incident to Messick during Respondent's investigation is corroborated by Messick's summary of his interview with McKenzie.

[32] This finding is based on the fact that a striker's description of the gun coincides with that of McKenzie's description.

[33] McKenzie so testified at the hearing without controversion.

[34] Respondent's map shows the relevant parking lot entrance to be 555 feet from the picket line.

[35] Wilson's and Tussey's affidavits, which were taken during Respondent's investigation, so state.

[36] Tussey so testified without controversion at the hearing.

[37] These findings concerning distance are based on the scale used on Respondent's map and the parties' stipulations as to the location of the car, the trailer and the picket line.

pointing the rifle at the pickets or trailer.[38] The pickets saw Hall and Skinner with the rifle and called the police.[39] Respondent issued written warnings to both supervisors "for using poor judgment in displaying a gun in front of pickets."[40]

The two supervisors' admitted possession and brandishing of a high-powered rifle took place (1) without a defensive motive, (2) during an already violent strike, (3) in close proximity to the picket line, (4) in broad daylight, and (5) within the view of peacefully picketing employees who reported the event to the police. Under these circumstances, I conclude that the conduct of Hall and Skinner "may reasonably tend to coerce or intimidate employees in exercise of rights protected by the Act" within the meaning of *Clear Pine Mouldings*, supra. See *Keco Industries*, 276 NLRB 1469 (1985), remanded 819 F.2d 300 (D.C. Cir. 1987), affd. on remand 301 NLRB 303 (1991); *Gibson Greetings, Inc.*, 310 NLRB at 1291, 1313. Neither the fact that Kentuckians may legally carry firearms nor the fact that an indeterminate proportion of the community carries firearms on occasion dictates modification of this conclusion. See *Lima v. NLRB*, 819 F.2d 300, 305 (D.C. Cir. 1987) (Williams, J., dissenting). For the foregoing reasons, I further conclude that Respondent's failure to discharge Hall and Skinner invalidates its termination of those strikers who engaged in equally or less severe misconduct. See *Aztec Bus Lines.*, supra; *Gibson Greetings, Inc.*, 310 NLRB at 1291. A nonstriker's display of a gun for all strikers to see has been characterized as "the implicit threat of the use of deadly force." *Gibson Greetings, Inc.*, 310 NLRB at 1313. The Board has also held that "the threat of physical harm is by its nature more serious than a threat to property." *Chesapeake Plywood, Inc.*, 294 NLRB at 205. Accordingly, I find that (1) the termination of Albert Clere for his attempt to run three employees off the road was more serious than the misconduct of Hall and Skinner and (2) the terminations of the remaining strikers, all of which were based on threats to property or acts of vandalism which were not shown to have resulted in human injury,[41] were less serious than the misconduct of Hall and Skinner.[42] I therefore conclude that Respondent's refusals to reinstate the following employees violated Section 8(a)(3) of the Act: Gary Estep, Kevin Smith, Tim Barker, Myron Hogan, Pat McDavid, Wes Lowe, James Berry, and Duane Dixon.

[38] The testimony of Hall and Skinner to this effect at the hearing corresponds to Messick's account of their stories during Respondent's investigation.

[39] The pickets so testified without controversion and accurately described the rifle.

[40] The two memoranda are of record.

[41] While Tim Barker was shown to have misused an automobile in the same manner as Albert Clere, Respondent did not have the "indisputable" evidence of Barker's misconduct required under its disciplinary standards until some 4 months after his discharge. After acquired evidence of a nondiscriminatory reason for discharge pretermits back pay and eliminates reinstatement as a remedy. *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879, 886 (1995); *Whitehall Packing Co.*, 257 NLRB 193 (1981).

[42] Given the findings in text, I find moot the allegations of less-serious misconduct by nonstriking employees Robin Caudill, David Caudill, and Charles Snavely.

D. *Alleged Coercion of Strikers*

1. The alleged incident involving Chris Stone

The preponderance of credible evidence does not establish that Stone, an admitted supervisor, engaged in any behavior violative of Section 8(a)(1) of the Act.[43]

2. The incident involving Cass Hall and David Skinner

Based on the above findings as to the manner in which admitted Supervisors Hall and Skinner possessed a firearm and displayed it to peacefully picketing employees, I find that such conduct "could only have the effect of inhibiting the pickets from engaging in their lawful right to conduct their picket line." *Highland Plastics*, 256 NLRB 146, 160 (1981). The test is one of whether their misconduct could reasonably be said to have a tendency to coerce, and the pickets' subjective feelings are not material. *Ford Bros., Inc.*, 294 NLRB 107 (1989). I therefore conclude that Respondent violated Section 8(a)(1) of the Act. See *Highland Plastics*, supra, 256 NLRB at 151, 160–161; *Davis Coal Co.*, 266 NLRB 1072, 1077 (1983) (dictum); *Ford Bros., Inc.*, supra.

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. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By coercively displaying a firearm to peacefully picketing employees, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.
4. By discriminatorily refusing to reinstate striking employees Gary Estep, Kevin Smith, Tim Barker, Myron Hogan, Pat McDavid, Wes Lowe, James Berry, and Duane Dixon, Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.
5. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. The preponderance of the evidence does not indicate that Respondent has otherwise violated the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease those practices and to take certain affirmative action designed to effectuate the policies of the Act. Because Respondent discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date

[43] Strikers William Marcum and Pat McDavid testified that Stone spit on Marcum while Stone was driving through the picket line at 30 miles per hour. Stone denied the behavior attributed to him and pointed out that spitting from a car moving at 30 miles per hour results in spittle on the spitter's face and car. On cross-examination, Marcum equivocated, was nonresponsive and testified under oath that, during his daily participation on the picket line for more than 16 months, he never saw a picketer engage in violence or vandalism. I find Marcum's testmony to be as incredible as that of McDavid. See fn. 17, above. For the foregoing reasons and based on my observation of the witnesses' demeanor on the stand, I credit Stone over Marcum and McDavid.

of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). For the reasons set forth in this decision, Tim Barker is not entitled to reinstatement but shall receive backpay from April 27, 1994, the date of his termination, until September 1, 1994, the date on which Respondent acquired evidence establishing a nondiscriminatory reason for his discharge. See *McKennon v. Nashville Banner Publishing Co.*, supra; *Whitehall Packing Co.*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[44]

ORDER

The Respondent, Cook Family Foods, Inc., Grayson, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively displaying firearms to peacefully picketing employees.

(b) Discriminatorily refusing to reinstate striking employees to their former or substantially equivalent positions 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) Within 14 days from the date of this Order, offer Gary Estep, Kevin Smith, Myron Hogan, Pat McDavid, Wes Lowe, James Berry, and Duane Dixon full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Gary Estep, Kevin Smith, Tim Barker, Myron Hogan, Pat McDavid, Wes Lowe, James Berry, and Duane Dixon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a 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) Within 14 days after service by the Region, post at its facility in Grayson, Kentucky, copies of the attached notice marked "Appendix."[45] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted by 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 Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 31, 1994.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[44] 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.

[45] 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."