Fineberg Packing Company, Inc. *and* Billy J. Exum.
Case 26–CA–20287

January 31, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On October 3, 2002, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent violated Section 8(a)(1) by discharging various unit employees as a result of their participation in a work stoppage. The judge found that (1) the work stoppage at issue constituted protected concerted activity, notwithstanding a no-strike clause in the parties' applicable collective-bargaining agreement, and (2) even assuming arguendo that the work stoppage was unprotected, the Respondent condoned the employees' conduct, such that it thereafter could not lawfully discipline the employees for that activity.

The Respondent excepts to these findings. It asserts, inter alia, that a finding that the employee work stoppage was protected is contrary not only to the pleadings and stipulations of the parties, but also to the evidence presented. In addition, the Respondent contends that the General Counsel failed to demonstrate, by clear and convincing evidence, that the Respondent condoned the employee work stoppage.

We find merit in the Respondent's exceptions. Contrary to the judge, we find that the General Counsel established neither that the employee work stoppage constituted protected activity, nor that the Respondent condoned the employee work stoppage. Accordingly, we reverse the judge's decision and dismiss the complaint.

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

I. FACTS

For more than 40 years, the Union has served as the exclusive bargaining representative of a unit of production and maintenance employees at the Respondent's meat-processing facility in Memphis, Tennessee. In January 2001,[2] the Respondent was experiencing financial pressures as a result of a slackening in business and an increase in utility expenditures. Because of those conditions, the Respondent requested that the Union, in lieu of a layoff, agree to a temporary 3-month suspension of the 35-hour work week guaranteed by the parties' existing collective-bargaining agreement. The Union's President, John Canada, agreed to the proposed temporary suspension, to commence on February 15 and terminate on May 15. On or about February 12, union steward Henry Lee Wright told unit employee Billy Exum about the anticipated temporary suspension.[3] Subsequently, Exum shared this information with some of his coworkers. A group of employees thereafter decided that the unit employees should meet as a group with plant manager Richard Freudenberg to ask him about the rumored reduction in work hours. Accordingly, in the early morning of February 14, the vast majority of the unit employees (including employees from virtually every department of the plant) left their work stations and went outside to wait for Freudenberg to arrive. At that time, supervisor David Green called Freudenberg on his cell phone to advise him that the employees had walked out and that they would not return to work until they spoke with Freudenberg.

When Freudenberg arrived at the plant, employees Kathy Furlong and Billy Exum approached him and informed him that the employees wished to speak to him concerning the rumored reduction in their work hours. Freudenberg responded that it would be unlawful for him to meet with the employees as a group, but that he could meet with them individually. Freudenberg thereafter ordered the employees to return to work or, alternatively, to leave the premises.[4] In response to subsequent questions from the employees as to whether they were fired, Freudenberg assured the employees that he was not firing

[2] All dates hereafter refer to 2001.

[3] The record evidence suggests that, prior to that date, the unit employees were not aware of the agreed-upon temporary suspension.

[4] Supervisor Green, as well as several employee witnesses, testified that Freudenberg indicated that the employees had between 10 and 20 minutes to elect one of the two courses of action. In addition, several employees, including Billy Exum, Katie Brooks, Janet Exum, and Melvin Guy, testified that Freudenberg told the employees that, if they did not leave the premises, he would call the police to have them removed from the property.

anyone, and told them to come back the next day.[5] The assembled employees subsequently dispersed; some employees returned to work, while others proceeded to the employee locker rooms to put away their work clothes and equipment. Freudenberg thereafter followed the latter group of employees into the locker rooms. Unit employee Billy Exum testified that Freudenberg entered the men's locker room and reiterated his instruction to the employees to leave. Exum further testified that he subsequently asked Freudenberg if he was firing them, and that Freudenberg responded, "No . . . come back tomorrow."[6] Finally, Exum testified (and Guy corroborated) that, when he (Exum) dropped a pen on the way out the door, Freudenberg told him to take the pen with him because he might need it. On cross-examination, Exum conceded that Freudenberg also told him that he might need the pen "to fill out an application for another job."[7]

Similarly, employee Katie Brooks testified that, following his remarks to the employees assembled outside of the plant, Freudenberg entered the women's locker room and engaged in a conversation with Brooks and employee Janet Exum. Brooks further testified that, in response to her question as to whether they were being fired, Freudenberg indicated that they were not fired, and told them to put their things away and "come back tomorrow."[8]

The employees who had retreated to the locker rooms thereafter departed the premises and assembled in an area outside the plant gate, where they awaited the arrival of their union representatives.

Union President John Canada testified that he arrived at the plant around noon, at which time he met with Freudenberg.[9] Canada asked Freudenberg to allow the employees who had left the premises to return to work, but Freudenberg indicated that he would not permit them to do so. Accordingly, Canada subsequently told the waiting employees that Freudenberg was not going to allow them to return to work and that the Union would hold a meeting with the employees the next day.[10]

The next morning, a number of the employees who had left the plant the previous day attempted to report to work as usual, but were prevented from entering the Respondent's premises (or, at a minimum, they perceived that they were being denied access to the premises). The next day, February 16, the employees returned to the plant to pick up their paychecks. At that time, Freudenberg gave the employees separation notices indicating

[5] At sec. II D, eighth paragraph, of her decision, the judge indicated that various employees testified that Freudenberg told them that they were not fired and that "they were to *return to work* the next morning" (emphasis added). However, an examination of the specific testimony of the employee witnesses reveals that, at the time of the mass gathering of the employees outside the plant, Freudenberg simply told the employees that he was not firing anyone, and that they should "come back tomorrow."

In this regard, and by way of example, the judge stated that employee Robert Earl Alston was one of the employees who "recalled that Freudenberg not only told the employees that they were not fired but that they were *to return to work* the next morning" (emphasis added). Yet immediately after making this statement, the judge quoted Alston's actual testimony that "'the last thing I heard and I'll never forget it, [Freudenberg] told Billy Joe there, told there was nobody fired, that we can go home and come back, you know, the next day.'" As Alston's further testimony, also quoted by the judge, makes clear, Alston interpreted from Freudenberg's statement—go home and come back the next day—that he (Alston) "was going back to work." But that is not, in fact, what Freudenberg said. It is Alston's interpretation of what Freudenberg said and, for that matter, it is also the judge's interpretation of what Freudenberg said. See fn. 15 below.

[6] Employees Carl Macklin and Melvin Guy corroborated Exum's testimony in this regard. As distinguished from Exum's and Macklin's testimony, however, Guy indicated that Freudenberg told them to put their belongings in the lockers and return *to work* the next day. The judge did not resolve the credibility issue. See fn. 7 below.

[7] Exum's description of the incident is set out in an affidavit dated June 22, 2001, which he provided to the Board in a related case. Given that Exum's affidavit stated that Freudenberg told him to "come back tomorrow" and that Freudenberg also said that he might need the pen "to fill out an application for another job," we find, contrary to Guy's testimony, that Freudenberg told Exum to "come back tomorrow," and did not tell him to "return to work" the next day. Of the three employees present during this incident, only Guy testified that Freudenberg told Exum to return to work the next day. Both Macklin and Exum testified that Freudenberg told Exum to "come back tomorrow." Exum's affidavit is consistent with this testimony. Further, we find that it would be inherently contradictory for Freudenberg to tell Exum that he might need the pen "to fill out an application for another job" if he had just told Exum, as Guy testified he did, that he should return to work the next day.

[8] Employees Janet Exum and Kathy Furlong corroborated Brooks' testimony in this regard. Although not mentioned by the judge, both Exum and Furlong indicated that Freudenberg also told them to come back *to work* the next day.

We do not find that Exum and Furlong, in testifying that Freudenberg also told them to "come back to work" the next day, gave false testimony. Rather, in our view, their testimony reflects their understanding of what they thought Freudenberg meant—and what they wanted him to mean.

[9] By this time, the employees had been stationed outside the plant gate for several hours.

[10] In an April 30, 2001 letter to the International Union's president, Canada described the events on the morning of February 14 (emphasis added):

> On the morning of the walkout, at approximately 7:00 a.m., Brother Wright contacted me at my home and advised me that his associates had walked off their jobs. I informed Brother Wright to have them go back to work until I would arrange a meeting with them and the Plant Manager. They refused to return to work on the Union advice; *and they were warned by the Plant Manager that they had 20 minutes to return to work with no reprisals, or to leave the grounds. They chose to leave.*

that they had "voluntarily quit" their jobs, and instructed them to clean out their lockers.[11]

II. JUDGE'S DECISION

On the basis of the above-described facts, the judge concluded that the February 14 employee work stoppage—through which the employees sought to collectively discuss their concerns regarding one of their employment conditions with their plant manager—constituted protected concerted activity. Further, citing *Silver State Disposal Service*, 326 NLRB 84 (1998), the judge concluded that the no-strike provision contained in the parties' applicable collective-bargaining agreement did not render the work stoppage unprotected. Specifically, the judge determined that the language of the no-strike clause[12] did not serve as a clear and unmistakable waiver of the employees' right to engage in unauthorized (i.e., wildcat) work stoppages, such as that which occurred on February 14.

The judge further concluded that, even assuming arguendo that the employees' work stoppage constituted unprotected activity, the Respondent condoned the employees' conduct, such that it could not thereafter lawfully discipline the employees for that activity. More specifically, the judge concluded that Freudenberg's statements to the employees that they were not fired, and that they should return the next day, clearly communicated the Respondent's intent to condone their activity. Further, the judge rejected the Respondent's contention that, assuming arguendo that it in fact had offered to forgive the employees' conduct, the Respondent withdrew that offer of condonation prior to the employees' acceptance of it. Accordingly, the judge concluded that the Respondent's subsequent discharge of the employees for their participation in the work stoppage violated 8(a)(1).

[11] There is no evidence that any of the employees—with the exception of one, employee Carl Macklin—alled the Respondent to complain or request an explanation as to the denial of entry to the plant on February 15 or their receipt of separation notices on the 16th. Further, although employee Macklin testified that he called the plant and left a telephone message for Freudenberg after being denied entry to the plant on February 15, he did not indicate that he made any inquiry or registered any complaint with Freudenberg when Freudenberg returned his phone call; rather, he simply testified that he responded to Freudenberg's questions regarding his reasons for leaving the premises on the day of the work stoppage.

[12] The no-strike clause set forth in the parties' collective-bargaining agreement provides:

> The Union and the Company agree that there shall be no strikes, lockouts, slow-downs or legal proceedings without first using all possible means of settlement as provided in this agreement of any controversy which might arise.

III. DISCUSSION

As an initial matter, we find merit in the Respondent's exception to the judge's conclusion that the February 14 work stoppage constituted protected concerted activity. Although the parties did not *formally* stipulate to the unprotected nature of the work stoppage as the Respondent alleges, it is clear that, in the pleadings, the General Counsel conceded that the work stoppage was not protected. Indeed, paragraph 7 of the complaint alleges that the enumerated employees "concertedly engaged in a strike in violation of the no-strike provision contained in the collective-bargaining agreement between the Respondent and the Union." Further, at the hearing before the judge, counsel for the General Counsel did not even assert that the work stoppage constituted protected activity under the Act. Thus, neither the broader issue of the protected or unprotected nature of the work stoppage, nor the more specific issue of the proper interpretation of the no-strike provision contained in the parties' collective-bargaining agreement, was litigated by the parties.[13]

It is well established that the General Counsel serves as the master of the complaint and controls the theory of the case.[14] In the instant case, the General Counsel expressly conceded that the work stoppage was unprotected and litigated the case consistent with that position. Consequently, the Respondent was not put on notice that the nature of the work stoppage would be considered by the judge, nor was it provided the opportunity to litigate the issue. Under these circumstances, it was not appropriate for the judge to make a finding that the work stoppage constituted protected concerted activity, and we therefore decline to adopt her finding in that regard. Accordingly, we further find it unnecessary to pass on the proper interpretation of the no-strike provision set forth in the parties' collective-bargaining agreement.

Having concluded that the parties in this proceeding did not dispute that the February 14 employee work stoppage was unprotected, we turn to the question of whether the Respondent condoned the employees' conduct, and therefore could not subsequently rely on that conduct as a basis for the imposition of disciplinary action.

Well-established Board precedent provides that "[t]he doctrine of condonation applies where there is *clear and convincing* evidence that the employer has agreed to for-

[13] Neither the General Counsel nor the Respondent addressed the issue in their posthearing briefs to the judge; rather, both parties identified the Respondent's asserted condonation of the employee work stoppage as the sole issue in dispute.

[14] See, e.g., *Planned Building Services*, 330 NLRB 791, 793 fn. 13 (2000), and *West Virginia Baking Co.*, 299 NLRB 306 n. 2 (1990), enfd. mem. 946 F.2d 1563 (D.C. Cir. 1991).

give the misconduct, to 'wipe the slate clean,' and to resume or continue the employment relationship as though no misconduct occurred." *United Parcel Service*, 301 NLRB 1142, 1143 (1991) (footnote omitted; emphasis added); *General Electric Co.*, 292 NLRB 843, 844 (1989). "'[C]ondonation may not be lightly presumed from mere silence or equivocal statements, but must clearly appear from some positive act by an employer indicating forgiveness and an intention of treating the guilty employees as if their misconduct had not occurred.'" *Packers Hide Association v. NLRB*, 360 F.2d 59, 63 (8th Cir. 1966)(quoting *Plasti-Line, Inc. v. NLRB*, 278 F.2d 482, 487 (6th Cir. 1960)). Applying these principles here, we conclude, for the reasons that follow, that the record in this case is insufficient to establish the existence of clear and convincing evidence that the Respondent intended to condone the employees' continuation of the work stoppage after Freudenberg gave the employees the choice of returning to work or leaving.

At the outset, we find it essential to distinguish between the employee conduct consisting of the initiation of the work stoppage on the morning of February 14, and the subsequent conduct consisting of the continuation of the work stoppage by some of the employees following Freudenberg's instruction to the massed group of employees to either return to work or leave. The Respondent did not punish those strikers who went back to work, but, in effect, condoned the initial work stoppage on condition that it cease. That the Respondent expressed a willingness to forgive those employees who would end the work stoppage does not establish, however, that the Respondent similarly intended to forgive any potential further action by the employees who decided not do so, and who chose instead to continue the work stoppage. Thus, the issue here is whether the record contains clear and convincing evidence that the Respondent intended to condone the continuation of the work stoppage. We find such evidence lacking here.

Thus, according to the credited testimony, in response to the unit employees' work stoppage on the morning of February 14, the Respondent's plant manager instructed the employees to return to work within a designated period of time or, alternatively, to leave the Respondent's premises. That is, the Respondent gave the employees a choice either to return to work without facing any reprisals, or to leave the property and thereby assume the risk of possible future disciplinary action. In this regard, the Respondent extended a limited offer of forgiveness, i.e., an offer to those employees who would end their work stoppage.

Our dissenting colleague says that there was a third alternative, i.e., continuing the work stoppage and *staying* on the premises. Our colleague then says that only the third option would result in discipline. Under this analysis, continuing the work stoppage and leaving the premises would not result in discipline. We disagree. The Respondent wanted employees to return to work. If they continued the work stoppage, they would be disciplined, irrespective of *where* they remained.

In our view, Freudenberg's subsequent responses to employee questions (both to the employee group outside the plant and, subsequently, to the employees in the locker rooms)—that he was not firing anyone, and that the employees should "come back tomorrow"—do not constitute clear and convincing evidence that the Respondent intended to forgive a continuation of the work stoppage or to condone further misconduct. Unlike the judge, we cannot infer from Freudenberg's remarks a definitive intent to forgive the actions of those employees who opted to continue the work stoppage.[15] At best, Freudenberg's statements were ambiguous. At no time did Freudenberg assure the employees that their actions had been completely forgiven or that no further consequences would ensue.[16] Thus, a reasonable interpretation

[15] At Sec. III B, second paragraph, of her decision, the judge found that "Freudenberg clearly communicated condonation" of the work stoppage by telling employees that they were not fired and directing them to "*return to work* the next day" (emphasis added). In making her finding of condonation, the judge specifically relied on Robert Alston's testimony, which the judge found "compelling." As described by the judge, Alston testified "that he would never have walked out if Freudenberg had not denied that they were fired and told them *to return to work* the next day" (emphasis added). But, as explained at fn. 5 above, Alston testified only that Freudenberg told the employees to "come back" the next day. Alston inferred from this, as did the judge, that Freudenberg meant that the employees were to return to work the next day. For the reasons set out here, we are unwilling to make such an inference.

Further, although several employees testified that they understood from Freudenberg's words that they were to "come back to work tomorrow," an examination of the record evidence compels the conclusion that Freudenberg simply told the employees that they should "come back tomorrow." In any event, the employees' subjective understanding of Freudenberg's remarks is irrelevant to a condonation analysis; the critical inquiry is whether the Respondent's actions evinced an intent to "wipe the slate clean." We find that they did not.

Contrary to our dissenting colleague's intimation, even if Freudenberg had told employees "to come back to work tomorrow," which he did not, that would not establish condonation. Under extant precedent, a respondent's statement authorizing employees to return to work does not necessarily constitute condonation. See, e.g., *Chesty Foods*, 215 NLRB 388 (1974).

[16] The cases relied on by our dissenting colleague to support her finding that Freudenberg's statements "constitute clear and convincing evidence that the Respondent condoned their misconduct" are readily distinguishable.

In *United Parcel Service*, 301 NLRB 1142, 1142–1144 (1991), a driver voiced his concerns about hazardous driving conditions to his supervisor and told his supervisor that the driving conditions were making him nervous and causing him to have stomach cramps. The

of Freudenberg's statements is that no decision had been made *at that point* to fire anyone. See *Chesty Foods*, supra.[17] But, that was certainly no guarantee that a decision had been made to retain the employees who continued the strike. Nor was it a guarantee as to what "tomorrow" might bring. In sum, the Respondent was seeking more time. It would be poor public policy to hold that an employer faced with an unprotected strike must decide immediately whether to discharge or not, and we decline to do so here.

For all the foregoing reasons, we conclude that the General Counsel has failed to demonstrate that the Respondent condoned the conduct of the group of employees who elected to continue the unprotected work stoppage. Accordingly, we reverse the judge's conclusion that the Respondent violated Section 8(a)(1) of the Act by discharging those employees.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. January 31, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, Dissenting in part.

The issue here is whether the Respondent condoned employee participation in an unprotected work stoppage. In response to employees' questions about whether they were fired, plant manager Richard Freudenberg stated that he was not firing anyone and that they should "come back tomorrow." Contrary to the majority's finding, there was nothing ambiguous about Freudenberg's statements. Rather, they clearly demonstrate an intent to overlook the employees' misconduct and to allow them to return to work. The Board has found condonation in similar circumstances, and it should do so here. Accordingly, I would affirm the judge and find that the Respon-

supervisor gave the driver permission to return to the UPS center. When the driver returned to the center and stated that he was still reluctant to make further deliveries because of the road hazards, the supervisor said that "in that case he could 'punch out and go home sick.'" The Board found that by giving the driver permission to return to the center, and then announcing that the driver could "punch out and go home sick," the supervisor "acquiesced in" the driver's failure to complete his route and found condonation on that basis. In the present case, Freudenberg did not acquiesce in the work stoppage; nor did he tell the employees who left to sign out as sick. He simply ordered them to leave the property. The fact that he told them that they were not fired and should return the next day does not establish condonation.

In *Asbestos Removal*, 293 NLRB 352 (1989), enfd. mem. 892 F.2d 79 (6th Cir. 1989), the Board adopted the judge's finding that the respondent condoned the work stoppage at issue there. In finding condonation, the judge found that on Wednesday, Middleton, a foreman, told the employees "that health officials said that the job was shut down, that there would be a meeting on Thursday, and there would probably not be any work until Friday," and that he would call them. The judge found that Middleton's conduct established condonation, although his statement was not as "emphatic" an act of condonation as a statement that the employees should "return to work on Friday." Id. at 354-356 and n. 6. In the present case, as established above, Freudenberg did not tell the employees to return to work the next day. Nor did he tell them—less 'emphatically'—that there probably would be work the next day. He simply told those employees who did not choose to return to work there and then to leave the property. As explained above, the fact that he also told them that they were not fired and to return the next day does not establish condonation.

Finally, in *Packers Hide Association*, 152 NLRB 655, 659 (1965), enf. denied 360 F.2d 59 (8th Cir. 1966), the Board found that the respondent condoned the strike "by inviting the strikers to return to work and permitting them to work[.]" In the present case, Freudenberg neither invited the employees who chose to leave to return to work, nor did he permit them to work.

Thus, under the precedent set out by our dissenting colleague, the Respondent did not condone the work stoppage. Freudenberg did not acquiesce in the work stoppage. He did not invite the employees who left the property to return to work. He did not permit them to work.

[17] In *Chesty Foods*, a group of employees engaged in an unprotected wildcat strike. At a meeting convened later that evening and attended by the respondent's branch manager and plant manager and an ad hoc employee committee, the parties apparently reached agreement on all of the underlying issues that had precipitated the strike, and the branch manager indicated that "'he would like to come up on the floor on Monday morning and smile at everybody and wave as he went by.'" The next day, the union business agent advised the respondent's plant manager that the employees had voted to return to work on Monday; the plant manager, in turn, informed all of the employees of that decision. On Monday morning, the employees did in fact return to work at their regularly scheduled times.

In the interim, however, the respondent had investigated and identified the "ringleaders" of the employee strike. And on Monday afternoon, the respondent distributed termination letters to the ringleaders at the end of their respective shifts.

On the basis of these facts, the Board concluded that the respondent had not condoned the strike ringleaders' conduct, notwithstanding either the branch manager's comments at the meeting on the evening of the strike or the respondent's act of allowing the ringleaders to return to work for a full day.

Our dissenting colleague accurately points out that the respondent in *Chesty Foods*, upon being notified by union officials of a possible employee strike in violation of a contractual no-strike provision, advised the union officials that employees who participated in the strike might face termination. We note, however, that the respondent did not convey any similar message—either before *or* after the strike—directly to the employees; further, when the respondent met with a group of employees in a poststrike meeting (described above), the respondent made no reference to any possible future disciplinary action. Rather, and most significantly, in our view, the respondent permitted all of the employees to return to work for a full day (again, with no suggestion of possible future disciplinary action) before ultimately terminating the strike ringleaders.

dent acted unlawfully in discharging the employees when they did come back to work.[1]

I.

The legal principles that govern this case are well-established:

> The doctrine of condonation applies where there is clear and convincing evidence that the employer has agreed to forgive the misconduct, to "wipe the slate clean," and to resume or continue the employment relationship as though no misconduct occurred. "The doctrine prohibits an employer from misleadingly agreeing to return its employees to work and then taking disciplinary action for something apparently forgiven."

General Electric Co., 292 NLRB 843, 844 (1989) (footnotes omitted). See, e.g., *United Parcel Service*, 301 NLRB 1142, 1143 (1991) (articulating identical standard).

As we have explained, "[i]n deciding whether an employer has condoned certain misconduct, the Board does not look for any 'magic words' suggesting that the employer has forgiven the employee." *White Oak Coal Co.*, 295 NLRB 567, 570 (1989). Rather, the Board must examine "all the circumstances." Id. Under Board precedent, condonation may be found based on an employer's affirmative statements clearly implying that employee misconduct had been forgiven, even if the employer did not specifically state that it would forgo disciplinary actions.[2]

"Once an employer condones an employee's activity, it cannot use any unlawful or unprotected aspect of that activity as a basis for discipline." *United Parcel Service*, supra, 301 NLRB at 1144.

II.

The evidence here shows that on February 14, 2001, a group of the Respondent's employees, concerned about rumors that their hours were going to be reduced, left their work stations and walked out of the plant to wait for plant manager Freudenberg. When Freudenberg arrived, he refused to discuss the matter and told employees to go back to work or to leave the premises. Some employees returned to work; others remained and asked Freudenberg if they were fired. Freudenberg assured them that he was not firing anyone, and told them to come back the next day.

The employees then went into the locker rooms to collect their belongings, followed by Freudenberg. In the locker rooms, Freudenberg again assured employees that they had not been fired. As employee Billy Exum was leaving the men's locker room, he dropped a pen. Freudenberg told Exum that he better take the pen with him because he would need it to fill out a job application. Exum then asked Freudenberg if he was fired, and Freudenberg told him that he was not firing the employees and they should come back tomorrow. Similarly, in the women's locker room Freudenberg assured employee Katie Brooks that he was not firing them and that they should put their things away and come back tomorrow.[3]

The next morning, several employees attempted to report to work, but were denied access to the Respondent's premises. The following day, when the employees returned to the plant to pick up their paychecks, Freudenberg gave them separation notices, which stated that the employees had "voluntarily quit."

III.

Under the cited Board precedent (see fn. 2, supra), Freudenberg's repeated assurances to employees that they were not fired, and that they should return the next day, constitute clear and convincing evidence that the Respondent condoned their misconduct. The majority's attempt to distinguish those cases is unavailing. Indeed, Freudenberg's assurances to employees that they were not being fired provide more persuasive evidence for finding condonation than in the earlier cases.

Moreover, the majority's characterization of the facts here is simply not supported by the record. The majority begins by characterizing the facts as demonstrating that the

[1] I agree with the majority that the judge's finding concerning the nature of the work stoppage should be reversed, because issues concerning the nature of the work stoppage and the interpretation of the no-strike provision in the collective-bargaining agreement were not litigated by the parties. I also agree that based on the language of paragraph 7 of the complaint, the General Counsel apparently conceded that the work stoppage was unprotected.

[2] See, e.g., *United Parcel Service, Inc.,* supra, 301 NLRB at 1143–1144 (condonation found based on supervisor's remark to driver that driver could "punch out and go home sick as far as [he] was concerned" after driver refused to complete his delivery route because of dangerous weather conditions); *Asbestos Removal*, 293 NLRB 352, 356 (1989), enfd. mem. 892 F.2d 79 (6th Cir. 1989) (employer found to have condoned employee misconduct based on supervisor's statement to employees, in response to their questions, that he would call them when jobsite reopened); *Packers Hide Association, Inc.*, 152 NLRB 655, 659 (1965), enf. denied 360 F.2d 59 (8th Cir. 1966) (employer found to have condoned unlawful strike by employees where it agreed that "all of them" could report to work the next day, including employee who instigated strike).

[3] I will assume, for the sake of argument, that the majority is correct in finding that Freudenberg did not tell employees to come back *to work* the next day, despite testimony by employees Melvin Guy, Janet Exum, and Kathy Furlong that this, indeed, was what Freudenberg said. For the majority, the distinction between "come back tomorrow" and "come back to work" is crucial. I disagree, as I will explain.

Respondent gave the employees a choice either to return to work without facing any reprisals, or to leave the property and thereby *assume the risk of possible future disciplinary action*. In this regard, the Respondent extended a limited offer of forgiveness, i.e., an offer to those employees who would end the work stoppage. [emphasis added]

Freudenberg certainly did give the employees two options: either return to work or leave the premises. An employee hearing that order would understand that he must choose an option and that if he did not—if he refused to return to work, but still remained on the premises—then he could be disciplined. But nothing in the order implies that employees who *complied* by leaving the premises were nevertheless subject to discipline.[4]

Indeed, Freudenberg expressly told the employees who did *not* return to work that (1) he was not firing anyone and (2) they should come back tomorrow. The majority characterizes these statements as "ambiguous," observing that:

> [A] reasonable interpretation of Freudenberg's statements is that no decision had been made *at that point* to fire anyone. [citation omitted] But, that was certainly no guarantee that a decision had been made to retain the employees who continued the strike. Nor was it a guarantee as to what "tomorrow" might bring. In sum, the Respondent was seeking more time. [emphasis added]

This characterization of Freudenberg's later statements has no firm basis in what he actually said (as found by the judge, based on credibility determinations). Instead, the majority simply posits its own rationale for his statements. There is no evidence here that "the Respondent was seeking more time," and even if the record supported such a view (e.g., if Freudenberg had testified that this was his intended message), the Respondent's uncommunicated intention would be immaterial.

Interpreted objectively, nothing in Freudenberg's words communicated the possibility that employees were still subject to discharge. Nor did his words suggest that employees should return to the workplace the next day, not to work (their obvious implication), but only to learn whether or not they would be fired.[5] Freudenberg had never even implicitly threatened to discipline employees who had obeyed his order (return to work or leave) by leaving. Nor had he implied, much less expressly said, that the issue of discipline was open. He did, however, explicitly assure employees that he was not firing them. And he explicitly told them to come back to the workplace the next day, without so much as hinting that they would be returning for any reason except to resume their jobs.

Had Freudenberg said only that employees were to come back tomorrow, this might be a closer case. Instead, Freudenberg repeatedly said both, that employees were not being fired and that they were to return to the workplace. Under all the circumstances here, the two statements, taken together, constitute clear and convincing evidence of the Respondent's intention to "wipe the slate clean," as the Board's cases put it. The majority conjures up an ambiguity out of thin air, imposing precisely the sort of "magic words" requirement for finding condonation that the Board has wisely disavowed.

IV.

The majority concludes by observing that "[i]t would be poor public policy to hold that an employer faced with an unprotected strike, must decide immediately whether to discharge or not." But finding condonation here would not force employers to make any immediate decision in similar situations. The employer in this case was perfectly free to tell employees nothing at all about potential discipline. It was free, as well, to tell employees that the issue of discipline was still under consideration.[6] What the employer could not do, in contrast—at least consistent with the Board's prior decisions and my view here—was clearly tell employees that they would not be fired for striking and then go back on its word. Such misleading conduct, as one court has pointed out, is a

[4] Cf. *Pantex Towing Corp.*, 258 NLRB 837, 843–844 (1981) (ship's pilot did not disobey lawful order when he exercised option to leave boat, rather than remain on-board and pilot vessel).

[5] The majority discounts the testimony of certain employees that Freudenberg told them to "come back *to work*" as simply "reflect[ing] their understanding of what they thought Freudenberg meant—and what they wanted him to mean." As indicated earlier (see fn. 3), I assume that Freudenberg did not say the words that these employees attributed to him. Nevertheless, considered objectively, and in context, Freudenberg's words did clearly communicate the meaning that the employees took from them.

[6] The majority's reliance on *Chesty Foods,* 215 NLRB 388 (1974), is misplaced. That decision is easily distinguishable on its facts.

The employer in *Chesty Foods,* upon learning of a possible strike by employees in violation of a contractual no-strike provision, immediately informed union representatives that employees who engaged in a strike might be discharged. After the employees went on strike, the employer met with employee representatives to discuss the issues that led to the work stoppage. The parties resolved their differences and the employees returned to work; however, the employer discharged those who instigated the strike. The Board upheld the discharges as lawful, finding that the employer had never retreated from its "previously stated position that it might take disciplinary action against employees if they participated in an unlawful strike." Id. at 388. In contrast, there is no evidence here that Freudenberg ever indicated that he might discharge the employees who left the premises.

recipe for the sort of workplace conflict that the Act is designed to prevent.[7] Accordingly, I dissent.

Dated, Washington, D.C. January 31, 2007

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Tamra J. Sikkink, Esq., for the General Counsel.
Herbert E. Gerson, Esq. and *Donald Wellford, Esq.,* for Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Memphis, Tennessee, on June 17, 18, and 19, 2002. All parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses and to argue orally. The charge was filed June 29, 2001,[1] by Billy J. Exum (Exum). A complaint issued March 29, 2002, alleging that Fineberg Packing Company, Inc. (Respondent) discharged 32 named strikers on or about February 15, 2001, in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).[2] Respondent filed an answer denying the pertinent allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in the processing of meat products at its facility in Memphis, Tennessee, where it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Tennessee. During the same 12-month period, Respondent also purchases and receives at its Memphis, Tennessee, facility, goods valued in excess of $50,000 directly from points located outside the State of Tennessee. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the United Food and Commercial Workers, Local No. 515 AFL–CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

General Counsel alleges that Respondent violated Section 8(a)(1) of the Act when it refused to allow 32 striking employees to return to work on February 15, 2001, after condoning their strike on February 14, 2001. General Counsel further alleges that Respondent instructed these same employees to leave Respondent's premises on February 14 and to return on February 15 and affirmatively told them that they were not fired. Respondent argues that the primary issue is whether there is clear and convincing evidence that Respondent took positive and unequivocal action, showing an intention and commitment to forgive the employees who engaged in an illegal strike in violation of the no-strike provision of the collective-bargaining agreement. Respondent argues that Respondent did not condone the conduct of the employees who walked off their jobs on February 14, 2001. Respondent further argues that the employees' wildcat strike removed them from the protection of the Act and no condonation occurred to bring them back within its protection.

B. Background

Prior to February 14, 2001, Respondent was in the business of buying and slaughtering live animals (hogs and cattle) and processing meat from the animals after they had been slaughtered. For over 40 years, the United Food and Commercial Workers Union (the Union) has represented Respondent's production and maintenance employees. The collective-bargaining agreement between the Union and Respondent provides for a guaranteed 35-hour workweek. The agreement also provides that "there shall be no strikes, lockouts, slow-downs, or legal proceedings without using all possible means of settlement as provided in this Agreement of any controversy which might arise." Prior to February 14, 2001, there were two previous strikes at Respondent's facility. One strike lasted for 1 to 2 weeks and the other strike lasted for 31 days. Richard Freudenberg has worked at Respondent's facility for 42 years and has served as plant manager for over 20 years. Freudenberg testified that following the previous strikes, Respondent resumed its normal operations.

Respondent asserts that in January 2001, it began to face large increases in utility costs due to increased natural gas and electricity expenses as well as other financial problems. In response to these additional financial pressures, Respondent met with the Union's President, John Canada, in January 2001. During the meeting, Freudenberg presented these economic problems to Canada and proposed a temporary 3-month suspension of the 35-hour guaranteed workweek as an alternative to a layoff. Canada agreed to Respondent's proposal and the temporary suspension of the guaranteed workweek provision was scheduled to begin on February 15, 2001.

C. Employees Learn of the Reduction in Hours

Billy Exum testified that on February 12, Shop Steward Henry Lee Wright told him that "they was considered taking our 35 hours and bringing us in and working us 10–15 hours a week." Exum later passed along this information to fellow employees Melvin Guy and Dock Dye. The rumor about the cut in

[7] *Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97, 103 (7th Cir. 1971).

[1] All dates are in 2001 unless otherwise indicated.

[2] At the close of the testimony, counsel for the General Counsel moved to amend the complaint to include violations of Section 8(a)(1) of the Act as recognized in *Johnnie's Poultry Co., 146 NLRB 770* (1964). General Counsel sought to add these additional allegations based upon the testimony of employee witnesses Marie Rayford and Rachael Lindsay concerning their interview with Respondent's attorneys prior to the trial. Finding that the matter was not closely related to the subject matter of the conduct that had been included in the original complaint and finding that the matter had not been fully litigated, General Counsel's motion was denied.

hours began circulating on the plant floor. Exum and Guy testified that they and other employees tried to reach Canada to discuss this change in hours but they were unsuccessful in doing so.

D. Employees meet with Freudenberg

As of February 14, 2001, Exum had worked for Respondent for 24 years and he was one of eight employees working in the Boning department. After his initial conversation with union steward Wright, Exum continued to speak with other employees about the reduction of their workweek. Exum discussed with other employees their preference for a layoff rather than trying to support their families working only 10 to 15 hours a week. Early in his shift on February 14, Exum learned that some of the employees who worked on the Kill Floor wanted to meet with Richard Freudenberg as a group to discuss their concerns about the reduction in hours. Exum recalled that all of the employees in his department left the building to go outside to wait for Freudenberg's arrival. Once outside, Exum saw employees from the Kitchen, Packing Room, Kill Floor, Laundry Room, and virtually every department of the plant.

Exum testified that he understood the proposed meeting was "to find out why they taking out (sic) 35 hours without us having a vote on it and have a say-so about it. We didn't think they could do it without the employees voting on it or having any discussion with the employees about it."

Employee Katie Brooks testified that the employees decided to meet with Freudenberg:

> Because he had told us that we could talk to him about anything when we get ready, because we was part of the plant, and he had talked to us before, and so we just assumed that we could talk to him. We wasn't walking out. We wasn't fired. We wasn't quitting. We're nothing. We wasn't doing that, and he had told us we could talk to him and so we just decided to ask him about that, because you know, we heard so many rumors so we said we going to ask Richard, and that's all we was going to do, ask him.

Brooks, who has worked for Respondent for 28 years, recalled that approximately 9 or 10 years before, employees had been concerned about an employee's discharge. Employees met as a group with Foreman Honeycut and voiced their concerns about the individual employee. Freudenberg testified that many times he had instructed his employees that they could come and talk with him and that he had an open door policy for employees.

The record reflects that employees left their individual work areas sometime between 7 and 8:15 a.m.[3] and they congregated outside the plant in front of the breakroom and the women's dressing room to wait for Freudenberg to arrive at the plant. While employees waited for Freudenberg to arrive at the plant, they circulated a paper stating their desire to change shop stewards.

Thomas David Green was a Hazard Analysis Critical Control Point (HAACP) inspector and a statutory supervisor in February 2001. He recalled that on the morning of February 14, he had vaguely heard that some of the employees were upset over a loss of their guaranteed time. He heard nothing further about their concerns until approximately 7 a.m. After hearing Exum tell employees on the killing Floor "Let's go," the employees in the killing department left the area and joined with other employees outside the building. Green then contacted Freudenberg on his cellular telephone. He testified that he told Freudenberg that "all the employees had walked out and they refused to go back to work until they had talked with Richard, and they were telling me that they were on strike and they just refused to go back to work until they talked with Richard." Freudenberg recalled that Green told him "the employees had staged a wildcat strike and had walked out." Green never identified any specific employees who told him that they were refusing to go back to work without talking with Freudenberg nor the identify of any employee who had announced this incident as a strike.

Having made the call to Freudenberg, Green and other supervisors joined the hourly employees outside the building.

Freudenberg estimated that he arrived at the plant approximately 20 to 25 minutes after receiving Green's call. Respondent's witness, Marie Rayford, estimated that employees waited approximately 15 to 20 minutes for Freudenberg to arrive at the plant. When Freudenberg arrived at the plant, employees Kathy Furlong and Exum approached Freudenberg and told him that the employees just wanted to talk with him about their pay. Freudenberg replied that it was illegal for him to meet with them as a group, but that he would meet with them individually. Freudenberg told them to go back to work. Furlong explained to him that they did not wish to talk with him individually but they had to meet with him as a group. Janet Exum recalled that Freudenberg told the employees that if they didn't go back to work, he would call the police and have them removed from the property. Melvin Guy recalled that Freudenberg told the employees that if they didn't leave the premises, he would have them removed. Freudenberg called Exum aside saying, "Get these folks back to work." Exum explained that he couldn't and that all they wanted to do was to talk with him. Employee Katie Brooks recalled Freudenberg's telling them to get off his property. Furlong testified that when she asked Freudenberg if they were fired, he told them to "put their stuff in their locker and leave." Employees Furlong, Billy Exum, Brooks, Billy Alston, Robert Earl Alston, and Melvin Guy all recalled that Freudenberg not only told the employees that they were not fired but that they were to return to work the next morning.

Freudenberg recalled that employees asked him if he were firing them. Freudenberg admittedly replied to the employees, "I am not firing anybody." Freudenberg further testified that he told employees that if they did not go back to work, the Company would treat them as if they had abandoned their jobs and they would have to leave the premises. In contrast however, Robert Alston testified that "the last thing I heard and I'll never forget it, [Freudenberg] told Billy Joe there, told there was nobody fired, that we can go home and come back, you know, the next day." Alston testified as follows:

> Q: What did you think Richard meant when he said come back tomorrow?

[3] Inasmuch as the employees are not permitted to wear a watch, the record is not clear as to when the employees actually left their work area.

A: I believed him. If it wasn't for that, I would never have walked out.
Q: What did you think he meant when he said come back tomorrow? What does that mean to you?
A: To come back tomorrow. Because I've been there 35 years, you know? I can't go out there and get another job. I got a hip replacement. So I never would have walked out if he hadn't said that.
Q: What did you think would happen the next morning.
A: I thought I was going back to work.

Counsel for the General Counsel asked Katie Brooks why she did not return to work when she was instructed to do so by Freudenberg. Brooks replied,

> Now, he told us to get off my property or I'm going to call the police. So I went in the dressing to get my stuff and he come in there and I said well Richard, are we fired? He said no. He said—then that's when I left. That's when he told me we wasn't fired. Then that's when I decided to leave.

Janet Exum corroborated Brooks' conversation with Freudenberg in the dressing room and recalled that when Brooks asked if they were fired, Freudenberg said, "No, put your stuff up and come back in the morning."

Employee Carl Macklin testified that he had not been able to hear all that Freudenberg said to the employees assembled outside the plant. He recalled however, that Freudenberg continued to talk with employees in the dressing room after his conversation with employees outside the dressing rooms. When asked what Freudenberg said to employees in the dressing room, Macklin replied,

> He just told us to put our stuff up, and Billy Joe asked him well, are we fired now? He said no you're not fired. He said the ones who want to come back tomorrow come back tomorrow.

E. Employees Leave Respondent's Premises

After changing clothes, Billy Exum left the plant and proceeded to the parking lot. He testified that the employees had planned to wait in the parking lot for the Union officials to arrive. Freudenberg however, told the employees that they could not wait in the parking lot, but they were to go outside the gates of the facility. Once the employees were outside the main gate, the gate was closed. Exum explained that once the gate is closed, it couldn't be opened from the outside. The employees continued their earlier attempts to reach their union representatives.

Union President John Canada testified that union steward Henry Wright contacted him on February 14, and told him that Respondent's employees had walked off their job. Canada maintained that he had told Wright to tell the employees not to walk out until he could come there and talk with Freudenberg.[4] The employees waited outside the gate for approximately 3 to 4 hours for the union officials to get to the plant. When Canada arrived around noon, he did not stop to talk with employees assembled outside the gate. He drove directly onto the property and went into the facility to speak with Freudenberg.[5] Upon leaving the facility, Canada stopped to speak with the employees for approximately 5 to 10 minutes. Canada told the employees that Freudenberg was not going to let them return to work. Canada recalled that from the time that he got out of his car to speak with the employees, the crowd became unruly. He told them that he would meet with them the following day in his office where there could be an orderly meeting. Canada admitted that having told the employees that Freudenberg was not going to let them return to work, there was no reason for them to return to the plant at their regular time the next day.

F. February 15, 2001

Although Union President Canada had told employees that Freudenberg would not allow them to return to work, many employees attempted to return the next day. Employees Janet Exum, Billy Exum, and Kathy Furlong testified that they went back to the plant the next morning but found the gate closed. Employees Macklin, Billy Alston, and Robert E. Alston testified that when they attempted to report to work on February 15, they were prevented from doing so by supervisors Green and Robert Billing, who were stationed at the gate. When employee Brooks reported to work on February 15, she not only saw supervisor Green at the gate but she also saw a lock on the gate.

G. February 16, 2001

The employees who had left the facility on February 14 went back to pick up their paychecks on February 16. They were give separation notices stating that they had "voluntarily quit" their employment and they were instructed to clean out their lockers.

III. FACTUAL AND LEGAL CONCLUSIONS

Just prior to February 14, employees heard rumors from their union steward that the Union and Respondent had eliminated their 35-hour guaranteed workweek without any notice to them. Attempts to reach the Union had been futile and their only remaining resource was plant manger Freudenberg. There was no evidence that the employees had any designated leader, common plan, or demands on the morning of February 14. It is undisputed that they told Freudenberg that they only wanted to talk with him as a group. In its 1962 seminal decision, the Supreme Court determined that seven unorganized employees were protected when they left work without permission to voice their concerns about the temperature in their work area. The fact that they did not present specific demands upon their employer did not diminish their right to engage in concerted activities under the Act.[6] The Court acknowledged however, that Section 7 of the Act does not protect all concerted activities. Activities that are unlawful, violent, or in breach of contract are normally not protected by the Act.[7] In its brief, Respondent argues that this is a case where a group of employees engaged in an illegal strike, deliberately timed, without prior warning,

[4] Canada admitted that he had no independent knowledge that Wright communicated this information to the employees prior to their leaving the facility.

[5] Two other union officials accompanied him.

[6] *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 82 S. Ct. 1099 (1962).

[7] Id at 1104.

with the intention of causing maximum damage and financial loss to their employer. Respondent argues that the only way to bring these strikers back within the protection of the Act is for the General Counsel to prove that Respondent condoned the conduct.

When the employees left their work area to meet with Freudenberg, 10 to 12 hogs had already been slaughtered and placed in the scalding pot for processing. Freudenberg admitted that at the time that he met with the employees, he was unaware of whether any hogs had been slaughtered. He did not learn that any hogs had been slaughtered until he went to the Killing Floor after the employees in issue were off the premises and the gate was closed.

Freudenberg confirmed however, that none of the animals slaughtered on February 14 were condemned. The government had found the meat safe for human consumption. Employees who had not left their work area or who had returned to their work area completed their work day and continued to process the meat.

In contrast to Respondent's argument, there is no record evidence that the employees' assembling together to talk with Freudenberg was deliberately timed or scheduled with the intention of causing maximum damage and financial loss to Respondent. The record reflects more of a disorganized, spontaneous gathering triggered by rumors and the employees' inability to reach the union officials. There was no evidence that these employees assembled with a predetermined motive to cause financial harm to the Respondent or even to engage in any specific strike conduct. Many of these employees had a long working relationship with the company and with Richard Freudenberg. Employees Guy, Scaife, and Exum had been with the company for over 20 years, while Brooks had been with the company for 28 years. Billy Alston had been with the company for 32 to 33 years and Robert Alston had been an employee for 35 years. It is apparent that many of these employees felt that they had a personal relationship with not only this company but with its plant manager of more than 20 years. Their actions of February 14 demonstrated their confidence in Freudenberg's ability to clear up the confusion on what was happening to their guaranteed workweek. There was no evidence to indicate that they left their work areas to issue an ultimatum or to make any demands upon Freudenberg. No witness testified that the employees requested anything other than the opportunity to talk with Freudenberg.

When questioned about his conversation with the employees, Freudenberg identified no demands that were made upon him. He recalled that Exum was the first employee to say anything to him. Exum showed him a legal pad and explained that it contained the names of employees gathered outside and who "had voted out Henry Lee Wright as their Union steward." Freudenberg recalled his conversation as:

> Q: What did you—what was your response?
> A: I told him that they could not vote him out in that manner, that that was a union job. It wasn't for them.
> Q: Did they make any other demands on you?
> A: Yes, He. Mr. Exum told me that the group of people wanted to talk to me. I said I cannot talk to you en masse. I said I cannot have a union meeting here without proper union representation.

Although Freudenberg went on to testify that Exum had told him that the employees were not going back to work until Freudenberg met Exum's demands, Freudenberg never identified any demand that was made. Respondent presented the testimony of two employees and two supervisors who were present during Freudenberg's meeting with employees. None of these witnesses identified any demands made by Exum or by any other employees.

Silver State Disposal Service, Inc., 326 NLRB 84 (1998) involved the discharge of employees who had engaged in a work stoppage and who were also covered by a collective-bargaining agreement. The agreement contained the provision that prohibited the Union from calling, encouraging, or condoning any work stoppage or work slowdown. The employees in issue had assembled near the entrance to the employer's property to discuss their concerns for a fellow employee's discharge and disregarded supervisors' directions to report to work. The employees disregarded the repeated pleas to report to report to work as scheduled and the police were ultimately called to the facility. The police directed the employees to either go to work or leave the employer's property. As the employees milled around in a vacant lot across the street, another supervisor urged them to return to work. When the employees later attempted to return to work, they were turned away and later told that they were terminated. The administrative law judge found that the employees' work stoppage had been condoned when the employer solicited the employees to return to work. The Board however, found no need to even reach the issue of condonation, finding that the employer had not established that the work stoppage violated the no-strike clause.

The Board specifically noted that the language of the no-strike clause did not purport to prohibit employees from engaging in unauthorized or "wildcat" work stoppages. The Board noted that given the drafting of the language, it is reasonable to expect that if the parties intended to reach concerted employee activities that were not sanctioned by the union, they would have inserted explicit language. The decision referenced those cases in which the collective-bargaining agreement specifically addressed work stoppages by employees and identified the action that could be taken by the employer in such circumstances.[8] The Board ultimately found that the employer had not sustained its burden of showing that the union "clearly and unmistakably" waived the employee's right to engage in concerted activities of the nature of the work stoppage. The Board further found that the employees' brief and spontaneous work stoppage was protected by Section 7 of the Act and their discharges were violative of the Act.

In a 1983 decision, the Supreme Court noted that it cannot be inferred from a general contractual provision that parties to a bargaining agreement intended to waive rights protected under federal labor law unless the undertaking is explicitly stated and the waiver must be clear an unmistakable. *Metropolitan Edison*

[8] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 459 (3rd Cir. 1981); *Food Fair Stores v. NLRB*, 491 F.2d 388 (3rd. Cir. 1974).

Co. v. NLRB, 460 U.S. 693, 103 S. Ct. 1467 (1983). Citing *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 459 (3rd Cir. 1981), the Board noted in *Silver State Disposal Service, Inc.,* supra, at 85, that in interpreting contractual language, words must be given their "ordinary and reasonable meaning." In the instant matter, the contractual language provides that "The Union and the Company agree that there shall be no strikes, lockouts, slowdowns, or legal proceedings without first using all possible means of settlement a provided in this Agreement of any controversy which might arise." There is no issue as to whether the Union sanctioned the work stoppage of February 14. The record reflects that the Union was as surprised by the employees' actions as was the Respondent. Despite the fact that the Union may not have sanctioned or even anticipated the work stoppage of February 14, there is no express or explicit contractual language to show that the existing no-strike clause was intended to prohibit "wildcat strikes" or the work stoppage as occurred on February 14. Accordingly, I find that the collective-bargaining agreement did not waive the employees' right to engage in protected concerted activities and the employees did not lose the protection of the Act by their work stoppage on February 14. Accordingly, their discharge for having engaged in protected concerted activity is violative of Section 8(a)(1) of the Act.

A. Respondent's Condonation of the Work Stoppage

Even if these employees had engaged in unprotected activity, Respondent nonetheless condoned their actions. Once an employer condones an employee's activity, it cannot use any unlawful or unprotected aspect of that activity as a basis for discipline. *United Parcel Service, Inc.,* 301 NLRB 1142, (1991), *General Electric Co.,* 292 NLRB 843 (1989).

The doctrine of condonation applies when "there is clear and convincing evidence that the employer has agreed to wipe the slate clean and resume or continue the employment as though no misconduct occurred. The doctrine prohibits an employer from misleadingly agreeing to return its employees to work and then taking action for something apparently forgiven." *General Electric Co.,* supra at 844. I find that in this case, Respondent has done just that. With Respondent's voluntary forgiveness of any unprotected aspect of the employees' concerted activity, the activity then assumes a protected status.[9]

B. Credibility

In its brief, Respondent argues that none of the General Counsel's employee witnesses can be believed as they all stand to gain personally in the case. Respondent argues that by comparison, Freudenberg's testimony is a clear and logical explanation of the events. I agree that Freudenberg's explanation is more logical, but I do not find it more credible than these nine employees. Janet Exum testified that Freudenberg told the assembled employees that if they didn't go back to work, he would call the police and have them leave the property. This statement appears to clearly put employees on notice that their failure to return to work would have consequences. Had there been nothing beyond that statement, there would be little support for any argument of condonation. The employees however, consistently testified that Freudenberg told them to leave the premises and return the next day. The employees also consistently testified that Freudenberg told them that they were not fired. Freudenberg even admitted that he had said "no" when asked if he were firing them.

General Counsel argues that in order to credit Freudenberg, all of the discharged strikers must be discredited. General Counsel argues that this conclusion requires a finding that the discharged employees either engaged in a sophisticated and legal complex conspiracy to testify that Freudenberg told them to return the following day or they independently all came up with the exact same story. I find merit to General Counsel's argument. There is no plausible explanation as to why there is such consistency in these employees' testimony other than the fact that they are truthfully recounting the events of February 14. Respondent points out in its brief that there was no basis for these employees to believe that Freudenberg simply gave them a day off. I agree that this conclusion by the employees may have been illogical. I note however, that this is a work force that has a long employment history with this company and with this individual plant manager. Based upon the demeanor of these witnesses and their individual employment experience, it is reasonable that they simply followed what they thought to be the instructions of Freudenberg with no apparent awareness that they might be terminated. In observing these employees as they testified, I find that this is far more likely than their having engaged in a sophisticated and legal complex conspiracy or their having all independently fabricated the exact same story. I found Robert Earl Alston to be one of the most credible witnesses and his testimony was compelling. Alston testified that he would never have walked out if Freudenberg had not denied that they were fired and told them to return to work the next day. Alston explained that having worked there for 35 years and having had a hip replacement, he had been very much aware of his inability to get another job. Alston credibly testified that he left the premises believing that he was going back to work the next morning. Accordingly, crediting Alston and the other discharged strikers,[10] I find that Respondent condoned the actions of these employees when they engaged in the temporary work stoppage. By telling these employees that they were not fired and directing them to leave and return to work the next day, Freudenberg clearly communicated condonation for their having engaged in the work stoppage. One might speculate that a work force with less tenure and loyalty might have questioned Freudenberg's directive to leave. This was not the case however, and these employees followed Freudenberg's instructions and left the facility with an intention to return to work the next day.

There is a good deal of testimony in the record with respect

[9] *Davis and Burton Contractors, Inc.,* 261 NLRB 728 (1982), enfd. 725 F.2d 684 (6th Cir. 1983).

[10] Overall, I found all of the alleged discriminatees to be credible in their testimony. While there was some slight variance in testimony, this would be expected when employees are recounting an event involving a large gathering of individuals and involving a highly emotional circumstance. By contrast, Freudenberg's testimony appeared less credible. As a witness, Freudenberg was often sarcastic and argumentative. His responses appeared at times indicative of disdain for not only General Counsel, but also the administrative process itself.

to what happened on the day following the work stoppage. Certainly, there was no consistency in how the employees attempted to return to work. Some employees found that they were unable to enter the premises because of Respondent's supervisors stationed at the gate and other employees perceived that the gate was locked and their entry prevented. Respondent argues that while employees Janet Exum, Billy Exum, Billy Alston, Brooks, and Robert Earl Alston testified that they were prevented from entering Respondent's premises to return to work on February 15, they made no attempt to contact the plant and report that they had attempted to report to work. I note however, that the locked gate and the supervisors at the gate simply confirmed what the union representative had already told these employees on the afternoon of February 14. After talking with Freudenberg on February 14, Canada told these employees that Freudenberg was not going to let them return to work.

Respondent argues that, assuming arguendo, an offer of condonation was made, it was withdrawn prior to acceptance and therefore there was no condonation. Respondent contends that even if Freudenberg told the strikers to leave Respondent's property and "come back tomorrow," he could still rescind a condonation before they returned on February 15, 2001, arguing that all of the terms of that condonation would not have occurred until each employee reported for work the next morning. Respondent argues that even if Freudenberg locked the gate on February 15, 2001, this conduct showed Respondent's intention to rescind any offer of condonation prior to the time that all of the terms could have been accepted by the strikers. Contrastly, I find that in leaving Respondent's facility, the employees accepted Respondent's condonation. The credited testimony of these employees indicates that they left the facility believing that they would be able to return the following day. It was only after they accepted Respondent's offer and left the facility that Respondent informed them that they could not return. What Respondent now characterizes as a withdrawal of its condonation appears to be more of an attempt to nullify the original condonation.

Respondent presented the testimony of former supervisor Richard Green. Green testified that after Freudenberg talked with the employees on February 14, he observed Melvin Guy walking to his car. Green testified that he asked Guy why "he was doing this" and Guy had replied that he "had to go." Green further testified that Freudenberg came up to Guy and repeatedly begged him not to go. Green credits Guy with saying, "I have to do what I have to do." Freudenberg testified that he told Guy "If you follow them out the gate, I said you're going to lose your job. I said go back inside and go back to work." In contradiction to Green, Guy denied having any conversation with Green. He described his conversation with Freudenberg as:

> As I was going out, he was coming toward me, and he kind of slowed his truck up and he said I still can't talk. He said I'm not going to talk to you all as a group, you know and he said I'm not going to talk and I went on out to the lot.

In *Asbestos Removal, Inc.,* 293 NLRB 352, 356 (1989), condonation was found where the employer told employees as they were walking out that there would be a meeting to discuss their concerns on the following day. The employer also added that there would probably be working on the day after that and that the employer would get in touch with them. In *United Parcel Service, Inc.,* 301 NLRB 1142 (1991), the employer allowed an employee to stop making deliveries after he voiced a reluctance to continue making deliveries because of road conditions. The employer told the employee to "punch out and go home sick." The Board found that even if the employee's failure to continue his deliveries had been unprotected, the employer condoned his actions.

C. Summary of Analysis

Paragraphs 9 and 10 of the complaint allege that Respondent discharged these 32 employees by refusing to allow them to return to work and that it did so to discourage employees from engaging in concerted activities. Under the framework of *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), General Counsel must initially show that the discriminatees engaged in activity protected by the National Labor Relations Act. There is no doubt that these discriminatees were engaged in concerted activity when they left their work areas on February 14, 2001, to meet with Freudenberg. Respondent however, disputes that this work stoppage was protected by the Act.

Section 7 of the Act protects the rights of employees to not only bargain collectively through the representative of their choosing, but to also engage in other concerted activities for the purpose of collective bargaining or for other mutual aid or protection.[11] In this case, concerns about the reduction of their hours motivated the employees to attempt to meet with Freudenberg to obtain information that they had not been able to get from the Union. Their purpose in meeting with Freudenberg certainly related to hours and conditions of employment. When these employees left their work area on February 14, they were engaging in concerted activity for their mutual aid or protection.

The evidence reflects that the employees who walked out did not have the permission of the Union in doing so. Their actions, including their attempt to oust their union steward, demonstrated some concerns about the Union's representation as well as their concerns about the reduction in hours. There are some circumstances when employees take concerted action independent of their chosen representative and their attempt to bypass the Union loses the protection of the law.[12] I do not find this to be the case in the actions of Respondent's employees. While they had concerns and sought information, there is no evidence that they were attempting to bypass the Union or to deal directly with Respondent. The fact that a union represents these employees does not diminish or extinguish the Act's protection as they engaged in concerted activity.[13]

Once it has been demonstrated that employees engaged in protected activity, General Counsel must show that the em-

[11] *National Labor Relations Board v. Washington Aluminum Co.,* 370 U.S. 9 (1962).

[12] *Emporium Capwell Co. v. Community Organization,* 420 U.S. 50 (1975).

[13] *Bridgeport Ambulance Service, Inc.,* 302 NLRB 358 (1991).

ployer knew of this activity and that the employees suffered adverse employment consequences. These elements are clearly met. Finally, the government must demonstrate a link or nexus between the employees' activities and the adverse employment actions. The government has demonstrated all elements of the Wright Line analysis. Accordingly, I find that these employees were discharged for their having engaged in protected concerted activity. As discussed above, their walkout on February 14 did not lose its protection because the Union represented them or because the language of the collective-bargaining agreement explicitly prohibited such conduct.

Recognizing that condonation "is not lightly inferred" by the Board,[14] I nevertheless find the overall record demonstrates that Respondent condoned the actions of the strikers on February 14, 2001. Accordingly, Respondent's discharge of those employees engaged in the work stoppage and who left Respondent's premises on February 14 was violative of 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Fineberg Packing Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers, Local No. 515, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Willie Alexander, Antonio Alston, Billy Alston, Gary Alston, Robert Alston, Katie Brooks, Woodrow Chamberlain, L.C. Cruthird, Dock Dye, Oceia Ellis, Carlos Epps, Billy Exum, Janet Exum, Kathy Furlong, Dianne Goodrum, Melvin Guy, David Harper, Jennifer Johnson, Carnell Jones, Carl Macklin, Clayton Prophete, Henry Ragsdale, Essic Hubbard, Jimmie Rogers, Darren Rush, Thurman Scaife, Frederick Smith, Quintell Stubbs, Eric Taylor, Leemord Thomas, Kellie Tidwell, and Frederick Washington because they engaged in protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[15]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[16]

ORDER

The Respondent, Fineberg Packing Company, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise disciplining employees because they have engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Offer to Willie Alexander, Antonio Alston, Billy Alston, Gary Alston, Robert Alston, Katie Brooks, Woodrow Chamberlain, L.C. Cruthird, Dock Dye, Oceia Ellis, Carlos Epps, Billy Exum, Janet Exum, Kathy Furlong, Dianne Goodrum, Melvin Guy, David Harper, Essic Hubbard, Jennifer Johnson, Carnell Jones, Carl Macklin, Clayton Prophete, Henry Ragsdale, Jimmie Rogers, Darren Rush, Thurman Scaife, Frederick Smith, Quintell Stubbs, Eric Taylor, Leemord Thomas, Kellie Tidwell, and Frederick Washington full and immediate reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or to other rights previously enjoyed, and make them whole for any loss of pay or benefits that they may have suffered by reason of the unlawful practices found, in the manner described in the remedy section of this decision.

(b) Within 14 days from the date of the Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Memphis, Tennessee facility, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided

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[14] *International Paper*, 309 NLRB 31, 38 (1992).

[15] Enclosed with her posthearing brief, counsel for the General Counsel submitted a proposed notice to employees that provides for immediate reinstatement for some employees and placement on a preferential hiring list for other employees. Inasmuch as there is no substantive record evidence to support this remedy distinction for the individual discriminatees, I leave this matter to the compliance stage of this proceeding for an appropriate resolution.

[16] 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.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 14, 2001.

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

Dated, Washington, D.C. October 3, 2002

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activity.

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

WE WILL, within 14 days, offer Willie Alexander, Antonio Alston, Billy Alston, Gary Alston, Robert Alston, Katie Brooks, Woodrow Chamberlain, L.C. Cruthird, Dock Dye, Oceia Ellis, Carlos Epps, Billy Exum, Janet Exum, Kathy Furlong, Dianne Goodrum, Melvin Guy, David Harper, Essic Hubbard, Jennifer Johnson, Carnell Jones, Carl Macklin, Clayton Prophete, Henry Ragsdale, Jimmie Rogers, Darren Rush, Thurman Scaife, Frederick Smith, Quintell Stubbs, Eric Taylor, Leemord Thomas, Kellie Tidwell, and Frederick Washington full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make these same employees whole for any loss of earnings and other benefits, resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days, remove from our files any reference to the unlawful discharges of the above-named employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

FINEBERG PACKING COMPANY, INC.

Tamra J. Sikkink, Esq., for the General Counsel.
Herbert E. Gerson, Esq. and *Donald Wellford, Esq.,* for Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Memphis, Tennessee, on June 17, 18, and 19, 2002. All parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses and to argue orally. The charge was filed June 29, 2001,[1] by Billy J. Exum (Exum). A complaint issued March 29, 2002, alleging that Fineberg Packing Company, Inc. (Respondent) discharged 32 named strikers on or about February 15, 2001, in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).[2] Respondent filed an answer denying the pertinent allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in the processing of meat products at its facility in Memphis, Tennessee, where it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Tennessee. During the same 12-month period, Respondent also purchases and receives at its Memphis, Tennessee, facility, goods valued in excess of $50,000 directly from points located outside the State of Tennessee. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the United Food and Commercial Workers, Local No. 515 AFL–CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

General Counsel alleges that Respondent violated Section

[1] All dates are in 2001 unless otherwise indicated.

[2] At the close of the testimony, counsel for the General Counsel moved to amend the complaint to include violations of Section 8(a)(1) of the Act as recognized in *Johnnie's Poultry Co., 146 NLRB 770* (1964). General Counsel sought to add these additional allegations based upon the testimony of employee witnesses Marie Rayford and Rachael Lindsay concerning their interview with Respondent's attorneys prior to the trial. Finding that the matter was not closely related to the subject matter of the conduct that had been included in the original complaint and finding that the matter had not been fully litigated, General Counsel's motion was denied.

8(a)(1) of the Act when it refused to allow 32 striking employees to return to work on February 15, 2001, after condoning their strike on February 14, 2001. General Counsel further alleges that Respondent instructed these same employees to leave Respondent's premises on February 14 and to return on February 15 and affirmatively told them that they were not fired. Respondent argues that the primary issue is whether there is clear and convincing evidence that Respondent took positive and unequivocal action, showing an intention and commitment to forgive the employees who engaged in an illegal strike in violation of the no-strike provision of the collective-bargaining agreement. Respondent argues that Respondent did not condone the conduct of the employees who walked off their jobs on February 14, 2001. Respondent further argues that the employees' wildcat strike removed them from the protection of the Act and no condonation occurred to bring them back within its protection.

B. Background

Prior to February 14, 2001, Respondent was in the business of buying and slaughtering live animals (hogs and cattle) and processing meat from the animals after they had been slaughtered. For over 40 years, the United Food and Commercial Workers Union (the Union) has represented Respondent's production and maintenance employees. The collective-bargaining agreement between the Union and Respondent provides for a guaranteed 35-hour workweek. The agreement also provides that "there shall be no strikes, lockouts, slow-downs, or legal proceedings without using all possible means of settlement as provided in this Agreement of any controversy which might arise." Prior to February 14, 2001, there were two previous strikes at Respondent's facility. One strike lasted for 1 to 2 weeks and the other strike lasted for 31 days. Richard Freudenberg has worked at Respondent's facility for 42 years and has served as plant manager for over 20 years. Freudenberg testified that following the previous strikes, Respondent resumed its normal operations.

Respondent asserts that in January 2001, it began to face large increases in utility costs due to increased natural gas and electricity expenses as well as other financial problems. In response to these additional financial pressures, Respondent met with the Union's President, John Canada, in January 2001. During the meeting, Freudenberg presented these economic problems to Canada and proposed a temporary 3-month suspension of the 35-hour guaranteed workweek as an alternative to a layoff. Canada agreed to Respondent's proposal and the temporary suspension of the guaranteed workweek provision was scheduled to begin on February 15, 2001.

C. Employees Learn of the Reduction in Hours

Billy Exum testified that on February 12, Shop Steward Henry Lee Wright told him that "they was considered taking our 35 hours and bringing us in and working us 10–15 hours a week." Exum later passed along this information to fellow employees Melvin Guy and Dock Dye. The rumor about the cut in hours began circulating on the plant floor. Exum and Guy testified that they and other employees tried to reach Canada to discuss this change in hours but they were unsuccessful in doing so.

D. Employees meet with Freudenberg

As of February 14, 2001, Exum had worked for Respondent for 24 years and he was one of eight employees working in the Boning department. After his initial conversation with union steward Wright, Exum continued to speak with other employees about the reduction of their workweek. Exum discussed with other employees their preference for a layoff rather than trying to support their families working only 10 to 15 hours a week. Early in his shift on February 14, Exum learned that some of the employees who worked on the Kill Floor wanted to meet with Richard Freudenberg as a group to discuss their concerns about the reduction in hours. Exum recalled that all of the employees in his department left the building to go outside to wait for Freudenberg's arrival. Once outside, Exum saw employees from the Kitchen, Packing Room, Kill Floor, Laundry Room, and virtually every department of the plant.

Exum testified that he understood the proposed meeting was "to find out why they taking out (sic) 35 hours without us having a vote on it and have a say-so about it. We didn't think they could do it without the employees voting on it or having any discussion with the employees about it."

Employee Katie Brooks testified that the employees decided to meet with Freudenberg:

> Because he had told us that we could talk to him about anything when we get ready, because we was part of the plant, and he had talked to us before, and so we just assumed that we could talk to him. We wasn't walking out. We wasn't fired. We wasn't quitting. We're nothing. We wasn't doing that, and he had told us we could talk to him and so we just decided to ask him about that, because you know, we heard so many rumors so we said we going to ask Richard, and that's all we was going to do, ask him.

Brooks, who has worked for Respondent for 28 years, recalled that approximately 9 or 10 years before, employees had been concerned about an employee's discharge. Employees met as a group with Foreman Honeycut and voiced their concerns about the individual employee. Freudenberg testified that many times he had instructed his employees that they could come and talk with him and that he had an open door policy for employees.

The record reflects that employees left their individual work areas sometime between 7 and 8:15 a.m.[3] and they congregated outside the plant in front of the breakroom and the women's dressing room to wait for Freudenberg to arrive at the plant. While employees waited for Freudenberg to arrive at the plant, they circulated a paper stating their desire to change shop stewards.

Thomas David Green was a Hazard Analysis Critical Control Point (HAACP) inspector and a statutory supervisor in February 2001. He recalled that on the morning of February 14, he had vaguely heard that some of the employees were upset over a loss of their guaranteed time. He heard nothing further about

[3] Inasmuch as the employees are not permitted to wear a watch, the record is not clear as to when the employees actually left their work area.

their concerns until approximately 7 a.m. After hearing Exum tell employees on the killing Floor "Let's go," the employees in the killing department left the area and joined with other employees outside the building. Green then contacted Freudenberg on his cellular telephone. He testified that he told Freudenberg that "all the employees had walked out and they refused to go back to work until they had talked with Richard, and they were telling me that they were on strike and they just refused to go back to work until they talked with Richard." Freudenberg recalled that Green told him "the employees had staged a wildcat strike and had walked out." Green never identified any specific employees who told him that they were refusing to go back to work without talking with Freudenberg nor the identify of any employee who had announced this incident as a strike.

Having made the call to Freudenberg, Green and other supervisors joined the hourly employees outside the building.

Freudenberg estimated that he arrived at the plant approximately 20 to 25 minutes after receiving Green's call. Respondent's witness, Marie Rayford, estimated that employees waited approximately 15 to 20 minutes for Freudenberg to arrive at the plant. When Freudenberg arrived at the plant, employees Kathy Furlong and Exum approached Freudenberg and told him that the employees just wanted to talk with him about their pay. Freudenberg replied that it was illegal for him to meet with them as a group, but that he would meet with them individually. Freudenberg told them to go back to work. Furlong explained to him that they did not wish to talk with him individually but they had to meet with him as a group. Janet Exum recalled that Freudenberg told the employees that if they didn't go back to work, he would call the police and have them removed from the property. Melvin Guy recalled that Freudenberg told the employees that if they didn't leave the premises, he would have them removed. Freudenberg called Exum aside saying, "Get these folks back to work." Exum explained that he couldn't and that all they wanted to do was to talk with him. Employee Katie Brooks recalled Freudenberg's telling them to get off his property. Furlong testified that when she asked Freudenberg if they were fired, he told them to "put their stuff in their locker and leave." Employees Furlong, Billy Exum, Brooks, Billy Alston, Robert Earl Alston, and Melvin Guy all recalled that Freudenberg not only told the employees that they were not fired but that they were to return to work the next morning.

Freudenberg recalled that employees asked him if he were firing them. Freudenberg admittedly replied to the employees, "I am not firing anybody." Freudenberg further testified that he told employees that if they did not go back to work, the Company would treat them as if they had abandoned their jobs and they would have to leave the premises. In contrast however, Robert Alston testified that "the last thing I heard and I'll never forget it, [Freudenberg] told Billy Joe there, told there was nobody fired, that we can go home and come back, you know, the next day." Alston testified as follows:

> Q: What did you think Richard meant when he said come back tomorrow?
> A: I believed him. If it wasn't for that, I would never have walked out.
> Q: What did you think he meant when he said come back tomorrow? What does that mean to you?
> A: To come back tomorrow. Because I've been there 35 years, you know? I can't go out there and get another job. I got a hip replacement. So I never would have walked out if he hadn't said that.
> Q: What did you think would happen the next morning.
> A: I thought I was going back to work.

Counsel for the General Counsel asked Katie Brooks why she did not return to work when she was instructed to do so by Freudenberg. Brooks replied,

> Now, he told us to get off my property or I'm going to call the police. So I went in the dressing to get my stuff and he come in there and I said well Richard, are we fired? He said no. He said—then that's when I left. That's when he told me we wasn't fired. Then that's when I decided to leave.

Janet Exum corroborated Brooks' conversation with Freudenberg in the dressing room and recalled that when Brooks asked if they were fired, Freudenberg said, "No, put your stuff up and come back in the morning."

Employee Carl Macklin testified that he had not been able to hear all that Freudenberg said to the employees assembled outside the plant. He recalled however, that Freudenberg continued to talk with employees in the dressing room after his conversation with employees outside the dressing rooms. When asked what Freudenberg said to employees in the dressing room, Macklin replied,

> He just told us to put our stuff up, and Billy Joe asked him well, are we fired now? He said no you're not fired. He said the ones who want to come back tomorrow come back tomorrow.

E. Employees Leave Respondent's Premises

After changing clothes, Billy Exum left the plant and proceeded to the parking lot. He testified that the employees had planned to wait in the parking lot for the Union officials to arrive. Freudenberg however, told the employees that they could not wait in the parking lot, but they were to go outside the gates of the facility. Once the employees were outside the main gate, the gate was closed. Exum explained that once the gate is closed, it couldn't be opened from the outside. The employees continued their earlier attempts to reach their union representatives.

Union President John Canada testified that union steward Henry Wright contacted him on February 14, and told him that Respondent's employees had walked off their job. Canada maintained that he had told Wright to tell the employees not to walk out until he could come there and talk with Freudenberg.[4] The employees waited outside the gate for approximately 3 to 4 hours for the union officials to get to the plant. When Canada arrived around noon, he did not stop to talk with employees assembled outside the gate. He drove directly onto the property and went into the facility to speak with Freudenberg.[5] Upon

[4] Canada admitted that he had no independent knowledge that Wright communicated this information to the employees prior to their leaving the facility.

[5] Two other union officials accompanied him.

leaving the facility, Canada stopped to speak with the employees for approximately 5 to 10 minutes. Canada told the employees that Freudenberg was not going to let them return to work. Canada recalled that from the time that he got out of his car to speak with the employees, the crowd became unruly. He told them that he would meet with them the following day in his office where there could be an orderly meeting. Canada admitted that having told the employees that Freudenberg was not going to let them return to work, there was no reason for them to return to the plant at their regular time the next day.

F. February 15, 2001

Although Union President Canada had told employees that Freudenberg would not allow them to return to work, many employees attempted to return the next day. Employees Janet Exum, Billy Exum, and Kathy Furlong testified that they went back to the plant the next morning but found the gate closed. Employees Macklin, Billy Alston, and Robert E. Alston testified that when they attempted to report to work on February 15, they were prevented from doing so by supervisors Green and Robert Billing, who were stationed at the gate. When employee Brooks reported to work on February 15, she not only saw supervisor Green at the gate but she also saw a lock on the gate.

G. February 16, 2001

The employees who had left the facility on February 14 went back to pick up their paychecks on February 16. They were give separation notices stating that they had "voluntarily quit" their employment and they were instructed to clean out their lockers.

III. FACTUAL AND LEGAL CONCLUSIONS

Just prior to February 14, employees heard rumors from their union steward that the Union and Respondent had eliminated their 35-hour guaranteed workweek without any notice to them. Attempts to reach the Union had been futile and their only remaining resource was plant manger Freudenberg. There was no evidence that the employees had any designated leader, common plan, or demands on the morning of February 14. It is undisputed that they told Freudenberg that they only wanted to talk with him as a group. In its 1962 seminal decision, the Supreme Court determined that seven unorganized employees were protected when they left work without permission to voice their concerns about the temperature in their work area. The fact that they did not present specific demands upon their employer did not diminish their right to engage in concerted activities under the Act.[6] The Court acknowledged however, that Section 7 of the Act does not protect all concerted activities. Activities that are unlawful, violent, or in breach of contract are normally not protected by the Act.[7] In its brief, Respondent argues that this is a case where a group of employees engaged in an illegal strike, deliberately timed, without prior warning, with the intention of causing maximum damage and financial loss to their employer. Respondent argues that the only way to bring these strikers back within the protection of the Act is for the General Counsel to prove that Respondent condoned the conduct.

When the employees left their work area to meet with Freudenberg, 10 to 12 hogs had already been slaughtered and placed in the scalding pot for processing. Freudenberg admitted that at the time that he met with the employees, he was unaware of whether any hogs had been slaughtered. He did not learn that any hogs had been slaughtered until he went to the Killing Floor after the employees in issue were off the premises and the gate was closed.

Freudenberg confirmed however, that none of the animals slaughtered on February 14 were condemned. The government had found the meat safe for human consumption. Employees who had not left their work area or who had returned to their work area completed their work day and continued to process the meat.

In contrast to Respondent's argument, there is no record evidence that the employees' assembling together to talk with Freudenberg was deliberately timed or scheduled with the intention of causing maximum damage and financial loss to Respondent. The record reflects more of a disorganized, spontaneous gathering triggered by rumors and the employees' inability to reach the union officials. There was no evidence that these employees assembled with a predetermined motive to cause financial harm to the Respondent or even to engage in any specific strike conduct. Many of these employees had a long working relationship with the company and with Richard Freudenberg. Employees Guy, Scaife, and Exum had been with the company for over 20 years, while Brooks had been with the company for 28 years. Billy Alston had been with the company for 32 to 33 years and Robert Alston had been an employee for 35 years. It is apparent that many of these employees felt that they had a personal relationship with not only this company but with its plant manager of more than 20 years. Their actions of February 14 demonstrated their confidence in Freudenberg's ability to clear up the confusion on what was happening to their guaranteed workweek. There was no evidence to indicate that they left their work areas to issue an ultimatum or to make any demands upon Freudenberg. No witness testified that the employees requested anything other than the opportunity to talk with Freudenberg.

When questioned about his conversation with the employees, Freudenberg identified no demands that were made upon him. He recalled that Exum was the first employee to say anything to him. Exum showed him a legal pad and explained that it contained the names of employees gathered outside and who "had voted out Henry Lee Wright as their Union steward." Freudenberg recalled his conversation as:

> Q: What did you—what was your response?
> A: I told him that they could not vote him out in that manner, that that was a union job. It wasn't for them.
> Q: Did they make any other demands on you?
> A: Yes, He. Mr. Exum told me that the group of people wanted to talk to me. I said I cannot talk to you en masse. I said I cannot have a union meeting here without proper union representation.

Although Freudenberg went on to testify that Exum had told

[6] *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 82 S. Ct. 1099 (1962).

[7] Id at 1104.

him that the employees were not going back to work until Freudenberg met Exum's demands, Freudenberg never identified any demand that was made. Respondent presented the testimony of two employees and two supervisors who were present during Freudenberg's meeting with employees. None of these witnesses identified any demands made by Exum or by any other employees.

Silver State Disposal Service, Inc., 326 NLRB 84 (1998) involved the discharge of employees who had engaged in a work stoppage and who were also covered by a collective-bargaining agreement. The agreement contained the provision that prohibited the Union from calling, encouraging, or condoning any work stoppage or work slowdown. The employees in issue had assembled near the entrance to the employer's property to discuss their concerns for a fellow employee's discharge and disregarded supervisors' directions to report to work. The employees disregarded the repeated pleas to report to report to work as scheduled and the police were ultimately called to the facility. The police directed the employees to either go to work or leave the employer's property. As the employees milled around in a vacant lot across the street, another supervisor urged them to return to work. When the employees later attempted to return to work, they were turned away and later told that they were terminated. The administrative law judge found that the employees' work stoppage had been condoned when the employer solicited the employees to return to work. The Board however, found no need to even reach the issue of condonation, finding that the employer had not established that the work stoppage violated the no-strike clause.

The Board specifically noted that the language of the no-strike clause did not purport to prohibit employees from engaging in unauthorized or "wildcat" work stoppages. The Board noted that given the drafting of the language, it is reasonable to expect that if the parties intended to reach concerted employee activities that were not sanctioned by the union, they would have inserted explicit language. The decision referenced those cases in which the collective-bargaining agreement specifically addressed work stoppages by employees and identified the action that could be taken by the employer in such circumstances.[8] The Board ultimately found that the employer had not sustained its burden of showing that the union "clearly and unmistakably" waived the employee's right to engage in concerted activities of the nature of the work stoppage. The Board further found that the employees' brief and spontaneous work stoppage was protected by Section 7 of the Act and their discharges were violative of the Act.

In a 1983 decision, the Supreme Court noted that it cannot be inferred from a general contractual provision that parties to a bargaining agreement intended to waive rights protected under federal labor law unless the undertaking is explicitly stated and the waiver must be clear an unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 103 S. Ct. 1467 (1983). Citing *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 459 (3rd Cir. 1981), the Board noted in *Silver State Disposal Service, Inc.,* supra, at 85, that in interpreting contractual language, words must be given their "ordinary and reasonable meaning." In the instant matter, the contractual language provides that "The Union and the Company agree that there shall be no strikes, lockouts, slowdowns, or legal proceedings without first using all possible means of settlement a provided in this Agreement of any controversy which might arise." There is no issue as to whether the Union sanctioned the work stoppage of February 14. The record reflects that the Union was as surprised by the employees' actions as was the Respondent. Despite the fact that the Union may not have sanctioned or even anticipated the work stoppage of February 14, there is no express or explicit contractual language to show that the existing no-strike clause was intended to prohibit "wildcat strikes" or the work stoppage as occurred on February 14. Accordingly, I find that the collective-bargaining agreement did not waive the employees' right to engage in protected concerted activities and the employees did not lose the protection of the Act by their work stoppage on February 14. Accordingly, their discharge for having engaged in protected concerted activity is violative of Section 8(a)(1) of the Act.

A. Respondent's Condonation of the Work Stoppage

Even if these employees had engaged in unprotected activity, Respondent nonetheless condoned their actions. Once an employer condones an employee's activity, it cannot use any unlawful or unprotected aspect of that activity as a basis for discipline. *United Parcel Service, Inc.,* 301 NLRB 1142, (1991), *General Electric Co.,* 292 NLRB 843 (1989).

The doctrine of condonation applies when "there is clear and convincing evidence that the employer has agreed to wipe the slate clean and resume or continue the employment as though no misconduct occurred. The doctrine prohibits an employer from misleadingly agreeing to return its employees to work and then taking action for something apparently forgiven." *General Electric Co.,* supra at 844. I find that in this case, Respondent has done just that. With Respondent's voluntary forgiveness of any unprotected aspect of the employees' concerted activity, the activity then assumes a protected status.[9]

B. Credibility

In its brief, Respondent argues that none of the General Counsel's employee witnesses can be believed as they all stand to gain personally in the case. Respondent argues that by comparison, Freudenberg's testimony is a clear and logical explanation of the events. I agree that Freudenberg's explanation is more logical, but I do not find it more credible than these nine employees. Janet Exum testified that Freudenberg told the assembled employees that if they didn't go back to work, he would call the police and have them leave the property. This statement appears to clearly put employees on notice that their failure to return to work would have consequences. Had there been nothing beyond that statement, there would be little support for any argument of condonation. The employees however, consistently testified that Freudenberg told them to leave the premises and return the next day. The employees also consis-

[8] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 459 (3rd Cir. 1981); *Food Fair Stores v. NLRB*, 491 F.2d 388 (3rd. Cir. 1974).

[9] *Davis and Burton Contractors, Inc.,* 261 NLRB 728 (1982), enfd. 725 F.2d 684 (6th Cir. 1983).

tently testified that Freudenberg told them that they were not fired. Freudenberg even admitted that he had said "no" when asked if he were firing them.

General Counsel argues that in order to credit Freudenberg, all of the discharged strikers must be discredited. General Counsel argues that this conclusion requires a finding that the discharged employees either engaged in a sophisticated and legal complex conspiracy to testify that Freudenberg told them to return the following day or they independently all came up with the exact same story. I find merit to General Counsel's argument. There is no plausible explanation as to why there is such consistency in these employees' testimony other than the fact that they are truthfully recounting the events of February 14. Respondent points out in its brief that there was no basis for these employees to believe that Freudenberg simply gave them a day off. I agree that this conclusion by the employees may have been illogical. I note however, that this is a work force that has a long employment history with this company and with this individual plant manager. Based upon the demeanor of these witnesses and their individual employment experience, it is reasonable that they simply followed what they thought to be the instructions of Freudenberg with no apparent awareness that they might be terminated. In observing these employees as they testified, I find that this is far more likely than their having engaged in a sophisticated and legal complex conspiracy or their having all independently fabricated the exact same story. I found Robert Earl Alston to be one of the most credible witnesses and his testimony was compelling. Alston testified that he would never have walked out if Freudenberg had not denied that they were fired and told them to return to work the next day. Alston explained that having worked there for 35 years and having had a hip replacement, he had been very much aware of his inability to get another job. Alston credibly testified that he left the premises believing that he was going back to work the next morning. Accordingly, crediting Alston and the other discharged strikers,[10] I find that Respondent condoned the actions of these employees when they engaged in the temporary work stoppage. By telling these employees that they were not fired and directing them to leave and return to work the next day, Freudenberg clearly communicated condonation for their having engaged in the work stoppage. One might speculate that a work force with less tenure and loyalty might have questioned Freudenberg's directive to leave. This was not the case however, and these employees followed Freudenberg's instructions and left the facility with an intention to return to work the next day.

There is a good deal of testimony in the record with respect to what happened on the day following the work stoppage. Certainly, there was no consistency in how the employees attempted to return to work. Some employees found that they were unable to enter the premises because of Respondent's supervisors stationed at the gate and other employees perceived that the gate was locked and their entry prevented. Respondent argues that while employees Janet Exum, Billy Exum, Billy Alston, Brooks, and Robert Earl Alston testified that they were prevented from entering Respondent's premises to return to work on February 15, they made no attempt to contact the plant and report that they had attempted to report to work. I note however, that the locked gate and the supervisors at the gate simply confirmed what the union representative had already told these employees on the afternoon of February 14. After talking with Freudenberg on February 14, Canada told these employees that Freudenberg was not going to let them return to work.

Respondent argues that, assuming arguendo, an offer of condonation was made, it was withdrawn prior to acceptance and therefore there was no condonation. Respondent contends that even if Freudenberg told the strikers to leave Respondent's property and "come back tomorrow," he could still rescind a condonation before they returned on February 15, 2001, arguing that all of the terms of that condonation would not have occurred until each employee reported for work the next morning. Respondent argues that even if Freudenberg locked the gate on February 15, 2001, this conduct showed Respondent's intention to rescind any offer of condonation prior to the time that all of the terms could have been accepted by the strikers. Contrastly, I find that in leaving Respondent's facility, the employees accepted Respondent's condonation. The credited testimony of these employees indicates that they left the facility believing that they would be able to return the following day. It was only after they accepted Respondent's offer and left the facility that Respondent informed them that they could not return. What Respondent now characterizes as a withdrawal of its condonation appears to be more of an attempt to nullify the original condonation.

Respondent presented the testimony of former supervisor Richard Green. Green testified that after Freudenberg talked with the employees on February 14, he observed Melvin Guy walking to his car. Green testified that he asked Guy why "he was doing this" and Guy had replied that he "had to go." Green further testified that Freudenberg came up to Guy and repeatedly begged him not to go. Green credits Guy with saying, "I have to do what I have to do." Freudenberg testified that he told Guy "If you follow them out the gate, I said you're going to lose your job. I said go back inside and go back to work." In contradiction to Green, Guy denied having any conversation with Green. He described his conversation with Freudenberg as:

> As I was going out, he was coming toward me, and he kind of slowed his truck up and he said I still can't talk. He said I'm not going to talk to you all as a group, you know and he said I'm not going to talk and I went on out to the lot.

In *Asbestos Removal, Inc.,* 293 NLRB 352, 356 (1989), condonation was found where the employer told employees as they were walking out that there would be a meeting to discuss their concerns on the following day. The employer also added that there would probably be working on the day after that and that

[10] Overall, I found all of the alleged discriminatees to be credible in their testimony. While there was some slight variance in testimony, this would be expected when employees are recounting an event involving a large gathering of individuals and involving a highly emotional circumstance. By contrast, Freudenberg's testimony appeared less credible. As a witness, Freudenberg was often sarcastic and argumentative. His responses appeared at times indicative of disdain for not only General Counsel, but also the administrative process itself.

the employer would get in touch with them. In *United Parcel Service, Inc.,* 301 NLRB 1142 (1991), the employer allowed an employee to stop making deliveries after he voiced a reluctance to continue making deliveries because of road conditions. The employer told the employee to "punch out and go home sick." The Board found that even if the employee's failure to continue his deliveries had been unprotected, the employer condoned his actions.

C. Summary of Analysis

Paragraphs 9 and 10 of the complaint allege that Respondent discharged these 32 employees by refusing to allow them to return to work and that it did so to discourage employees from engaging in concerted activities. Under the framework of *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), General Counsel must initially show that the discriminatees engaged in activity protected by the National Labor Relations Act. There is no doubt that these discriminatees were engaged in concerted activity when they left their work areas on February 14, 2001, to meet with Freudenberg. Respondent however, disputes that this work stoppage was protected by the Act.

Section 7 of the Act protects the rights of employees to not only bargain collectively through the representative of their choosing, but to also engage in other concerted activities for the purpose of collective bargaining or for other mutual aid or protection.[11] In this case, concerns about the reduction of their hours motivated the employees to attempt to meet with Freudenberg to obtain information that they had not been able to get from the Union. Their purpose in meeting with Freudenberg certainly related to hours and conditions of employment. When these employees left their work area on February 14, they were engaging in concerted activity for their mutual aid or protection.

The evidence reflects that the employees who walked out did not have the permission of the Union in doing so. Their actions, including their attempt to oust their union steward, demonstrated some concerns about the Union's representation as well as their concerns about the reduction in hours. There are some circumstances when employees take concerted action independent of their chosen representative and their attempt to bypass the Union loses the protection of the law.[12] I do not find this to be the case in the actions of Respondent's employees. While they had concerns and sought information, there is no evidence that they were attempting to bypass the Union or to deal directly with Respondent. The fact that a union represents these employees does not diminish or extinguish the Act's protection as they engaged in concerted activity.[13]

Once it has been demonstrated that employees engaged in protected activity, General Counsel must show that the employer knew of this activity and that the employees suffered adverse employment consequences. These elements are clearly met. Finally, the government must demonstrate a link or nexus between the employees' activities and the adverse employment actions. The government has demonstrated all elements of the Wright Line analysis. Accordingly, I find that these employees were discharged for their having engaged in protected concerted activity. As discussed above, their walkout on February 14 did not lose its protection because the Union represented them or because the language of the collective-bargaining agreement explicitly prohibited such conduct.

Recognizing that condonation "is not lightly inferred" by the Board,[14] I nevertheless find the overall record demonstrates that Respondent condoned the actions of the strikers on February 14, 2001. Accordingly, Respondent's discharge of those employees engaged in the work stoppage and who left Respondent's premises on February 14 was violative of 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Fineberg Packing Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers, Local No. 515, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Willie Alexander, Antonio Alston, Billy Alston, Gary Alston, Robert Alston, Katie Brooks, Woodrow Chamberlain, L.C. Cruthird, Dock Dye, Oceia Ellis, Carlos Epps, Billy Exum, Janet Exum, Kathy Furlong, Dianne Goodrum, Melvin Guy, David Harper, Jennifer Johnson, Carnell Jones, Carl Macklin, Clayton Prophete, Henry Ragsdale, Essic Hubbard, Jimmie Rogers, Darren Rush, Thurman Scaife, Frederick Smith, Quintell Stubbs, Eric Taylor, Leemord Thomas, Kellie Tidwell, and Frederick Washington because they engaged in protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[15]

[11] *National Labor Relations Board v. Washington Aluminum Co.,* 370 U.S. 9 (1962).

[12] *Emporium Capwell Co. v. Community Organization,* 420 U.S. 50 (1975).

[13] *Bridgeport Ambulance Service, Inc.,* 302 NLRB 358 (1991).

[14] *International Paper*, 309 NLRB 31, 38 (1992).

[15] Enclosed with her posthearing brief, counsel for the General Counsel submitted a proposed notice to employees that provides for immediate reinstatement for some employees and placement on a preferential hiring list for other employees. Inasmuch as there is no substantive record evidence to support this remedy distinction for the individual discriminatees, I leave this matter to the compliance stage of this proceeding for an appropriate resolution.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[16]

ORDER

The Respondent, Fineberg Packing Company, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise disciplining employees because they have engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Offer to Willie Alexander, Antonio Alston, Billy Alston, Gary Alston, Robert Alston, Katie Brooks, Woodrow Chamberlain, L.C. Cruthird, Dock Dye, Oceia Ellis, Carlos Epps, Billy Exum, Janet Exum, Kathy Furlong, Dianne Goodrum, Melvin Guy, David Harper, Essic Hubbard, Jennifer Johnson, Carnell Jones, Carl Macklin, Clayton Prophete, Henry Ragsdale, Jimmie Rogers, Darren Rush, Thurman Scaife, Frederick Smith, Quintell Stubbs, Eric Taylor, Leemord Thomas, Kellie Tidwell, and Frederick Washington full and immediate reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or to other rights previously enjoyed, and make them whole for any loss of pay or benefits that they may have suffered by reason of the unlawful practices found, in the manner described in the remedy section of this decision.

(b) Within 14 days from the date of the Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Memphis, Tennessee facility, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 14, 2001.

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

Dated, Washington, D.C. October 3, 2002

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activity.

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

WE WILL, within 14 days, offer Willie Alexander, Antonio Alston, Billy Alston, Gary Alston, Robert Alston, Katie Brooks, Woodrow Chamberlain, L.C. Cruthird, Dock Dye, Oceia Ellis, Carlos Epps, Billy Exum, Janet Exum, Kathy Furlong, Dianne Goodrum, Melvin Guy, David Harper, Essic Hubbard, Jennifer Johnson, Carnell Jones, Carl Macklin, Clayton Prophete, Henry Ragsdale, Jimmie Rogers, Darren Rush, Thurman Scaife, Frederick Smith, Quintell Stubbs, Eric Taylor, Leemord Thomas, Kellie Tidwell, and Frederick Washington full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make these same employees whole for any loss of earnings and other benefits, resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days, remove from our files any reference to the unlawful discharges of the above-named employees,

[16] 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.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

FINEBERG PACKING COMPANY, INC.