

Boghosian Raisin Packing Company, Inc. and Packing House Employees and Warehousemen's Union, Local 616 a/w International Brotherhood of Teamsters, AFL-CIO. Cases 32-CA-17721-1, 32-CA-17839-1, and 32-CA-17985-1

June 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
LIEBMAN AND SCHAUMBER

On October 31, 2000, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as further discussed below, and to adopt the recommended Order.

The primary issue in this case is whether the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate 42 economic strikers and violated Section 8(a)(5) and (1) by subsequently withdrawing recognition from their collective-bargaining representative and changing terms of employment. We find, in agreement with the judge, that the Respondent was not required to reinstate the strikers because the strikers had, under the express language in the loss-of-status provision of Section 8(d), lost their protected status as employees under the Act by reason of their Union's failure to file a notice with the Federal Mediation and Conciliation Service (FMCS) as required by Section 8(d)(3).² We find further

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Sec. 8(d) provides, in relevant part:

[W]here there is in effect a collective-bargaining contract . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

....

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute,

that subsequently the Respondent lawfully withdrew recognition from the Union based on a petition signed by an uncoerced majority of the unit employees, and changed their terms of employment.

I. MATERIAL FACTS

The Union represented the Respondent's processing, handling, and packing employees from 1970 until the time of the strike at issue. The most recent agreement between the parties expired by its terms on May 31, 1999.³ By letter dated January 26, the Union notified the Respondent that it desired to terminate the contract. On February 19, the Union sent notice of the pending dispute to the California Mediation and Conciliation Service (CMCS) as mandated under Section 8(d)(3). Although the Union's secretary-treasurer, George Avalos, prepared a similar notice to the FMCS, as mandated by Section 8(d)(3), that notice was not mailed due to a clerical error within the union offices.

The parties held a number of bargaining sessions between January and June. On June 3, they agreed to extend the expired contract pending further negotiations. The extension agreement permitted either party to terminate the agreement on 7 days written notice. Negotiations continued through September, but the parties remained far apart in their bargaining proposals.

On September 22, the unit members voted to reject the Respondent's "last, best, and final" offer, and on September 24 the Union notified the Respondent that it was terminating the extension agreement as of October 1. Also on September 24, Avalos completed a Teamsters Joint Council questionnaire concerning the contract dispute and instructed his secretary to mail it to the Joint Council. The questionnaire specifically asked whether notice of the dispute had been sent to the FMCS and the state mediation service as required by Section 8(d)(3). The questionnaire further directed the local to "*attach copies of the return receipts*" (emphasis in original) for

and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . . 28 U.S.C. § 158(d).

Sec. 8(d) also includes a "loss of status" provision, which states in relevant part:

Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act. . . . Id.

³ All dates hereafter are in 1999, unless otherwise specified.

such notices. Without taking any action to verify that the required notice had been sent, or that return receipts confirmed delivery, Avalos signed the form, indicating that the 8(d)(3) notices had been sent.⁴ At the hearing, Avalos conceded that he did not then, or at any other time prior to the strike, look for a return receipt to confirm that the FMCS notice had been sent. He candidly admitted that his failure to ensure that the FMCS notice had been sent was “based on the fact that [he] just didn’t know the legal significance of . . . mailing it.” He conceded further, regarding the Joint Council questionnaire, “We weren’t familiar with it, because I had never done it myself.”

The Respondent was unaware of any action by the Union with regard to notifying or intending to notify FMCS as required by Section 8(d)(3). Upon receiving the Union’s September 24 notice terminating the extension agreement, the Respondent’s attorney, Howard Sagaser, contacted the FMCS and the CMCS to determine whether the Union had filed the required 8(d)(3) notices. He was informed by both agencies that the Union had not filed 8(d)(3) notices.⁵ The parties held their final bargaining session on September 30, before the expiration of the extension agreement, but remained far apart at the end of that session. Union officials then began making active preparations for a strike.

On the morning of October 1, employees reported for work at their regular time and began work. At about 7:15 a.m., however, they ceased production, walked out, and set up a picket line. The record indicates that before walking out the employees cleaned up their work areas as they would have done before going on a short break, but not as was customary for a thorough nightly cleaning to prevent spoilage. As a result, they left a quantity of raisins exposed to spoilage. The judge found that the resulting product damage was intentional.

At 7:50 a.m., Sagaser telephoned Avalos on the picket line to inform him that the strike was illegal because the Union had not sent its required notice to the FMCS. After speaking with the Union’s attorney, Avalos returned to the Union office to determine whether the FMCS notice had been sent. At approximately 1 p.m., he confirmed that the original copy of the notice remained in the Union’s files and that there was no return receipt indicating it had been mailed. Later that day the Union

made an oral offer, through its counsel, to return all employees to work under status quo terms and conditions of employment and resume negotiations for a new contract provided that the Union could not find a copy of the FMCS notice. The Union did not, however, take any other action to end the strike although it was clear that no later than 1 p.m. on October 1, it had full knowledge that the statutorily required FMCS notice had not been mailed. The strike, thereafter, continued for 4 additional days.

On October 2, the parties met but failed to resolve the dispute. Sagaser stated that the Respondent was “reserving all options . . . up to and including discharge” of all the strikers. On October 4, the Union again offered to end the strike under status quo terms of employment and continue negotiations. The Respondent responded in writing, through Sagaser, that it still reserved its right to terminate all the strikers and would do so unless the Union provided documentation the following day “that the strike is legal.”

On October 5, the Union sent a written offer to return to work “on the basis of the Company’s last, best and final offer at the bargaining table.” Later that day, the Respondent sent individual notices to each of the strikers stating that “you abandoned your workstation and engaged in an illegal strike” and that “[t]herefore, the Company has elected to terminate your employment.” The Respondent then hired new employees.

In January 2000, 35 of the employees who were then in the bargaining unit signed a petition stating that they no longer wanted representation by the Union. On February 2, 2000, the Respondent withdrew recognition of the Union. The Respondent subsequently made a number of changes in terms and conditions of employment.

II. ANALYSIS

A. *The Strikers’ Loss of Protected Status Under Section 8(d)*

Section 8(d) of the Act expressly requires that before a union can engage in a strike it must give written notice to the employer of its intent to modify or terminate the agreement and to the FMCS and any relevant state mediation agency of its intent to strike. These provisions are mandatory and contain a severe penalty for failure to comply: employees who engage in a strike without the requisite notices being given forfeit their status as employees “of the employer engaged in the particular labor dispute.” These provisions are a clear expression of Congressional intent to minimize the interruption of commerce resulting from strikes and to further the use of mediation to assist parties in settling their labor disputes peaceably.

⁴ The Respondent was not aware of the Union’s written notice to the Joint Council before the strike.

⁵ The record reflects that the Union did file the required 8(d)(3) notice with the CMCS in Fresno, even though Sagaser was initially advised by the San Francisco office (the agency’s state headquarters) that no notice had been filed. On October 1, Sagaser learned that the state notice had been filed in Fresno.

There is no dispute here that the Union failed to file the required notice with the FMCS before commencing an economic strike. Moreover, even after the Union knew full well that the notice had not been sent, it said that it would end its unlawful strike only if the status quo in terms and conditions of employment were maintained.⁶ Four days later, the Union said that it would end the strike only under the terms and conditions last offered by the Respondent. Thus, for this period the Union continued its unlawful strike, and the strikers lost their status as statutory employees. The Respondent could therefore discharge them.⁷

It is true that enforcement of these statutory provisions may in some circumstances yield a harsh result. The dissent argues that this is such a case. We do not disagree in that the Union's initial failure to comply was not deliberate, and the strikers did not participate in the Union's negligence. Nonetheless, the forfeiture provisions apply. The statute provides a clear mandate that we are obligated to respect and enforce. These notice requirements are part of the overall statutory scheme intended to encourage the peaceful resolution of labor disputes. While the statute may in some instances yield severe consequences, it is the Congress that made that determination, and it is our obligation to obey this legislative demand.

Our dissenting colleague, in focusing on the Respondent's allegedly improper conduct, largely ignores the Union's failure to meet its obligations and its persistence with the strike after learning of its error. Although the immediate cause of the Union's failure to file the FMCS notice was an error by a clerical employee, it was the Union that employed that clerical employee, and it was the union secretary-treasurer who failed to supervise the clerical employee's performance of this important function. Likewise, it was this same senior union official who signed internal union documents affirming that the FMCS notice had been mailed without: checking to confirm that it had in fact been mailed; verifying that he had the return receipt; or contacting FMCS to determine whether the notice had been received. In short, the Union was negligent. Just as the employees may enjoy the

benefits of competent union representation, so too the employees may suffer the consequences of negligent union representation. In addition and very significantly, as mentioned above, after learning of its error, the Union failed to unconditionally cease and desist from its unlawful actions.

Our dissenting colleague argues that the Respondent was not entitled to rely on 8(d)'s loss-of-status provision because it acted in bad faith by concealing from the Union its critical knowledge, gained in advance of the strike, that the Union had failed to notify the FMCS. She emphasizes that the Union erroneously thought the notice to the FMCS had been sent, and that the Respondent learned that it had not in fact been sent. We disagree with her on both the facts and the law.

First, there is no support in the record for inferring that the Respondent concealed its knowledge for the purpose of inducing an unlawful strike, or even that the Respondent knew that the Union erroneously believed the notice had been sent.⁸ Indeed, as the dissent concedes, Sagaser testified that he believed, from the absence of the FMCS notice, that the Union was not going to strike.⁹ Although the judge did not address this testimony, absent any testimony to the contrary, we find it strongly supports the conclusion that the Respondent did not act in bad faith.

Next, quite apart from the facts, our colleague's position is at variance with the plain words of Section 8(d) and with the clear expression of Congressional intent evident in those provisions. The notice requirements of Section 8(d)(3) are specifically assigned: the burden to notify the mediation services in this case was on the Union, as "the party desiring [the] termination or modification" of the parties' contract. In this regard, Section 8(d) contains no exceptions and provides no mitigating circumstances justifying a failure to comply. It neither states, nor implies, that the penalties it imposes are dependent upon who may have been "at fault" in failing to comply. That the Union's failure to file with the FMCS was not deliberate but the product of negligence is not exculpatory. In sum, the statute provides no basis for exempting the Union and the strikers from the strict requirements of Section 8(d), or from the loss-of-status sanctions it imposes in the event of infraction.

It follows that a party's knowledge, understanding, or intent at a given time, whether before or after a strike

⁶ Our dissenting colleague notes that there had been no lawful imposition of new terms, and thus the strikers were unconditionally "entitled" to return under the extant terms. We disagree. Inasmuch as the strike was unlawful under Sec. 8(d), and the strikers had lost their employee status, the strikers were not "entitled" to return at all irrespective of the conditions. Of course, should the employer accept their offer to return to work (effectively foregoing its 8(d) position), then and only then would it have to offer them work under the extant terms, absent a lawful impasse and unilaterally implemented new terms.

⁷ *Fort Smith Chair Co.*, 143 NLRB 514 (1963), aff'd. 336 F.2d 738 (D.C. Cir. 1964), cert. denied 379 U.S. 838 (1964).

⁸ Accordingly, the cases cited in the dissent involving an employer's misleading conduct during negotiations are clearly inapposite.

⁹ The fact that the Respondent contacted a security firm before October 1 does not establish that the Respondent knew that a strike would occur. The Respondent said only that it had concerns about "upcoming events." That phrase encompasses a myriad of possible disruptive acts, not just strikes.

begins, cannot affect the operation of Section 8(d)'s loss-of-status provision with respect to a strike that is unlawful under Section 8(d)(3) and (4). There is no warrant in the language of the Act, or its policies, for the dissent's conclusion that the Union's burden of timely notifying the FMCS, or the consequences for its failure to do so, were lifted simply because the Respondent did not comment on the absence of the notice. The obligation to notify the FMCS was the Union's, and there is no basis for placing any obligation on the Respondent to disclose the Union's failure to comply. For this reason, any analysis of the evidence by our dissenting colleague with respect to Respondent's knowledge and intent, and her speculation as to what the Union might have done if it had been informed of its failure to file an FMCS notice, is immaterial to a decision in this case. Here, the sole question is whether under Section 8(d), the Union, as the party desiring to modify or terminate the agreement, gave the notices prescribed by the Section. If the Union did not, its failure to do so triggers the loss of status provision and the inquiry is over.

Our dissenting colleague relies on *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), to argue that the Respondent should not be able to avail itself of the 8(d) loss-of-status provision. She claims that the Respondent is in the same position as *Mastro Plastics*, whose unfair labor practices triggered a strike and that, as the Court held, there is an "inherent inequity" in an interpretation of Section 8(d) that "penalizes one party to a contract for conduct induced solely by the unlawful conduct of the other." *Id.* at 287. Our colleague's attempts to bring this case within the dictates of *Mastro Plastics* are unavailing. In *Mastro Plastics*, the employers engaged in unfair labor practices—described as "vigorous efforts by the employers to influence and even to coerce their employees to abandon the Carpenters as their bargaining representative and to substitute Local 318," *id.* at 277—that triggered the strike. Presented with these circumstances, the Supreme Court, drawing on the provisions of the legislative history, recognized that the supporters of the bill distinguished between employees engaged in economic strikes and those engaged in strikes precipitated by unfair labor practices. As to the latter, the Court held that to impose the 60-day cooling off period of Section 8(d) would in effect give legal sanction to an illegal act. Thus, Section 8(d) applies to economic disputes and strikes, not to strikes protesting unlawful conduct. However, as noted above, once Section 8(d) does apply, the requirements are strict. The strike in this case was a purely economic strike, not induced by any unlawful conduct, but by a disagreement over new contract terms. In this context, the notice provisions of Section 8(d) ap-

ply, and the kind of "inherent inequity" discussed in *Mastro Plastics* is neither present nor a factor. As seen, there is simply no room in *Mastro Plastics* for the "equitable" interpretation offered by our colleague.

Excusing the Union's failure to file with the FMCS, by shifting the blame to the Respondent for its failure to notify the Union that FMCS may not have been notified, as the dissent advocates, would undermine the Congressional policy underlying Section 8(d). The statute—including its loss-of-status provision—is clearly intended to express the public interest in advance notice to the mediation agencies, to give them the opportunity to head off the disruption of an economic strike before it occurs. The public interest is best served, in our view, by strictly enforcing the requirements of Section 8(d) as its words require, and the Respondent's conduct, even had it been undertaken in bad faith, as the dissent speculates, would not justify an exception. As indicated above, the *Mastro Plastics* exception to Section 8(d) applies to unfair labor practice strikes. It is axiomatic that there can be no unfair labor practice strike without a finding of an unfair labor practice, and there can be no such finding without a complaint allegation. There is no such allegation in this case.

Our dissenting colleague also contends that the Respondent used the loss-of-status provision improperly as a "club" to extract additional bargaining concessions. The Respondent's obligation to bargain with the Union, however, did not end with the illegal strike; it was ongoing. Thus, rather than indicating bad faith, as our colleague suggests, the Respondent's willingness to continue bargaining is indicative of its good faith. That the Union had placed itself in a vulnerable position, in turn, was not the Respondent's fault or its responsibility: it was entitled to press its advantage in negotiations.

Our colleague suggests that the Respondent's conduct did not comport with the "good faith" requirement of Section 8(d). The short answer is that there is no such allegation in this case. By contrast, the Union's conduct after it was informed by the Respondent that its strike was unlawful only compounded its violation of Section 8(d). Upon acquiring this information, the Union did not promptly call an unconditional end to the strike and have the strikers report for work. There is all the less basis for lenience in view of this continuing misconduct.

Our dissenting colleague also cites *ABC Automotive Products*, 307 NLRB 248 (1992), *enfd.* 986 F.2d 500 (2d Cir. 1992), in support of her position that the Respondent waived its right to treat the employees as unprotected under the Act. In that case, the union timely mailed a 60-day notice of intent to renegotiate to the employer, pursuant to Section 8(d)(1). However, due to a significant

delay caused by the Postal Service, the notice arrived less than 60 days before the employees began their strike. The employer not only failed to inform the union that it had not received a full 60-day notice of their intent to terminate the contract, it successfully attempted to bait the Union into striking during the 60-day protected period by refusing to make a wage offer and to provide health and welfare coverage. The Board found that the employer thereby encouraged its employees to strike less than 60 days after its receipt of the notice, and concluded that the employer waived the right to treat the employees as unprotected. However, *ABC Automotive* is certainly distinguishable.

First, unlike the instant case, the failure to give timely notice in *ABC Automotive* was due to the fault of a third party—the post office—and not the Union. Here, due to the negligence of its staff, the Union never mailed the required notice to FMCS. Second, due to its cursory completion of a questionnaire, the Union negligently failed to discover their omission which a thorough completion of the questionnaire would have provided.¹⁰ Third, and most importantly, the Respondent in the instant case did nothing to actively encourage the Union to strike in a manner prohibited by Section 8(d) while in *ABC Automotive*, the respondent baited the union into an illegal strike. Last of all, when the Union in the instant case learned of its mistake, it did not terminate its unlawful strike immediately with an unconditional offer to return to work, but allowed it to continue for 4 additional days.

In summary, we do not agree with our dissenting colleague that the Respondent violated Section 8(a)(1) and (3) by discharging 42 employees for engaging in what was an illegal economic strike. Her view is inconsistent with the plain language of Section 8(d) and the Congressional intent in passing it. Since the notice requirement was not met, the strikers lost their status as protected employees under the Act, and their discharges by the Respondent were lawful.

B. *The Withdrawal of Recognition*

We agree with the judge that the Respondent lawfully withdrew recognition from the Union, based on a petition signed by an uncoerced majority of unit employees. Between January 27 and 31, 2000, 35 of 44 unit employees signed a petition stating that “We the undersigned employee’s (sic) of Boghosian Raisin Packing of Fowler, Calif. don’t want to be represented by Teamsters Union Local 616 of Fresno, Calif.” On February 2, 2000, the Respondent withdrew recognition from the Union and

¹⁰ The questionnaire required the Union to verify it had mailed the notice to FMCS and had the return receipt.

subsequently implemented unilateral changes in the employees’ terms and conditions of employment.

The good-faith doubt standard, as interpreted by the Supreme Court in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), is the controlling standard for analysis in this case.¹¹ *Allentown Mack* instructed that the term “doubt” as used in this standard signifies “uncertainty,” so that the test could be phrased in terms of whether the employer at issue “lacked a genuine, reasonable uncertainty about whether [the union] enjoyed the continuing support of a majority of unit employees.” *Id.* at 367.

Applying the “good-faith uncertainty” standard articulated in *Allentown Mack* and explicated in subsequent Board decisions, we conclude, in agreement with the judge, that the Respondent has demonstrated that it possessed a good-faith uncertainty regarding the Union’s majority status based on the antiunion petition signed by a majority of unit employees.¹²

For all these reasons, we agree with the judge that the complaint should be dismissed in its entirety.¹³

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER LIEBMAN, dissenting.

Today’s decision rewards conduct that is precisely the opposite of what the National Labor Relations Act envisions: good-faith collective bargaining that will avert unnecessary strikes. Here, an employer waited for employees to strike before revealing that their union—ignorant of its own clerical error—had failed to file a

¹¹ During the pendency of this case, the Board issued *Levitz*, 333 NLRB 717 (2001), in which it overruled *Celanese Corp.*, 95 NLRB 664 (1951), to the extent that it permitted an employer to withdraw recognition based on a good-faith doubt of the union’s continuing majority support. *Levitz* held that “an employer may rebut the continuing presumption of an incumbent union’s majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.” 333 NLRB at 725. *Levitz* further held, however, that the new standard would not be applied in cases then pending. *Id.* at 729. Because *Levitz* is not applicable here, Chairman Battista and Member Schaumber express no view as to whether that case was correctly decided.

¹² Having concluded that the Respondent lawfully discharged the strikers, we find that the good-faith uncertainty was raised in a context free of unfair labor practices of the sort that would tend to cause employees to become disaffected from the Union.

¹³ Because we find that the Respondent lawfully discharged the strikers for engaging in a strike without filing the required FMCS notice, we also agree with the judge that the Respondent did not violate Sec. 8(a)(1) by advising the strikers that they were being discharged because they engaged in a strike. We find it unnecessary to pass on the judge’s alternative finding that the discharge of the strikers was lawful because they had intentionally walked out in the middle of their shift in order to damage the Respondent’s product.

statutorily required notice of dispute with the Federal Mediation and Conciliation Service. The employer then: rejected the union's offer to return employees to work under the employer's last bargaining proposal; threatened employees with mass discharge to get more concessions; and, when the union did not give in, quickly fired all the strikers. New workers were hired who declared their opposition to the union, letting the employer withdraw recognition.

In short, the Union's mistake, seized on by the employer, cost employees their jobs and the Union its status. That result, says the majority, is simply a consequence of how the Act works. I disagree. As it did in another recent case,¹ the majority applies Section 8(d)(3) of the Act, and its loss-of-status provision, in a way that Congress never could have intended.

I. FACTUAL BACKGROUND

The facts here matter, unless the notice requirements of Section 8(d) are to be applied mechanically. In this case, the facts paint the Respondent employer, not the Union, as the bad actor.

A. *Events Preceding the Strike*

The Union represented the Respondent's processing, handling, and packaging employees at its raisin packing facility in Fowler, California, for 29 years prior to the strike at issue. At the time of the strike, the first in the parties' history, there were 45 employees in the bargaining unit. The parties' last collective-bargaining agreement ran from 1996 to May 31, 1999.²

On or about January 26, the Union gave the Respondent written notice of intent to reopen the contract. On February 19, the Union sent notice of the pending contract dispute to the California Mediation Service (CMS), as mandated under Section 8(d)(3). The Union prepared a similar notice for the Federal Mediation and Conciliation Service (FMCS), as Section 8(d)(3) also requires. However, as a result of an undiscovered clerical error, that notice was never mailed. For the next 7 months, the Union's officials mistakenly assumed that the FMCS notice had been sent at the same time as the CMS notice.

The parties had a number of bargaining sessions, continuing through September. When the contract expired, the parties agreed in writing to extend it pending further negotiations, with either party permitted to terminate the extension on 7 days written notice. From the beginning, however, bargaining was more difficult than on previous occasions because the Respondent was seeking major concessions that would enhance its competitive position.

On September 22, at a union meeting, the unit members voted to reject the Respondent's most recent contract offer and discussed the possibility of striking. On September 24, the Union sent the required 7-day notice to the Respondent that it was terminating the extension agreement as of October 1. Immediately upon receiving this notice, the Respondent's counsel and chief negotiator, Howard Sagaser, contacted the FMCS to ascertain whether the Union had filed the required Section 8(d)(3) notice with that agency. Sagaser learned that the FMCS had not received such notice.

In addition, shortly before the October 1 strike, the Respondent contacted a private security company and arranged for security on short notice. The security company's chief official testified that the Respondent's representatives told him they were motivated by "concerns of some upcoming events," and "some rumors swirling around" the facility. The government inspector who periodically visited the facility to enforce product standards also testified that she overheard unit employees discussing the possibility of a strike.

On September 30, the parties had their last bargaining session. Although the agreement would expire on the following day and the parties' bargaining positions were still far apart, Sagaser did not indicate to the Union, at this session or before, that he was aware of its failure to file notice with the FMCS. He did not reveal this knowledge even when the session ended with George Avalos, the Union's secretary-treasurer, saying to Sagaser, "I guess we have to do what we've got to do." The Union's negotiating and tactical position therefore was not tempered by knowledge of its exposure to the potential consequences of noncompliance with Section 8(d)(3).

B. *The Strike and the Revelation of the Union's Notice Error*

On October 1 (a Friday), the employees reported for work at their usual time. At about 7:15 a.m., however, at the call of the Union, they ceased production, did a standard clean-up of their work areas (of the type they usually performed before taking short breaks), walked out, and set up a picket line.

Less than an hour later, Sagaser contacted Avalos on the picket line by telephone and told him the strike was unlawful because the Union had failed to file notice with the FMCS. Sagaser also called the office of the Union's counsel, Jason Rabinowitz, and left a similar message. Later that day, Rabinowitz called Sagaser and said the Union had not yet been able to find a return receipt for its FMCS notice, but that if the documentation was not found the Union was prepared to "return everybody to work immediately, under the status quo ante the strike,

¹ See *Alexandria Clinic*, 339 NLRB 1262, 1269 (2003) (dissenting opinion of Member Liebman and Member Walsh).

² All dates are in 1999, unless otherwise indicated.

while we continue to negotiate for the new contract, and will the company take the people back.”

Sagaser (by his own testimony) told Rabinowitz that “the company was reserving all its options, that if the strike was illegal, we reserved the right to impose discipline up to and including discharge . . . [and that] because it was an illegal strike the Company could reserve the right to pick and choose, bring back some but not all.”

Still later in the day, Sagaser and Avalos agreed to meet the following day, October 2 (Saturday). Sagaser testified that “[t]hey [the Union] had asked for the meeting, so I thought perhaps they had a concrete proposal. And at that time I was still looking at a contract that economically was way above anything in the industry. . . .”

C. Negotiations after the Strike Began

At the October 2 meeting, Sagaser (by his own testimony) repeated to the union representatives that the Respondent “was reserving all options . . . up to and including discharge,” and that “if it was an illegal strike that we could bring back some but not all.” Sagaser then suggested that the parties caucus to “discuss proposals,” and a break was taken for that purpose. After the break had lasted for awhile, Sagaser and the Respondent’s other representatives “wonder[ed] why it was taking them [the Union] so long to put their proposal together.” When the parties reconvened, Sagaser testified, the Union representatives “did not give us any type of a counterproposal.” Sagaser then told Avalos that the owners would decide what to do the next day, and the meeting ended.

The following day, October 3 (Sunday), Sagaser met with the Boghosians, explaining (as he testified) that the employees were engaging in an illegal strike “while we were meeting with them and while they were not changing their terms from before.”

On October 4 (Monday), the employees resumed their picket line at the Respondent’s facility. Also that day the Union, through a letter from Rabinowitz to Sagaser, again offered to return the employees to work immediately under preexisting terms of employment and resume bargaining. Sagaser responded in writing the same day, again reserving the Respondent’s right to terminate “all employees who engaged in the illegal strike” and stating that unless the Union provided documentation “that the strike is legal” by 3 p.m. on October 5, the Respondent would terminate all such employees. Having demanded and not received such documentation from the Union for the previous 3 days, and having already checked twice with the FMCS, Sagaser clearly knew that no such documentation could be provided.

On October 5, Rabinowitz sent another written offer from the Union to return to work, this time “on the basis

of the Company’s last, best and final offer at the bargaining table.”

D. The Discharges and the Withdrawal of Recognition

Later that day, the Respondent sent identical discharge letters to 42 of the striking employees, stating in pertinent part that “[c]ommencing on October 1, 1999, you abandoned your work station and engaged in an illegal strike. Therefore, the Company has elected to terminate your employment.” The Respondent then proceeded to hire new employees, retaining only three strikers who had special needed skills. The Union and the Respondent had another unsuccessful negotiating session on October 14, at which the Respondent refused to take back the employees it had discharged. Toward the end of January 2000, 35 of the employees then in the bargaining unit signed a petition stating that they did not want to be represented by the Union. In a letter dated February 2, 2000, the Respondent withdrew recognition from the Union. The Respondent subsequently made a number of unilateral changes in the employees’ terms and conditions of employment.

II. ANALYSIS

Unlike the majority, I believe that under certain circumstances, an employer may not take advantage of the loss-of-status provision in Section 8(d), even where a union has failed to comply with the Act’s notice requirements before striking. This is such a case. Here, the Union’s failure to submit the FMCS notice was the result of a clerical error. The Respondent’s own failure to disclose the Union’s mistake, in turn, reflects a lack of good faith, confirmed by its actions after the strike began. Permitting the Respondent to invoke the loss-of-status provision, as the majority does, defeats the purpose of Section 8(d)—to avert strikes—and imposes a harsh penalty that serves no statutory purpose. Neither the Union nor represented employees can fairly be faulted for striking, while the employer’s conduct demonstrates that it had no interest in averting a strike or seeking government mediation. In these circumstances, the Act does not dictate the majority’s inequitable result—just the opposite.

A. Controlling Principles

The goal of Section 8(d) of the Act—which encompasses the duty to bargain in good faith, notice requirements related to contract termination and modification, and the loss-of-status provision—is to avoid unnecessary strikes, substituting agreement for economic warfare. E.g., *Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185 (1971). The majority’s mistake here is divorcing the notice requirements and the loss-of-status provision from the goals

Congress intended them to serve. Indeed, my colleagues flatly state that the Respondent's conduct would be irrelevant "even had it been undertaken in bad faith."

The Supreme Court has warned us against this error, in holding that the loss-of-status provision was *not* triggered by participation in an unfair labor practice strike, called within the statutory notice period. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 284–289 (1956). The Court observed that we "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." 350 U.S. at 285 (internal quotation marks omitted). Rejecting a literal reading of the Act, the Court explained there was an "inherent inequity in any interpretation that penalizes one party to a contract for conduct induced solely by the unlawful conduct of the other, thus giving advantage to the wrongdoer." *Id.* at 287 (footnote omitted).³

The Board, too, has recognized the principle that an employer's prior conduct can preclude it from relying on the loss-of-status provision to defend its discharge of striking employees. In *ABC Automotive Products*, 307 NLRB 248 (1992), *enfd.* 986 F.2d 500 (2d Cir. 1992), an employer encouraged his employees to engage in a strike that was unlawful under Section 8(d). Unknown to the union, the employer did not receive the union's 60-day notice of intent to renegotiate, required by Section 8(d)(1), until after a significant delay by the Postal Service caused the notice to arrive less than 60 days before the employees began their strike. The employer, however, did not invoke Section 8(d) to avert a strike, but rather encouraged one. 307 NLRB at 249. Citing the purpose of the statutory notice requirement, the Board found that the employer's conduct "constituted a waiver of its 8(d) defense to the allegation that it violated the Act by firing the strikers." *Id.*⁴

In evaluating an employer's conduct, finally, the duty to bargain in good faith, as well as general equitable considerations, is implicated. The duty applies with respect to "the negotiation of an agreement" itself. Section 8(d). It includes the obligation to disclose relevant information to the other party. *E.g.*, *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). The standard of good faith—a higher standard than is required in some other business dealings—must guide the Board's application of the loss-of-status provision.

³ Contrary to my colleagues' suggestion, the guidance of the *Mastro Plastics* Court on how to interpret the Act is not limited to cases involving unfair labor practice strikes.

⁴ The majority attempts to distinguish *ABC Automotive* on the basis that the employer there "baited" the union into striking, while the Respondent here "did nothing to actively encourage" a strike (emphasis added). Under the circumstances here, however, the Respondent's silence was just as culpable.

It is no answer to insist, as the majority does, that the notice-provision of Section 8(d) be read in isolation. The Act "is not to be read overliterally," but rather "must be interpreted in light of the spirit in which [it was] written and the reasons for [its] enactment." *General Service Employees, Local 73 v. NLRB*, 578 F.2d 361, 366 (D.C. Cir. 1978) (footnotes omitted).⁵

B. Application of the Controlling Principles

In light of the principles derived from Section 8(d) as a whole, it is clear that the Respondent should not be entitled to rely on the loss-of-status provision here. The Respondent's course of conduct—centering on its pre-strike failure to disclose the Union's error with respect to the FMCS notice—was not consistent with the good faith demanded by Section 8(d). Indeed, it would be inequitable to reward the Respondent, and to punish employees and the Union, by finding that the striking employees had lost their protected status under the Act and so could be fired at will.

It is undisputed that the Union's failure to file the required FMCS notice was inadvertent and that the Union was unaware of the error.⁶ The Respondent, of course, learned of the failure *before* the strike, but remained silent. Under the circumstances, it had a duty to speak, if it intended to rely on the loss-of-status provision. The Board has not hesitated to find that employers have violated the duty to bargain in good faith by misleading the union or by failing to disclose a material fact, where it is clear that the union's ability to effectively represent employees was compromised as a result.⁷

That was precisely the result of the Respondent's non-disclosure here. No reasonable person could believe that

⁵ Indeed, as Justice Stevens has observed (quoting Justice Aharon Barak of the Supreme Court of Israel), the "'minimalist' judge 'who holds that the purpose of the statute may be learned only from its language' has more discretion than the judge 'who will seek guidance from every reliable source.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 133 (2001) (Stevens, J., dissenting).

⁶ The majority attempts to magnify the Union's negligence and distinguish *ABC Automotive* by emphasizing the steps that Avalos failed to take that would have brought the notice-error to light earlier. The issue, however, is not the extent of the Union's negligence, but whether the Act dictates that the Respondent's employees can be punished for it, despite the Respondent's own, culpable behavior.

⁷ See, *e.g.*, *Waymouth Farms, Inc.*, 324 NLRB 960 (1997), *enfd.* in relevant part 172 F.3d 598 (8th Cir. 1999) (employer misrepresentation concerning plant relocation while negotiating for plant closure agreement); *Sheller-Globe Corp.*, 296 NLRB 116 (1989) (severance agreement negotiated on false premise that employer would discontinue operations); *Accurate Die Casting*, 292 NLRB 284 (1989) (employer's false claim that it was not in financial difficulty). As the Board has held, "[t]here can be no question as to the justification for Board intervention in circumstances where an employer has concealed an intention to take drastic, unforeseeable action, in circumstances where such concealment occurred in circumstances preventing a union from taking steps through negotiation and economic action to protect represented employees." *Valley Mould & Iron*, 226 NLRB 1211, 1212 (1976).

the Union would have struck, and placed its members in a fatally vulnerable position, had it known of its failure to file the required FMCS notice.⁸ The Respondent's knowledge accordingly gave it an advantage that it exploited to undermine the Union's bargaining power and its ability to effectively represent its members, as confirmed by the actions the Respondent took after the strike began. It used the loss-of-status provision as a club, rejecting repeated offers by the Union to return to work and rebuffing attempts by several employees to actually return to work individually, before ultimately firing all striking employees when the Union made too few concessions.⁹

All of this could easily have been averted. Good faith required the Respondent to disclose the Union's failure to send the FMCS notice before the strike began. Ordinarily, an employer will be under no obligation to make a prestrike disclosure of a Union's failure to comply with the notice requirements of Section 8(d). Compliance, after all, is the union's responsibility, and an employer is entitled to presume that the union understands its legal obligations. But this case is different. Here, the Respondent knew or should have known that the Union was

⁸ The Respondent's chief negotiator Sagaser testified that he drew the conclusion that the Union "was not going to strike" when he discovered that the Union had filed no FMCS notice. But to infer that no strike was imminent, Sagaser would have had to assume that the Union had deliberately chosen to foreclose its members' protected right to strike. No rational union would deliberately enter into contract negotiations knowing that it could not use its principal economic weapon—and knowing that the employer likely would soon learn that a lawful strike was impossible and that the union had no bargaining leverage. Here, Sagaser and the Respondent's management would also have had to ignore the "rumors swirling around" the facility that some kind of collective action was imminent (notably, the Respondent approached a security firm well before the strike), as well as union negotiator Avalos' parting comment at the end of the last prestrike negotiating session that "I guess we have to do what we've got to do."

⁹ The majority calls the Union's offer to return to work "conditional" because it "only" offered to return first under the preexisting terms of employment, and then under the terms of the Respondent's own last offer. I disagree. Because there was no lawful imposition of new terms and conditions of employment after the strike began, the Union's initial offer accurately stated the terms under which the strikers were entitled to be returned to work and accordingly was unconditional; and its later offer to accept the Respondent's own last offer can hardly be called "conditional." It was the Respondent, which "reserved all its options" and rejected the Union's offer on each occasion, that prolonged the strike. See *Hawaii Meat Co.*, 139 NLRB 966, 971 (1962), enf. denied on other grounds 321 F.2d 397 (9th Cir. 1963) ("An unconditional request for reinstatement of strikers must carry with it . . . an undertaking to abandon the strike, [but] it does not require that the employees forfeit their right to continue to strike, if the request is denied"). Contrary to the majority, the discharge of the strikers after they offered to return to work based on the preexisting terms, and then on the Respondent's own last offer, shows only that the Respondent had been intent on extracting even more concessions than before, not that it was operating in good faith.

operating under a mistake that was basic to the negotiations: the belief that the Union could lawfully strike and so apply bargaining leverage. And given the Respondent's actual or imputed knowledge, it should have informed the Union of its mistake (at least if it intended to take advantage of the loss-of-status provision).

There is no reason why federal labor law, which seeks to avoid disputes, should impose lesser obligations on parties to a collective-bargaining relationship than the common law imposes on commercial actors. In the ordinary commercial context, as the *Restatement (Second) of Torts* observes:

The continuing development of modern business ethics has . . . limited to some extent th[e] privilege to take advantage of ignorance. There are situations in which the defendant not only knows that his bargaining adversary is acting under a mistake basic to the transaction, but also knows that the adversary, by reason of the relation between them, the customs of the trade or other objective circumstances, is reasonably relying upon a disclosure of the unrevealed fact if it exists. In this type of case good faith and fair dealing may require a disclosure.

Restatement (Second) of Torts §551 ("Liability for Nondisclosure"), comment l (1977). These words could have been written with the National Labor Relations Act, and its statutory duty of good faith, in mind.

Not surprisingly, applying equitable principles leads to the same result, under either estoppel or waiver theories. By failing to disclose the Union's notice-failure, the Respondent effectively induced the Union to strike. As a result, the Respondent should be estopped from invoking the notice-failure, and the loss-of-status provision, to defend the mass discharge of striking employees. The essence of estoppel is that a party may not induce another party to rely on the truth of certain facts, benefit from that reliance, and then controvert those facts to the prejudice of the other party. See, e.g., *Red Coats, Inc.*, 328 NLRB 205, 206–207 (1999). The necessary elements of estoppel—the Respondent's knowledge and intent, as well as the Union's mistaken belief and detrimental reliance on an assumption the Respondent knew to be false—are all present here.¹⁰

The notion of waiver, invoked in *ABC Automotive Products*, is applicable as well. The loss-of-status provi-

¹⁰ See, e.g., *Restatement (Second) of Torts* §894(2) ("Equitable Estoppel as a Defense") ("If one realizes that another because of his mistaken belief of fact is about to do an act that would not be tortious if the facts were as the other believes them to be, he is not entitled to maintain an action of tort for the act if he could easily inform the other of his mistake but makes no effort to do so.").

sion is essentially a defense.¹¹ Where an employer demonstrates that it has no interest in averting a strike or seeking mediation—the purpose of Section 8(d) and its notice requirements—then it has waived that defense. The Respondent contacted FMCS, but only to confirm that the agency had not received the Union’s notice. And, of course, it never told the Union what it had learned. In the words of the *ABC Automotive Products* Board, the Respondent’s actions “encouraged the type of conduct Section 8(d) is intended to prevent.” 307 NLRB at 249.

In short, the Respondent stands in essentially the same position as the employer in *Mastro Plastics*, whose unfair labor practices triggered a strike, and the employer in *ABC Automotive Products*, who explicitly encouraged employees to strike. In both cases, the Union’s failure to file the notice ostensibly required by Section 8(d) was excused, based on the employer’s conduct. The majority argues that here, employees, as members of the bargaining unit, appropriately must “suffer the consequences” of the Union’s negligence, just as they would enjoy the benefits of its representation. But that view misses the point: it was the employer who was truly at fault. I therefore would find that the Respondent was barred from treating its striking employees as unprotected.

C. Remaining Issues

It follows that the Respondent could not have lawfully discharged employees for participating in the strike. Rather, it was required to treat them as economic strikers entitled to protections under the Act and to reinstatement “upon application, absent a legitimate and substantial business justification, such as permanent replacement.” *Golden Stevedoring Co.*, 335 NLRB 410, 412 (2001).

Here, as discussed above, although the Union unconditionally offered to return the strikers to work on October 1, the Respondent refused to reinstate them. The Respondent does not defend this action on the ground that the strikers had been permanently replaced, and offers no other legitimate and substantial business justification for its conduct. I would accordingly conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers on October 1. For the same reasons, the Respondent violated Sections 8(a)(1) and (3) 4 days later by advising the strikers that they were discharged for engaging in a strike, and by discharging them.¹²

¹¹ The operation of the loss-of-status provision is not, by its terms, automatic and irrevocable. Sec. 8(d) provides that a discharged employee’s loss of protected status “shall terminate if and when he is reemployed by such employer.”

¹² I find it unnecessary to pass on the complaint allegations that the Respondent violated Sec. 8(a)(4) and (1) by refusing to reinstate the

I would also conclude that the Respondent’s withdrawal of recognition from the Union violated Section 8(a)(5) and (1). The Respondent’s February 2, 2000 letter to the Union withdrawing recognition was based on a petition signed by a majority of the employees of that date stating that they did not want the Union to represent them. The Respondent’s new employees had been hired to replace the strikers whom the Respondent unlawfully discharged and refused to reinstate. If the Respondent had retained the strikers, as it was legally obligated to do, it would not have hired the new employees whose petition led to the withdrawal of recognition. *J. M. Sahlein Music Co.*, 299 NLRB 842, 850 (1990). In any event, the Board has long held that an employer may not withdraw recognition where it has committed unremedied unfair labor practices tending to cause employees to become disaffected from the union. *Olson Bodies*, 206 NLRB 779, 780 (1973). The unfair labor practices described unquestionably tended to erode the Union’s support. They therefore precluded the Respondent from lawfully withdrawing recognition.

Finally, the Respondent admits that after withdrawing recognition of the Union, it made subsequent unilateral changes in terms of employment. Those changes also violated Section 8(a)(5) and (1).

III.

Sadly, in this case, as in *Alexandria Clinic*, 339 NLRB 1262 (2003), the majority prefers its takes on statutory words to the realities of a labor dispute. Congress could not have imagined that a strike unlawful only because of a union’s clerical error could serve as pretext for discharging an entire workforce and ending a collective bargaining relationship—at least where the employer itself is, as an equitable matter, responsible for the strike. The majority reaches a harsh result, applying the Act with little regard for its purposes and with no sense of fundamental fairness. Accordingly, I dissent.

Veronica I. Clements, Esq., for the General Counsel.
S. Brett Sutton and Howard Sagaser, Esqs., of Fresno, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Fresno, California, on July 10, 11, and 12,

strikers and by discharging them, and that it violated Sec. 8(a)(3), (4), and (1) by refusing to rehire them as new employees, because these additional violations would be cumulative. Like my colleagues, I do not reach the issue of whether “intentional” product damage caused by the strikers’ walkout constituted a separate basis for their loss of protection, as the judge found. Notably, at the time of the strike the Respondent did not cite product damage as a reason for the discharges.

2000, upon the General Counsel's complaint which principally alleged that the Respondent discharged 42 economic strikers in violation of Section 8(a)(3) and (4) of the National Labor Relations Act. It is also alleged that the Respondent withdrew recognition from the Charging Party and made certain unilateral changes in working conditions in violation of Section 8(a)(5) of the Act and, committed two violations of Section 8(a)(1).

The Respondent generally denied that it committed any violations of the Act and affirmatively contends the strike occurred without the Charging Party having given notice to the Federal Mediation and Consolidation Service as required by Section 8(d) of the Act and therefore the strikers lost their status as employees. The Respondent also contends that the strike was unprotected because it breached the no-strike clause of the extended collective-bargaining agreement; and, the strike started midshift causing substantial product damage. Finally, the Respondent contends that it withdrew recognition only after receiving a petition from a majority of unit employees that they did not want the Union to represent them.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law, and recommended order.

I. JURISDICTION

The Respondent is a California corporation with a place of business in Fowler, California, engaged in operating a raisin packing facility. In the course and conduct of this business, the Respondent annually purchases, and receives directly from point outside the State of California, goods, products, and materials valued in excess of \$50,000 and annually sells goods and services valued in excess of \$50,000 directly to customers outside the State of California. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, Packing House Employees and Warehousemen's Union, Local 616, a/w International Brotherhood of Teamsters, AFL-CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The operative facts in this matter are largely undisputed. Since 1970 the Union has represented a unit of the Respondent's employees engaged in the processing, handling and packing of dried fruits or nuts, with the usual exceptions. And, the parties negotiated a series of collective-bargaining agreements, the last of which was effective from 1996 to May 31, 1999.¹

On or about January 26, the Union served the Respondent a written notice that it desired to reopen the contract and on February 19, sent an appropriate notice under Section 8(d)(3) to the California Mediation Service. The Union did not send a notice

to the Federal Mediation and Conciliation Service then, or at any time prior to the strike of October 1.

The parties had a number of bargaining sessions in the spring, summer, and fall but were unable to reach an agreement. Thus, on September 24 the Union served a written notice on the Respondent, as required by the agreement to extend the contract, that it was terminating the agreement.

On September 30 the parties had a final bargaining session, but were again unable to reach an agreement. On October 1 the employees reported for work at their usual time and at 6 a.m. began processing raisins. At about 7:15 a.m. the Union called on them to strike, and after a quick cleanup (of the type usually performed before going [on a] break as opposed to the thorough nightly cleaning) they went out.

At about 7:50 a.m., Howard Sagaser, the Respondent's attorney, contacted George Avalos, the Union's secretary and treasurer, and told him that the strike was in violation of Section 8(d)(3) and (4) because the Union failed to give the FMCS notice. He suggested that Avalos have the Union's attorney call him and Sagaser called the FMCS office in Washington to confirm that the agency had no record of receiving the 8(d) notice. He had earlier made such an inquiry and learned that the FMCS had no record of receiving a notice from the Union.

Sagaser then called the office of the Union's attorneys, leaving the same message on the voice mail. At about 9 a.m., Jason Rabinowitz, one of the Union's attorneys was contacted by his secretary with this message. Rabinowitz called Avalos, who at the time was on the picket line, and told him what Sagaser had said. Avalos told Rabinowitz (without checking the file) that the notice was in fact sent in February.

A couple of hours later Rabinowitz made contact with Sagaser and told him that he had been assured by Avalos that the notice was sent—that "the local feels very strongly that it was sent in." Sagaser responded that the FMCS had no record of receiving it, and gave Rabinowitz the FMCS number in Washington.²

Later Friday afternoon, Rabinowitz called Sagaser and said the Union had not been able to find the return receipt, but he was sure the notice had been sent and continued to be hopeful that they could find the return receipt. "But," he told Sagaser, "if we're not able to find it, and we're not able to demonstrate that the form was mailed to FMCS, the union has authorized me to offer to return everybody to work immediately, under the status quo ante the strike, while we continue to negotiate for the new contract, and will the company take the people back." Rabinowitz testified that Sagaser said that "after what's happened we're not going to take the people back. We—we may consider taking certain people back, or some people back on an individual case-by-case basis, but we're not taking them all back."

In filing notices to reopen contracts, the Union uses a four-part form. One part is sent to the company, another to the FMCS, another to the state agency, and the fourth is kept in the Union's file. On searching the Union's file, Avalos found the

¹ All dates are in 1999, unless otherwise indicated.

² Sagaser filed a charge by FAX to the effect that the Union violated Sec. 8(b)(3). This charge is being held in abeyance, pending the outcome of the instant case.

part of the form meant to be sent to the FMCS. He did not find a return receipt from the FMCS, though receipts from the California agency and the Respondent were there.

The parties met on Saturday afternoon. Rabinowitz stated that the notice was apparently not sent to the FMCS due to a clerical error. Sagaser said that the “family” wanted to meet and discuss all the pending issues, and perhaps he and the Union’s representatives could get together the next day. In fact they did not meet Sunday.

Thus on Monday, October 4, Rabinowitz wrote Sagaser: “The Union has authorized me to offer to return the Boghosian employees to work immediately, so that production may resume and continue while the parties work to negotiate a new contract. Of course, this offer is for all the employees to return to work, with their seniority intact, under the previously existing terms and conditions of employment.”

Sagaser responded, in material part, that “(f)rom the outset of the strike, Boghosian Raisin Packing Company has notified the Union that it is reserving the right to impose discipline, including termination, of all employees who engaged in the illegal strike. Unless the Union can provide documentation by 3:00 p.m. on October 5, 1999 that the strike is legal, it is the intent of Boghosian Raisin Packing Company to terminate all employees who engaged in the illegal strike which began on October 1, 1999.”

Rabinowitz wrote back on October 4: “As I informed you during our meeting on Saturday, October 2, Union Secretary-Treasurer George Avalos prepared the notification form in February of this year, and gave it to the Union’s secretary to send out to the appropriate authorities. The Union’s search of its files on Friday revealed that the form was apparently not mailed to the FMCS due to a clerical error.”

And on October 5 Rabinowitz wrote Sagaser: “This will confirm my voice mail message to you of a few minutes ago, offering that the employees will return to work on the basis of the Company’s last, best and final offer at the bargaining table.”

Finally, on October 5 the Respondent sent discharge letters to each striking employee: “Commencing on October 1, 1999, you abandoned your work station and engaged in an illegal strike. Therefore, the Company has elected to terminate your employment.”

The Respondent then began hiring replacements, retaining three of the striking employees. Thus by October 26, there were 49 employees in the bargaining unit—three retained and 46 new. That number was reduced to 44 as of January 31, 2000. Between January 27 and 31, 35 of these employees signed petitions stating (in the English translation) that: “We the undersigned employee’s [sic] of Boghosian Raisin Packing of Fowler, Calif. don’t want to be represented by Teamsters Union Local 616 of Fresno, Calif.”

On February 2, 2000, the Respondent withdrew recognition from the Union and subsequently made certain changes in terms and conditions of employment without notice to or negotiating with the Union.

B. Analysis and Concluding Findings

1. The unlawful strike and loss of employee status

There is a distinction, not always clearly defined in the cases, between an unlawful strike and one which is unprotected. There is also a distinction between striking employees who may be disciplined for engaging in unprotected activity associated with a strike and strikers who lose their status as employees. This case deals with an unlawful strike and employee loss of status under Section 8(d). Those cases considering levels of unprotected activity and motive for discipline are inapposite.

The General Counsel argues that the Respondent violated Section 8(a)(3) and (4) by 1) refusing the strikers’ unconditional offers to return to work, 2) discharging them on October 5, and 3) refusing thereafter to rehire them because: (a) they engaged in a strike protected by the Act; (b) in retaliation for the Union’s having previously filed an unfair labor practice charge and grievance; and (c) for having engaged in hard bargaining.

The Respondent contends that the strike was unlawful, since notice to the FMCS required by Section 8(d) was not given; and was unprotected 1) since it started within the 7-day notice provision of the extension agreement while the “no-strike” clause of the expiring collective-bargaining agreement was still in effect and, (2) the strike began midshift thus causing substantial product damage.

There is no question that the Union did not send any kind of notice of the labor dispute to the FMCS prior to calling the strike on October 1. From statements and arguments of counsel, it is clear that the principal issue in this matter is whether this lack of notice caused the strike to be illegal and caused the strikers to lose their status as employees under the Act. Though the result here may be more harsh than intended by Congress, the conclusion is inescapable that the strike was illegal and the employees lost their protection under the Act. The Board, with court approval, has consistently held that the notice requirements of Section 8(d), and the penalties for failing to do so, are clear and unambiguous. Notices to the FMCS and appropriate state agency are required, lest the union be in violation of its duty to bargain and the strikers lose their status as employees.

Early on, the Board held that the notice requirements of Section 8(d) are mandatory and a strike without giving notice to the FMCS was unlawful and caused the union to be in violation of its duty to bargain under Section 8(b)(3). *Retail Clerks International Local 1179 (J. C. Penny Co.)*, 109 NLRB 754 (1954).

Then in 1963, on facts similar to those here, the Board held that the union’s “failure to file the notices required by Section 8(d)(3) caused the strike to be unlawful from its inception.” *Fort Smith Chair Co.*, 143 NLRB 514 (1963), enf’d. 336 F.2d 738 (D.C. Cir. 1964), cert. denied 379 U.S. 838 (1964). The Board rejected the General Counsel’s contention that the true motive for discharging the strikers was its financial difficulties, the union’s filing grievances and the union’s uncompromising attitude in negotiations. Said the Board, “by operation of the loss-of-status provision of Section 8(d), the strikers lost their employee status and the protection of Section 8(a) when they walked out on June 1 and that, consequently, such motive as

may have been behind the Respondent's actions with respect to them is immaterial." 143 NLRB at 519.³

Though recognizing the clear language of Section 8(d) and the holding in *Fort Smith Chair Co.*, the General Counsel nevertheless argues that the Union's failure to give notice to the FMCS is de minimus, should be excused as an administrative error outside the control of the Union, and/or the Respondent is culpable for the Union having called an illegal strike.

Counsel for the General Counsel has cited no authority for the proposition that failure to give notice to the FMCS or appropriate state agency has ever been considered de minimus. To the contrary, even where the state agency rarely engages in mediation, suggesting that failure to notify it would not be significant, the Board has held the notice to be required. *Meatcutters Local 576 (Kansas City Chip Steak Co.)*, 40 NLRB 876 (1963). *Retail Store Employees Local 322 (Willow Corp.)*, 240 NLRB 1109 (1979). Only in the case where the state does not have an agency established to mediate and conciliate labor disputes are parties relieved from filing notice with the state. *Brotherhood of Locomotive Firemen & Engineers (Phelps Dodge Corp.) v. NLRB*, 302 F.2d 198 (9th Cir. 1962).

Similarly, counsel for the General Counsel argues that the Respondent showed no signs of being interested in mediation because when Sagaser called the FMCS he did not request that agency's aid in resolving the dispute. Thus notice to the FMCS would have been futile. I find nothing in the Act, or cases construing Section 8(d), to the effect that this speculation, even if true, would relieve the Union of its obligation to give the FMCS notice.

Counsel for the General Counsel cites *Longshoremen ILA Local 1814 (Amstar Sugar Corp.)*, 301 NLRB 764 (1991), for the proposition that the Union should be excused from its technical failure to give notice to the FMCS. In that case a divided Board approved a settlement agreement over the General Counsel's objection reached after the administrative law judge had found the union to have violated the Act by striking within 30 days of sending the mediation agencies notice (20 and 26 days respectively). Though stating that the strike was technical violation against a company with "little interest in mediation" the Board concluded that the private settlement agreement provided substantially the same remedy as the judge ordered. I do not believe this case is authority to excuse the Union's failure to give notice here.

First, the Board did not reverse or even question the judge's finding of an unfair labor practice. The Board's comments concerning the company having notice for a "not insignificant" time related to its justification for approving a settlement agreement over the objections of the General Counsel. Here there was no notice at all. Counsel for the General Counsel contends, however, that these cases are analogous since counsel

for the Respondent could have asked the FMCS to come into the dispute and having failed to do so demonstrated "little interest" in mediation. In effect, the General Counsel argues that blame for the Union's failure to give notice should shift to the Respondent since it did not ask for mediation. The *Longshoremen's* case is not authority for such a proposition.

Counsel for the General Counsel does cite some legislative history for the 1974 health care amendments to the Act along with a case construing the notice requirements of Section 8(g), arguing that a "rule of reason" and caution against "rigid adherence" to the notice requirements by analogy apply to the situation here. Thus in *Greater New Orleans Artificial Kidney Center*, 240 NLRB 432 (1979), the Board concluded that failure of the company to receive the required notice under Section 8(g) did not make the strike unlawful, or cause the strikers to lose their status as employees. The union in fact mailed the notice in time for it to be received within the 8(g) time period. The fact it was not the Board attributed to a failure of the U.S. Postal Service. Further, the company had actual timely notice, having been called by the FMCS, and made contingency preparations for the strike. The Board found that the union took "reasonable steps to insure compliance with the 8(g) requirements." "Thus, we find that it would be inequitable to hold the Union responsible for the untimely service of the notice when no reason for the delay can be attributed to it." 240 NLRB at 433. Finally, since the company had actual notice for the period provided in Section 8(g), the Congressional concern relating to health care institutions for the continuity of patient care was satisfied.

None of the facts or reasoning of *New Orleans Artificial Kidney*, apply here. The key fact was delay in delivering the 8(g) notice to the company—not, as here, failure even to send the appropriate notice. The Union here, unlike the union in *New Orleans Artificial Kidney*, cannot be excused because some outside agency failed to deliver a properly sent notice. In fact, it was agents of the Union who did not send the notice and it was agents of the Union who took no steps to insure that it was sent.

The Union has three employees—Avalos, the secretary/treasurer, one business agent, and one secretary. Until her retirement on June 1, the secretary was Marilyn Banister. She was replaced by her daughter Debra.

Avalos testified that his practice was to have the secretary prepare the reopening letters and appropriate notices. He would then review the documents, sign them, and give them to her to mail. The General Counsel blames the failure to notify the FMCS on a now retired clerk. But she was not an outside agency. Certainly Avalos had some responsibility to supervise and insure that important matters were completed by the person to whom he delegated the task. He did not. It would have been obvious, had he looked at his file for the Respondent, that the notice had not been sent to the FMCS. Not only was there no return receipt, but the page of the form to go to the FMCS was still in the file.

On September 28, Avalos completed and signed a form sent to the Teamster Joint Council for the purpose of obtaining sanction for the forthcoming strike. Paragraph 11 of this form reads:

³ This was apparently a five-member decision, with Chairman McCullough concurring that the discharges were motivated by the unlawful strike, thus, he would not decide the loss of status issue. Member Fanning dissented on grounds that the loss of status provision would not apply for failure to notify the FMCS or state agency since, as written at the time, Sec. 8(d)(4) referred to the "sixty-day period specified in this subsection." This phrase was subsequently amended to read "within any notice period specified in this subsection."

Attach copies of 60-day modification or termination notice and 30-day notice to federal and state mediation services, required by Taft-Hartley Section 8(d), as well as copies of *certified mail receipt signed by the company and federal and state mediation services*. (Emphasis in original.)

Avalos testified that he did not look for the return receipts at this time, while blaming his secretary who “is the one that always took care of this.” However, the new secretary testified that Avalos prepared the form to send to the Joint Council and gave her the material to be sent along with the form. Avalos also testified that he did not understand the significance of failing to send the notices. This, notwithstanding that the requirement to attach the return receipts was underlined. I conclude that for any reasonable person, the requirement in paragraph 11 should have been a red flag, alerting Avalos to the importance of having sent the appropriate notices before striking. Perhaps Avalos was not aware of the seriousness Congress and Board attaches to giving notices under 8(d) or the potential consequences for failure to do so. But this lack of understanding, if any, cannot be a basis for a ruling in this matter.

The General Counsel argues that the mistake in failing to send a notice to the FMCS was “made by a clerical employee who had the obligation to handle these matters” and such relieves the Union from responsibility. To accept this argument would be tantamount to rewriting Section 8(d) by saying that the notice requirements of Section 8(d) need not be met if responsibility for filing the notices is delegated to a staff employee. I conclude that the Union cannot be excused because its chief executive officer delegated responsibility for sending the notices to someone else.

Citing *ABC Automotive Products Corp.*, 307 NLRB 248 (1992), the General Counsel argues that the Union’s failure here can be attributed to the Respondent, thus the Respondent can not avail itself of the 8(d) defense. In *ABC Automotive*, among other things, the company refused to make a wage offer during negotiations and then told the union that the employees should go ahead and strike if they wanted. The Board held that striking within the 60 day “cooling off” period did not violate Section 8(d) because the respondent encouraged the employees to strike and such “constituted a waiver of its 8(d) defense to the allegation that it violated the Act by firing the strikers.” Since “the Respondent encouraged the type of conduct Section 8(d) is intended to prevent—a strike commencing less than 60 days after receipt of a notice of termination or modification . . . the Respondent may not subsequently avail itself of the remedies in Section 8(d) to justify its unlawful termination of the striking employees.” 307 NLRB at 249.

There is nothing in this record to suggest that the Respondent encouraged the strike or encouraged the Union to fail to send notice to the FMCS. The Respondent’s Counsel did inquire of the FMCS whether the notice had been sent, and did not tell the Union what he had learned until after the strike began. But he had no control over when, or whether, the employees would strike. Further, within a half-hour or so of the strike’s beginning, Sagaser told Avalos that the strike was illegal for failure to give the notice. Avalos took no steps then to call off the strike or even check the correctness of Sagaser’s assertion.

From the clear language of the Act, and the overwhelming, long-time case authority, I conclude that where, as here, the union fails to give a mediation agency the notice required by Section 8(d)(3), any strike in support of its negotiation position is an unfair labor practice and the strikers lose their status as employees. Accordingly, the Respondent was privileged to discharge any or all of them for striking, and whatever other motive the Respondent may have harbored is immaterial.

I therefore do not consider the General Counsel’s argument that a motivating cause for discharging the strikers was an unfair labor practice charge the Union filed relating to the Dehydrator Plant (in a case dismissed by Judge Kennedy in a bench decision);⁴ nor the grievance relating to the Dehydrator Plant; nor the contention that the Respondent was motivated by the Union’s hard bargaining. Even if these factors were present, unless and until the strikers regained their status as employees, they had no rights under Section 8 of the Act.

In paragraph 11 of the complaint, it is alleged that when the discharged strikers made application to be hired as new employees, the Respondent was required to do so. This is apparently an alternative theory in the event that discharge of the strikers is found lawful. I find this allegation has no merit. Of course the Respondent could have rehired them, and in doing so the loss of status would have ended. However, unless and until that occurred, the strikers had no status under the Act as to the Respondent. To conclude otherwise would be to amend out of the Act the loss-of-status clause.

2. The no-strike clause defense

The Respondent also argues that the strike occurred within 7 days of the Union’s giving notice to terminate the contract as extended. Therefore it was unprotected and the employees could be discharged for striking. I disagree. I conclude that notice given on September 24 was sufficient to terminate the contract by October 1 when the strike commenced. Therefore, for this reason the strike was not unprotected.

3. Product damage

The same, however, cannot be said of the Respondent’s defense that by striking midshift, the employees damaged product. Though a finding in this regard is not critical to this decision, it should be noted that the Union apparently decided on the evening of September 30 to strike the next day, however rather than having employees not report for work, the Union did the opposite. The employees reported and began working, then at 7:15 a.m. word was passed to strike. While the employees did a mini cleanup, of the type required when they went on a short break, there is no question that by leaving for the day, there was product damage. Indeed, the Commodity Grader for the United States Department of Agriculture assigned to the Respondent testified that some of the raisins left on the machine might be salvageable, but those in the water tank would not. At least, she testified, “I wouldn’t want to eat them.” And there can be little question that the product damage was intentional. In such a situation, the action of employees is unprotected.

⁴ Case 32–CA–17375.

The Board has long held that employees have the duty to take reasonable precautions when striking in order to avoid damage to the company's property. *Marshall Car & Wheel Foundry Co.*, 107 NLRB 314 (1953), *enfd. denied* 218 F.2d 409 (5th Cir 1955) (the court disagreeing that the company had waived its right to discharge the strikers for engaging in unprotected activity). Necessarily a strike will cause some economic loss to an employer, as well as to the employees. But damage to the company's property goes beyond such loss and where strikers deliberately time their strike to cause product damage, then their activity is unprotected for which they can be disciplined or discharged.

4. Withdrawal of recognition

Shortly after the Respondent discharged the strikers, it began hiring replacements. It has long been held that an employer may withdraw recognition from the union which represents its employees if it has a good-faith doubt of the union's continued status as the majority representative of employees. *Celanese Corp. of America*, 95 NLRB 664 (1951). This doubt, however, "must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996).

Since I conclude that the strikers lost their status as employees, and were lawfully discharged and denied reinstatement, I conclude that there were no unfair labor practices of the sort which would impair a good faith doubt. I further find that when presented with a petition signed by a substantial majority of the new employees that they did not want to be represented by the Union, the Respondent had a good-faith doubt of the Union's continued status as the majority representative. Therefore, the withdrawal of recognition on February 1, 2000, was not unlawful. *Fort Smith Chair Co.*, *supra*.

Since the Respondent lawfully withdrew recognition, it follows that any subsequent changes it made to employee terms and conditions of employment was not violative of Section 8(a)(5).

5. The alleged Section 8(a)(1) violations

It is alleged that in late September, Richard Lokey, the Respondent's plant manager violated Section 8(a)(1) (and presumably supplied a proscribed motive for the discharges) by telling an employee that "he hoped Unit employees would go on strike so he could fire them all."

Support for this allegation is the testimony of Scott Lokey, Richard Lokey's cousin and a machine operator for the Respondent until his discharge for engaging in the strike. Scott Lokey testified that they were drinking at a bar near the Respondent's plant after work, as they did on a fairly regular basis. During this, Scott said that Richard asked about the employees' view of the contract negotiations and then said that he hoped the employees went on strike so he could fire them all.

Richard Lokey denied making such a statement and it is his testimony I credit. First, I found Richard more credible than Scott. Second, [the] statement attributed to Richard simply makes no sense. Though Richard was the plant manager, he did not in fact have the authority to fire the entire workforce, nor was there shown any reason why he would want to. There is no proven animosity between Richard Lokey and any of the employees. I simply do not believe that Richard Lokey made the statement attributed to him by his cousin.

The discharge letter to all striking employees of October 5 is also alleged violative of Section 8(a)(1). As I have found the Respondent's act of discharging the strikers to have been lawful, I conclude that sending the letter was not a violation of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The complaint is dismissed in its entirety.

⁵ 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.