Martel Construction, Inc. *and* Western Montana Area District Council of Carpenters, affiliated with United Brotherhood of Carpenters and Joiners of America *and* International Union of Operating Engineers Local No. 400, affiliated with International Union of Operating Engineers, AFL–CIO. Cases 19–CA–20435 and 19–CA–20436

May 28, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 31, 1992, Administrative Law Judge Burton Litvack issued the attached supplemental decision.[1] The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the judge's supplemental decision.[2]

The 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,[3] and conclusions and to adopt the recommended Order.

1. In adopting the judge's decision, supplemental decision, and recommended Order, we note in particular that no evidence was introduced that either of the alleged discriminatees, Robert Williams and Raymund Waliser, who had refrained from entering the jobsite through the primary gate intended for their use, thereafter participated in any illegal secondary picketing at the neutral gate. Under these circumstances, we agree with the judge that Williams and Waliser's withholding of services from their employers was lawful primary strike activity and that the protected character of their activity was not forfeited solely because, on the second day of picketing, the Unions, without the participation of Williams or Waliser, unlawfully picketed the neutral gate in addition to the primary gate. Consequently, we agree that the Respondent's contention that Williams and Waliser had engaged in unprotected activity lacks merit.

2. In examining the Respondent's exception pertaining to the adequacy of its July 28 reinstatement offers to Williams and Waliser, we, unlike our dissenting colleague, find that the wording of those offers amounts to precisely what the Board in *Esterline Electronics Corp.*, 290 NLRB 834 (1988), specified would not suffice to toll an employer's backpay obligations. The dissent, in citing *Esterline* for the proposition that the Board will not find a reinstatement offer invalid merely because the ''specified reporting date is unreasonably short,'' ignores the condition precedent that the offer be valid and *Esterline*'s clear explanation that:

> [t]he offer will be treated as invalid . . . if the letter on its face makes it clear that reinstatement is dependent on the employee's returning on the specified date *or if the letter otherwise suggests that the offer will lapse if a decision on reinstatement is not made by that date*. [290 NLRB at 835, emphasis added.]

Contrary to our colleague, we do not find that the discriminatees had up to a week to consider the Respondent's offers. The plain language of those offers instructed them ''to immediately report to work *no later than twenty-four (24) hours after receipt of this letter, or Friday, August 4, whichever occurs first.*'' (Emphasis added.)[4] Clearly the next and concluding sentence in the offer, ''[i]f you do not report by those deadlines, we will assume that you are no longer interested in working for our company,'' indicates that the offers would lapse if the discriminatees did not report within 24 hours of receiving them or at the latest by August 4. Not only were these offers inadequate by virtue of the lapsing language, but the evidence is also uncontradicted that neither claimant received notice of the Respondent's offer at a time when it was, by its terms, still outstanding and thus capable of acceptance.

In sum, contrary to our dissenting colleague, we find that the Respondent's offer employed language that would not lead any reasonable person to believe that it survived after August 4. Under *Esterline* this was not a cognizable offer of reinstatement, at least for any person who, like the discriminatees, did not see it until

[1] On June 28, 1990, the judge issued his original decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a response brief, a clarification of the response brief, and a motion to correct and clarify the judge's decision. On April 15, 1991, the Board issued a Decision and Order at 302 NLRB 522, remanding the proceeding to the judge to take evidence the Respondent had sought to introduce in support of its defense that the Unions had engaged in illegal picketing of its reserved gate and to consider what effect, if any, that defense had on his findings and conclusions that the Respondent unlawfully terminated the alleged discriminatees. The Board at that time did not rule on the Respondent's other exceptions nor on the General Counsel's motion to correct and clarify the judge's decision.

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

[3] In referring to a certain complaint allegation in his initial decision, the judge inadvertently stated that the Respondent had violated Sec. 8(4)(1) and (3) of the Act. That reference should be to Sec. 8(a)(1) and (3). Similarly, the judge's reference in sec. III of his findings to Sec. 8(b)(1) should be to Sec. 8(a)(1); his reference in item 3 of his conclusions of law and in the remedy section should be to Sec. 8(a)(1) and (3); and his reference in item 5 of his conclusions of law should be to Sec. 2(6) and (7) of the Act. Finally, in the judge's recommended order, the paragraph after 1(a) should be designated paragraph (b) rather then 2(b), and the term ''later organization'' in that paragraph should be ''labor organization.''

[4] Consequently, we find it unnecessary to consider whether a period of 1 week to respond would have been reasonable under the circumstances. We do note, however, that the Respondent did not proffer reinstatement until 2 weeks after its unlawful dismissal of Waliser and Williams. The timing of its offer thus casts doubt on the imnmediacy of its need to know whether Waliser or Williams intended to return.

after August 4, and they would therefore have no duty of further inquiry.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Martel Construction, Inc., Bozeman, Montana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER OVIATT, dissenting in part.

I join my colleagues in finding that the Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge and no future employment unless they ceased their affiliation with any union, and that the Respondent violated Section 8(a)(3) and (1) by discharging Raymond Waliser and Robert Williams because they refused to cross a picket line and report for work. Unlike the majority, however, I find that the Respondent's July 28, 1989 reinstatement offers to Waliser and Williams tolled the Respondent's backpay obligations.

On July 28, 1989, the Respondent sent reemployment offers to Waliser and Williams in identical registered letters. These letters stated, inter alia, that neither union membership or the lack of union membership was a condition of employment, but that reporting for work each day as assigned was an employment requirement. The reinstatement offers also stated that if Waliser or Williams participated in a strike against the Respondent, they ''will be subject to replacement and subsequent reinstatement only as allowed and required by law.'' Most significantly, the letters closed by stating that

> If you choose to accept reemployment, please immediately report to work no later than twenty-four (24) hours after receipt of this letter, or Friday, August 4, whichever occurs first. If you do not report by those deadlines, we will assume that you are no longer interested in working for our company.

Waliser testified that the letter arrived at his home before August 4, but that when it was delivered he was out of the state attempting to find work elsewhere. Waliser stated that he did not learn of the letter's contents until 4 days after his wife received it, and that he did not respond to the offer, because of its reporting requirements. Williams testified that he first saw a copy of the Respondent's reinstatement offer on August 12. He stated that it had been correctly addressed, but speculated that his wife had received notice of attempted deliveries but had not informed him.

The judge found that these two reinstatement offers were invalid under the principles set forth in *Esterline Electronics Corp.*, 290 NLRB 834 (1988), because each letter

> on its face makes it clear that reinstatement is dependent on the employee's returning on the specified date or the letter otherwise suggests that the offer will lapse if a decision on reinstatement is not made by that date.

In the circumstances presented here, I do not agree that the Respondent's reinstatement offers were inadequate under *Esterline* or under any other Board precedent. In *Esterline* at 835, the Board stated that

> A discriminatee who receives an otherwise valid offer, however, cannot rely on the mere inclusion of an unreasonably short report-back date in the letter to justify a failure to make some response to the employer, if only to ask for more time to consider the offer. A failure to make such a response within a reasonable time after the offer has been made will toll the running of backpay. [Footnote omitted.]

With this in mind, I find that the failure of Waliser and Williams to respond to the Respondent's reinstatement offer tolled the running of the backpay period. The employees' stated reasons for doing so do not, in my view, justify their failure to fulfill their obligation to respond in a relatively prompt manner to the Respondent's letter. It does not place an undue burden on an employee to require him to inform his employer of his intention regarding reinstatement within a reasonable time after notice.

The underlying rationale of *Esterline* is that both the employer and the employee must deal in good faith with each other over matters of reinstatement offers and their implementation. I believe that the Respondent acted in good faith concerning its reinstatement offers, but that the employees did not demonstrate the diligence necessary to continue the backpay period beyond the suggested reporting dates specified by the Respondent's letter. The Respondent gave the two employees up to a week to respond to the reinstatement offers, but the employees declined to express any interest in continued employment with the Respondent.

It is significant with respect to this issue that the Respondent is engaged as a general contractor in the construction industry. As such, the Respondent had a particular need to know whether Waliser or Williams had any intention of returning to work within a reasonable period of time. This is especially true in the case of Waliser, who was particularly valuable to the Respondent because he was able to operate the complicated piece of machinery known as the ''Grove'' crane. The majority's adoption of the judge's recommended reinstatement and backpay remedy unduly penalizes an employer that expressed its willingness to reemploy these employees unconditionally, and rewards two employees who, for all intents and purposes, had abandoned any interest in future employment with the Re-

spondent by failing to respond to the letters offering reinstatement. Accordingly, I dissent from my colleagues' adoption of the judge's recommended reinstatement and backpay order.

Michael S. Hurtado, Esq., for the General Counsel.
Donald C. Robinson, Esq. (Poore, Roth & Robinson, P.C.), of Butte, Montana, appearing on behalf of the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. On June 28, 1990, I issued my decision in the above-captioned matter, finding that Martel Construction, Inc. (Respondent), terminated two employees, Robert Williams and Raymond Waliser, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), and recommending that Respondent be ordered to reinstate said employees to their former positions of employment or, if said positions no longer exist, to substantially equivalent positions and to make each whole for any wages lost, with interest. Subsequently, on April 13, 1991, the National Labor Relations Board (the Board), issued a Decision and Order, remanding the case to me to reopen the hearing and to ''take evidence related to the Respondent's defense concerning the Union's alleged illegal secondary picketing and, thereafter, consider the effect, if any, of that defense on his findings that the Respondent engaged in unlawful conduct.'' Pursuant to the order of the Board, the hearing, in the above-captioned matter, was reopened by me in Bozeman, Montana, on September 24, 1991, and, at said reopened hearing, all parties were afforded the opportunity to examine and cross-examine witnesses, to offer any relevant evidence, and to argue their legal positions orally on the issues, as framed by the Board's order.[1] Additionally, having been afforded the opportunity, both counsel for the General Counsel and counsel for Respondent filed posthearing briefs, which have been carefully considered. Accordingly, on the entire record of the reopened hearing, including the posthearing briefs and my observation of the testimonial demeanor of the several witnesses, I make the following

FINDINGS OF FACT

I. THE ALLEGEDLY UNLAWFUL SECONDARY PICKETING

A. *The Facts*

Respondent is engaged in business as a general contractor in the building and construction industry in the State of Montana, and, in April 1989, commenced work on a multimillion dollar project, a Federal reserve bank building, in Helena, Montana. The record establishes that the jobsite was bordered on the south by Neill Avenue, on the east by Front Street, and on the west by Getchell Avenue; that to the north was a 10-acre vacant lot which was not separated by any natural demarcation from the jobsite; and that the jobsite was completely enclosed by a fence except along the northern end where the fence stopped at a dirt road which cut through the vacant lot to the jobsite. The record further establishes that the jobsite was located on a steep hill, with the northern end at the base of the hill; that the main entrance to the jobsite was on front Street near the corner of Neill Avenue and Front Street; that a second entrance to the project was located on Front Street 330 feet to the north of the main entrance; and that, given the steep hill and the difficult turn into the main entrance, drivers of large delivery trucks would often utilize the dirt road, which cut through the vacant lot to the north of the jobsite, to deliver their loads to the project.[2]

Early in the morning of Thursday, July l3, l989, business agents of the Western Montana Area District Council of Carpenters, affiliated with United Brotherhood of Carpenters and Joiners of America (Carpenters), the International Union of Operating Engineers Local No. 400, affiliated with International Union of Operating Engineers, AFL–CIO (Operating Engineers), and Laborers Local 254, affiliated with Laborers' International Union of North America, AFL–CIO (Laborers), commenced picketing at the jobsite with placards which read, ''On strike due to unfair labor practices against Martel Construction.''[3] Clarence (Clancy) Gaworski, Respondent's project superintendent, testified that at least 10 individuals congregated on the sidewalk and in the street next to the jobsite's main entrance, which is a driveway 18 to 20 feet wide,[4] and that none of the pickets were at the other Front Street entrance to the jobsite, Gaworski also testified that he spoke to Lars Erickson, a representative of the Carpenters who was carrying a picket sign, on the sidewalk near the main entrance, and ''I kind of asked him what they were doing there, and he said that they were picketing the jobsite against Martel.'' Gaworski mentioned that there were two

[1] In addition to the issue raised by the Board's remand, counsel for Respondent sought permission to introduce additional evidence related to its offers of reinstatement to the two discriminatees. Counsel for the General Counsel objected to any such evidence on the grounds that such was beyond the subject of the Board's remand order to me. I received the proffered evidence subject to my ruling herein.

[2] Respondent hired both union and nonunion employees to work for it on the project and utilized subcontractors, who were signatory to collective-bargaining agreements with labor organizations, and subcontractors, which were operating on a nonunion basis.

[3] At the time of the commencement of the picketing allegations that Respondent had engaged in conduct violative of Sec. 8(a)(1) and (5) of the Act, by failing to execute successor collective-bargaining agreements with the three labor organizations, were pending before Administrative Law Judge Jay Pollack, and, I credited discriminatee Waliser, that, when he arrived at the jobsite at approximately 8 o'clock that morning, he was told by business agents of the Operating Engineers that the picketing was to protest unfair labor practices of Respondent. Subsequently, Judge Pollack dismissed the above allegations.

As I noted in my decision, that the Unions' picketing began on this date does not appear to have been happenstance. Thus, according to William Martel, Respondent's president, concrete pours were scheduled to begin at that time.

I have previously concluded that the two discriminatees, Waliser and Williams, arrived at the jobsite that morning at their normal times; that each observed the picketing and decided not to cross the picket line and report for work; and that, after remaining for a short time, each left and returned home. There is no record evidence that either Waliser or Williams participated in the picketing on July 13.

[4] At the southeast corner of the jobsite were Respondent's office trailer, an architect's office and lunch trailer, and a tool van. The entrance was between the tool van and the lunch trailer.

entrances to the jobsite, but Erickson said they were ''illegal gates'' because no signs were posted.[5] After speaking to Erickson, at approximately 8:30 or 9 a.m., Gaworski telephoned William Martel at Respondent's office in Bozeman and told him that the jobsite was being picketed. Martel responded that they would go to a two-gate system, and Gaworski, recalling what Erickson told him, said they would need posted signs. At approximately 11 a.m., Martel ''faxed'' the ''legal language'' for the gate designation signs to Gaworski, and Gaworski contacted a sign painter in Helena with instructions to have the completed gate signs ready early the next morning. That afternoon, according to Gaworski, anticipating that the three unions would continue their picketing the next day, he dug holes by the two entrances off of Front Street for the placement of the gate signs, placed wire across the opening in the fence in front of the office trailer, informed the workers on the jobsite that gate designation signs would be posted by the entrances the next morning, and instructed them as to which entrances were to be used by Respondent's employees and the employees of the various subcontractors.

Also, on July 13, on becoming aware of the above picketing at the Federal reserve bank building jobsite in Helena, Respondent mailed and ''faxed'' the following letter to the picketing labor organizations:

> You are hereby notified that Martel Construction, Inc. has erected separate reserved gates as follows:
>
> *Gate 1*
>
> Location: On Front Street at North Entrance across from Job Service Building.
>
> Language on sign: This sign reserved for the exclusive use of employees, suppliers, and visitors of Martel Construction, Inc. . . .
>
> *Gate 2*
>
> Location: On corner of Neill and Front Street near Job Office. Language on sign: This gate reserved for the exclusive use of employees, suppliers, and visitors of: Metalworks of Montana, Yellowstone Electric, Big Sky Fire Protection, Missoula Sheet Metal, Shipman Brothers Masonry, Structural Steel, Helena Sand & Gravel, and Lagerquist Elevators.
>
> If your Union engages in picketing activities, Martel Construction, Inc. expects the officers, agents and members of the Union to confine your activities to Gate 1. Picketing at any other location will constitute an illegal secondary boycott.

According to Clancy Gaworski, on Friday, July 14, the sign painter delivered the completed gate designation signs at approximately 5 a.m.; each sign was approximately 4 feet square; and he proceeded to place the signs by the proper entrances. Thus, by the main entrance to the jobsite, near the corner of Neill Avenue and Front Street, he posted the following sign: ''GATE 2; THIS GATE RESERVED FOR THE EXCLUSIVE USE OF EMPLOYEES, SUPPLIERS & VISITORS OF: Big Sky Fire Protection, Structural Steel, Yellowstone Electric, Missoula Sheetmetal, Helena Sand & Gravel, Metalworks of Montana, Shipman Bros. Masonry; NO OTHER PERSON MAY USE THIS GATE,'' and, by the other entrance on Front Street, located 330 feet north of the main entrance, he posted the following sign: ''GATE 1; THIS GATE RESERVED FOR THE EXCLUSIVE USE OF EMPLOYEES, SUPPLIERS & VISITORS OF: MARTEL CONSTRUCTION . . .; NO OTHER PERSON MAY USE THIS GATE!'' After completing the posting of the gate designation signs, Gaworski went inside the office trailer and, shortly thereafter, exited the trailer in order to return to his home. At this point, according to Gaworski, he observed an individual picketing at Gate 2, the main entrance. Gaworski walked over to the picket and said he should not be carrying his sign at that entrance, and the picket, whom Gaworski could not identify, replied, ''We can picket wherever we want.'' The project superintendent then left the jobsite, returning at approximately 6:45 a.m. By the time work was scheduled to commence, and continuing for the remainder of the morning, according to Gaworski, the striking labor organizations had individuals, with placards, stationed at Gates 1 and 2 and had pickets walking between the entrances on Front Street and along the southern end of the jobsite on Neill Avenue. In support of Gaworski's testimony, Respondent offered into evidence a photograph of the scene at Gate 2, which photograph, Gaworski testified, was taken by him. Said photograph, Respondent's Exhibit 4(b), shows two men, carrying placards, standing at the corner of Neill Avenue and Front Street and a few feet from the entrance designated as Gate 2; three placards, placed against the jobsite fence, between the pickets and the entrance driveway; and the entrance gate, which is shut across the driveway. While there is no date stamp on this exhibit to corroborate Gaworski's testimony that the photograph was taken at 6:45 a.m. on June 14, 1989, corroboration for the fact that the gate designation signs were erected on July 14 does exist. Thus, Respondent's Exhibit 2(d) is a photograph bearing the date stamp ''14–7–89'' and showing two individuals,[6] who are carrying placards[7] and standing in the driveway of the main jobsite entrance, which is designated by the posted sign as Gate 2.[8] Finally, according to uncontroverted testimony of William Martel, the picketing at the main entrance, designated Gate 2, on July 14 resulted in the refusal of employees of Yellowstone Electric, Respondent's electrical subcontractor, whose employees were required to enter the jobsite through Gate 2, to enter the jobsite and work.

There is no dispute that picketing occurred at both entrances to the jobsite on the morning of July 14; however, what is in dispute is whether the gate designation signs had been posted that day. Thus, discriminatee Raymond Waliser testified that he arrived at the jobsite at 7:50 a.m., that, just

[5] During cross-examination, Gaworski stated that there was an opening in the jobsite fence on Neill Avenue and in front of the Martel office trailer and that employees would enter and exit the jobsite through said opening. He added that said opening, which was three feet wide, was ''probably'' used by jobsite workers on July 13.

[6] One of the men depicted in this photograph is also seen in R. Exh. 4(b).

[7] The message on the placards was the same as on the placards carried the day before by pickets at the jobsite.

[8] According to Gaworski, this photograph was taken at approximately 8 a.m. by a representative of the Federal reserve bank. Gaworski added that the picture was taken after work had commenced on the project that morning inasmuch as the entrance gate is shown to be open.

as the day before, picketing was occurring at both entrances on Front Street, and that he stood at the corner of Front Street and Neill Avenue for 15 minutes and observed what was occurring before leaving and returning to his house.[9] As to whether the entrances were designated as Gates 1 and 2 at the time he was at the jobsite that morning, Waliser testified, ''The gates were not up. These particular signs were not up the morning of the 14th.'' Not quite corroborating the testimony of Waliser, Eugene Federson, the business manager of the Montana District Council of Laborers,[10] testified that he arrived at the jobsite at 7 a.m. on July 14, that he remained there most of the morning, and that he could not recall seeing the gate designation signs posted that morning. Casting doubt on the veracity of Federson's asserted lack of recollection and, also, on Waliser's testimony is the former's admission that he received William Martel's letter, informed the picketing labor organizations of the establishment of the reserved gate system at the Federal reserve bank building jobsite, later that morning and immediately replied with a letter, dated July 14, reading: ''This is to inform you that we believe that the two gate system which you *have established* on the Federal Reserve Bank in Helena, *has not been properly established.* We therefore will continue to picket all gates as needed until such time as they are properly established.'' (Emphasis added.)[11]

In addition to insisting that there were no posted gate designation signs at the jobsite entrances on July 14, Federson asserted that, on that day, ingress to and egress from the jobsite was nothing less than ''a three ring circus.'' Elaborating, Federson testified that the jobsite was ''very confusing'' with numerous people and trucks entering and leaving the jobsite through the two Front Street entrances, the open area at the northern end of the project, and the hole in the fence, in front of the office trailer on the Neill Avenue side of the project. With regard to the northern area at the point where the dirt road enters the project, according to Federson, ''I saw numerous people and vehicles coming out through this area,'' including electricians, plumbers, employees of Respondent, and suppliers.[12] As to the opening in the fence on Neill Avenue, Federson assertedly observed two individuals, whom he identified as carpenters employed by Respondent, leaving the jobsite ''at the lunch period'' between 12:25 and 12:35 p.m.[13] Later, Federson said that what he observed was people going into the jobsite through the opening in the fence ''after the noon break.''

While the testimony of Clancy Gaworski was definite as to closure of the opening in the fence on Neill Avenue on July 13 so that such could not have been utilized for ingress or egress on July 14, his testimony as to usage of the unfenced northern end of the jobsite for entry and exit on July 14 was far less certain. Thus, at the outset, Gaworski conceded that the northern boundary fence ''wasn't all the way across'' the project on July 13 and 14 and that the unfenced area was the point at which the dirt road entered the jobsite. As stated above, because jobsite entry was difficult, if not impossible, through the main entrance for large truck deliveries, such were routinely made through the rear dirt entryway. Gaworski could not recall if any such deliveries were made through the rear entry area on July 13 and, when asked if any rear entry deliveries were made on the next day, initially said ''Not to my recollection'' and then said ''I sure don't think so.'' As to individuals entering or exiting the jobsite through the rear entryway, Gaworski testified that a subcontractor, Structural Systems, had a job trailer located on the north end of the jobsite and that the subcontractor's employees, members of the Ironworkers Union, were working on the project on July 13 and 14. He added that said individuals habitually parked their cars on the vacant lot beyond the northern boundary of the jobsite and entered the jobsite along the back dirt road and that ''some employees did'' enter and exit the project in this manner on July 14.[14]

No picketing occurred on Monday, July 17, but such resumed on July 18 at both Gates 1 and 2.[15] Some time after July 18, for safety-related reasons, Respondent moved its Gate 2 designation sign to the dirt road entrance at the northern end of the jobsite and continued the Gate 1 entrance at the same location. After this, picketing continued at the Gate 1 entrance, that which was established for Respondent and other contractors, but, according to Gaworski, no further picketing occurred at the Gate 2 entrance.[16] The picketing of

[9] Discriminatee Robert Williams also drove to the jobsite on July 14, observed that the pickets had returned, and, after a few minutes, went home. There is no record evidence that either discriminatee engaged in picketing on this day.

[10] Federson testified that the picketing, on July 13 and continuing thereafter, resulted from the Unions' belief ''that the Martel Company had committed an unfair labor practice,'' involving an agreed-upon collective-bargaining agreement.

[11] Asked to explain the plain meaning of the words of his reply letter to Martel, Federson stated that the letter was merely a reply to what Martel had written and that ''I knew there was no gates'' on the jobsite at the time.

[12] Federson testified that most of the subcontractors had their job shacks just inside the fenced-in area but that the employees parked ''outside of the fence'' where Respondent and the subcontractors had placed much of their materials. Consequently, according to Federson, on several occasions, he observed forklifts being driven out of the jobsite for materials.

[13] Federson's testimony suggests that he was present at the jobsite until approximately 12:30 in the afternoon. However, he originally testified that he remained at the jobsite only until ''late morning.'' Then, Federson changed his testimony, saying that, on Friday, July 14, ''I was probably there until . . . at least one'' o'clock in the afternoon. Finally, asked again what time he left the jobsite that day, the witness testified, ''I think I left at what I call late morning, probably 10:30, and then came back numerous times during the day.''

[14] Contrary to counsel for the General Counsel, I believe that, at all times, Gaworski was referring to the employees of Structural Systems as entering through the northern area of the jobsite. In this regard, the record evidence is that employees of Structural Systems should have utilized the main entrance, Gate 2 for entry and exit on July 14.

[15] Apparently, on July 18, a jobsite delivery to Respondent was made through Gate 2. Eugene Federson wrote a letter, dated July 18, to Respondent, noting two such neutral gate violations by Respondent's concrete supplier on that date. William Martel wrote back that such neutral gate violation was inadvertent and against explicit instructions.

[16] Gaworski testified that he observed individuals, who had engaged in picketing at Gate 2 before it was relocated, sitting in a car next to the entrance, and that said individuals would speak to workers as they walked onto the jobsite.

the jobsite ended until Thursday, August 10, after having continued for a total of 25 days.[17]

B. *Analysis*

At the outset, in analyzing Respondent's defense, that the picketing by the labor organizations herein constituted an unlawful secondary boycott; that, by honoring the picket line, Waliser and Williams each engaged in an illegal strike; and that, accordingly, neither was engaged in protected activity at the time of his termination, it is important to recall that the undersigned has previously found that Robert Williams was terminated on July 14 and that Raymond Waliser was terminated on July 17. Inasmuch as there is no contention that the picketing on July 13 was illegal, if this aspect of Respondent's defense has any validity, it must be found that the picketing on July 14 was secondary in scope. Given the Board's injunction that I make a finding on this point, I conclude that the labor organization's picketing on that date was probably unlawfully secondary in nature; however, I also conclude that, if unlawful, such does not constitute a valid defense to the conclusion that the terminations of Waliser and Williams were violative of Section 8(a)(1) and (3) of the Act.

Initially, in determining whether the picketing on July 14 was unlawfully secondary in scope, I have relied on the testimony of Clancy Gaworski as to what occurred on July 13 and July 14. At least with regard to this aspect of the instant matter, he appeared to be testifying in a candid and straightforward manner, obviously attempting to honestly recount events to the best of his recollection. Moreover, I agree with Respondent's counsel that his testimony most logically comports with the record evidence, particularly as to the posting of the reserve gate system on July 14. Thus, given William Martel's July 13 letter to the picketing labor organizations and the July 14 date stamp on the photograph, received as Respondent's Exhibit 2(d), as corroboration for his testimony, there appears to be no reason not to credit Gaworski as to when and how the gate system was established. In contrast, I was not impressed by the testimony of Eugene Federson, who appeared to be an utterly mendacious and unreliable witness, on two particular points. First, noting his July 14 letter to Respondent, regarding his claim that the two gate system at the jobsite was not properly established, I believe his asserted lack of recall as to the existence of a reserve gate system at the jobsite that day was nothing but fabrication.[18] Further, noting Federson's letter, dated July 18, in which he wrote about a violation of the neutral gate, Gate 2, by the concrete supplier of Respondent, inasmuch as he failed to mention anything, in writing, about the ''three ring circus,'' which assertedly existed on July 14, I believe his testimony as to violations of the reserve gate system that day likewise was a mere canard.

It is well established that the provisions of Section 8(b)(4)(i) and (ii)(B) of the Act reflect the dual objectives of Congress of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from controversies not their own. *Denver Building Trades Council v. NLRB*, 341 U.S. 675, 692 (1951). In common situs construction project situations, such as herein involved, where two or more employers are engaged in their normal business operations, the Board has long relied on certain evidentiary guidelines to determine the true object of picketing, with one being that the picketing must be ''limited to places reasonably close to the location of the situs'' of the dispute. *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547, 549 (1950). In accord with this standard, the Board and the courts have recognized the right of employers at a common situs to designate a gate reserved for the exclusive use of the employer, with whom labor organizations have a labor dispute, and a gate for the use of those employers which are neutral in the labor dispute. When such gates are properly designated and maintained, labor organizations must confine any picketing to the date reserved for the primary employer. *Electrical Workers Local 761 IBEW v. NLRB*, 366 U.S. 667 (1961); *Iron Workers Local 433 (Chris Crane)*, 294 NLRB 182 (1989); *Operating Engineers (Linbeck Construction)*, 219 NLRB 997 (1975). Picketing not confined to some area reasonably close to the gate, which is reserved for the primary disputant, and, thus, the location of the situs of the dispute, is considered to constitute evidence of an unlawful secondary objective, one designed to enmesh neutrals in a labor dispute not their own. *Electrical Workers*, supra; *Carpenters Local 470 (Mueller-Anderson, Inc.)*, 224 NLRB 315 (1977).

Herein, based on my aforementioned credibility resolutions, I find that, early in the morning on July 14 and prior to the start of the picketing that day, Respondent's project superintendent, Gaworski, established a reserve gate system at the jobsite, posting gate designation signs at both entrances on Front Street. Further, while it is unclear whether the three labor organizations received notice, on July 13, of the reserve gate system,[19] one may argue that, given the earlier erection of the gate designation signs, when representatives of the picketing labor organizations arrived at the jobsite at approximately 6:45 a.m. on July 14, they undoubtedly had sufficient notice of the reserve gate system so as to mandate that they confine their picketing to the gate, which had been reserved for Respondent. Inasmuch as the picketing continued that day at the jobsite's main entrance, which clearly was designated as the entrance for neutral employers and through which Respondent was prohibited from entering, the labor organizations' conduct may be considered as being unlawfully secondary. *Iron Workers Local 433*, supra; *Ironworkers District Council (Hoffman Construction)*, 292 NLRB 562 (1989). Disputing such a conclusion, counsel for the General Counsel argues that the two gate system, at the jobsite, was defective. In this regard, he argues that an entryway was created where there existed a hole in the jobsite fence on Neill Avenue in front of the office trailer. However, I credit Gaworski that, on July 13, not only did he instruct job-

[17] Besides picketing, handbills were distributed on July 24, and videotaping of jobsite activities occurred on July 25.

[18] While I continue to believe that Raymond Waliser was a truthful witness, I believe he was mistaken in his recollection that no two gate system had been yet posted at the jobsite when he was present there on the morning of July 14. I think he was more concerned with the fact that the picketing continued than with the existence of gate designation signs.

[19] Apparently, on July 13, Respondent gave notice by mail and by fax of the reserve gate system. There is no evidence as to the receipt of the fax transmissions and the mail was not received until the next day.

site workers to no longer use this hole in the fence as an entry and exit point but also he wired the hole shut, and I do not credit the uncorroborated testimony of Federson that he observed anyone using that location as an entryway on July 14. Counsel next points to the northern end of the project as an open area through which Respondent's employees entered and exited the jobsite on July 14. Contrary to counsel, while employees of a neutral subcontractor, Structural Systems, may have entered and exited the jobsite via the dirt road, which intersected the jobsite at its northern end, there is no evidence that Respondent's employees entered or exited through any entrance but Gate 1, the entrance reserved for Respondent. *Iron Workers Local 433 (Barry-Wehmiller Co.)*, 303 NLRB 287 (1991). Further, inasmuch as I cannot credit Federson, there is no evidence of any sort of ''three ring circus'' usage of the northern boundary as an entry and exit area. Accordingly, based on the foregoing, and the record as a whole, it may reasonably be concluded that the July 14 picketing by the three labor organizations constituted unlawful secondary conduct.

Having so concluded, the issue is, of course, the effect, if any, of such on my conclusion that both Williams and Waliser were terminated illegally. At the outset, there is no question that sympathy strikers, who honor a secondary picket line, are engaged in unprotected activity and may lawfully be disciplined by their employer. *Chevron U.S.A., Inc*., 244 NLRB 1081 (1979). However, contrary to Respondent's counsel, such is not the situation herein. Thus, commencing on July 13, three labor organizations, the Carpenters, the Operating Engineers, and the Laborers, commenced picketing against Respondent, at its Federal reserve bank building construction project in Helena, to protest alleged unfair labor practices involving Respondent's failure and refusal to execute a collective-bargaining agreement. Two of Respondent's employees, Raymond Waliser, a member of the Operating Engineers, and Robert Williams, a member of the Carpenters, on July 13 and 14 refused to cross their own labor organization's picket line and perform work for Respondent on the jobsite. Accordingly, each employee was engaged in a primary strike against his employer, striking in order to protest alleged unfair labor practices. Subsequently, when Administrative Law Judge Jay Pollack dismissed the unfair labor practice allegations, their strike was converted to an economic strike, and, as economic strikers, each remained entitled to the protection of the Act.[20]

Furthermore, notwithstanding that, given the establishment of the reserve gate system at the jobsite on July 14 and the continued picketing at the Gate 2 entrance thereafter, said conduct became illegally secondary in scope, the conclusion remains warranted that Waliser's and Williams' respective conduct continued to be protected within the meaning of Section 7 of the Act. Thus, the central fact herein is that, while both discriminatees engaged in the strike against Respondent, there is no evidence that either engaged in the picketing on July 14. This is of crucial significance; for, while there is, indeed, warrant for finding the picketing on July 14 illegal, there is no record evidence that the strike was for an unlawful objective[21] or that the discriminatees' participation therein was unprotected. Put another way, a distinction must be drawn between mere participation in the protected strike and engaging in the unprotected, illegal picketing, and, while Waliser and Williams may have lost their protected status if either had engaged in the unlawful picketing, neither did. *Rapid Armoured Truck Corp*., 281 NLRB 371, 382 (1986); *Local 707 Motor Freight Drivers (Claremont Polychemical Corp.)*, 196 NLRB 613, 614–615 (1972). Thus, in my view, the fact that the picketing labor organizations engaged in unlawful secondary activity had no effect on the discriminatees' status as employees entitled to the continued protection of Section 7 of the Act. Accordingly, based on the foregoing, the undersigned adheres to his original findings that Respondent terminated employees Raymond Waliser and Robert L. Williams in violation of Section 8(a)(1) and (3) of the Act.

II. EVIDENCE REGARDING THE OFFERS OF REINSTATEMENT

In the original decision herein, I concluded that Respondent's July 28, 1989 offers of reinstatement to Waliser and Williams were inadequate to stop Respondent's backpay obligations to either. At the instant remand hearing, Respondent offered evidence that the letters, offering reinstatement to the discriminatees, were drafted with input from a field examiner, employed by the Board's Region 19, and changed to satisfy her requirements. Inasmuch as the remand order of the Board was quite specific as to what evidence and issues should be addressed at the remand hearing and in the remand decision and as evidence pertaining to reinstatement and backpay was not mentioned by the Board, the conclusion is mandated that the proffered evidence should not be considered. However, in the interest of due process and fairness, I have considered the foregoing and find it insufficient to change the prior conclusions as to the inadequacy of the offers of reinstatement. Thus, Board law is fundamental that it is not bound by advice given to respondents by Board agents, ''especially where employee rights are violated pursuant to that advice.'' *Capitol Temptrol Corporation*, 243 NLRB 575, 589 fn. 59 (1979). Such is the case herein, and Respondent acted at its peril in accepting the advice of the Board agent.

[20] In my original decision, I cited to *Crystal Princeton Refining Co*., 222 NLRB 1068 (1976), as support for this conclusion and reiterate my reliance on that decision of the Board for the legal conclusion that nominal unfair labor practice strikers are transformed, in status, to economic strikers, and entitled to the protection of the Act, if, in fact, no unfair labor practices were committed. Contrary to Respondent's counsel, the fact that the strikers therein made an unconditional offer to return has nothing to do with the fact that the nominal unfair labor practice strikers retained their privileged status, under the Act, as economic strikers when the reason for their strike was found not to have been unlawful.

[21] Respondent's counsel, in his posthearing brief, argues that the motivation for the strike, which commenced on July 13 could not, as the record evidence indicates, have been Respondent's alleged unfair labor practices. While counsel's argument is plausible, the only record evidence is that the picketing was to protest the pending unfair labor practice allegations. The fact that the picketing unions chose to protest at the time that Respondent was to commence a concrete pour at the Federal reserve bank jobsite does not detract from the foregoing finding. While Respondent also argues that the picketing had a recognitional object, such seems merely speculative, and, even if true, such would not make the picketing unlawful. In this regard, I note that the duration of such was less than 30 days.

CONCLUSIONS OF LAW

1. The picketing by the Carpenters, the Operating Engineers, and the Laborers on July 14 was unlawfully secondary.

2. Inasmuch as Respondent's employees Raymond Waliser and Robert Williams were engaged in an economic strike against Respondent on July 13 and 14 and as neither engaged in the aforementioned unlawful picketing on July 14, each was engaged in protected concerted activities when terminated by Respondent.

Based on these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

That Respondent, Martel Construction, Inc., Bozeman, Montana, its officers, agents, successors, and assigns, shall abide by the terms of the Order, issued by me on June 28, 1990.

[22] 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.