UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

LAUREN ENGINEERS & CONSTRUCTORS, INC.

and Case 10–CA–36395

ROBERT PARTON, an Individual

and Case 10–CA–36396

SETH JONES, an Individual

Kerstin I. Meyers, Esq., for the General Counsel.
Stephen M. Darden, Esq., for the Respondent.

DECISION

Statement of the Case

GEORGE CARSON II, Administrative Law Judge. This case was tried in Erwin, Tennessee, on November 30 and December 1, 2006, pursuant to a consolidated complaint that issued on September 29, 2006.[1] The complaint alleges that the Respondent threatened employees and constructively discharged Robert Parton and discharged Seth Jones because they engaged in protected concerted activity, thereby violating Section 8(a)(1) of the National Labor Relations Act. The Respondent's answer denies that it violated the Act. I find that the Respondent did threaten employees and did unlawfully discharge Seth Jones.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following[2]

[1] All dates are in 2006 unless otherwise indicated. The charge in Case 10–CA–36395 was filed on August 3. The charge in Case 10–CA–36396 was filed on August 3 and was amended on September 27.

[2] On December 13, consistent with my instructions at trial, Counsel for the Respondent filed a motion to accept four Subcontractor Work Checklist documents as post hearing joint exhibits. Counsel for the General Counsel does not oppose receipt of the documents. Joint Exhibits 4, 5, 6, and 7 are hereby received. On January 11, the Respondent filed an unopposed Motion to Correct Transcript. That Motion is granted. The Motion, which sets out the corrections, is received as Respondent's Exhibit 42.

Findings of Fact

I. Jurisdiction

The Respondent, Lauren Engineers & Constructors, Inc., Lauren, is a Delaware corporation that provides maintenance services throughout the United States. In Erwin, Tennessee, it provides services as a subcontractor for Nuclear Fuel Services, NFS, a corporation that, inter alia, produces nuclear fuel for the United States Navy at its facility in Erwin. Lauren annually purchases and receives goods and services valued in excess of $50,000 directly from points located outside the State of Tennessee. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The issue central to this proceeding relates to struck work. United Steelworkers Local Union No. 9677 (USW), the Union, represents employees of NFS. The collective-bargaining agreement between the Union and NFS expired on May 15. Negotiations for a new agreement had been unsuccessful, and the Union went on strike on May 15. The strike ended on October 15, when the Union made an unconditional offer for the employees it represents to return to work. The threat alleged in the complaint is a threat to discharge employees who honored the Union's picket line. The constructive discharge allegation relates to Robert Parton's anticipatory refusal to perform struck work. The discharge allegation relates to the refusal of Seth Jones to perform what he reasonably believed to be struck work.

The expired collective-bargaining agreement, Article 18, gave NFS the "right to subcontract work specifically, but without limitation, for construction and/or installation of new facilities and systems." Section 1(a), which defines normal maintenance provides:

> Normal maintenance work is work performed to effect repairs or replacement of equipment in the plant system so as to return it to an as-was condition. In addition, replacement and restoration of existing equipment, systems, and structures to put them in an as-was condition and modification of plant equipment, systems, and structures either of which require less than 450 direct work hours, according to engineering estimates, will be considered normal maintenance to be performed by bargaining unit employees.

The engineering estimate of 450 hours was made by NFS engineers. Whether a specific task was unit maintenance work or work that was properly assigned to a subcontractor pursuant to the contract was a source of friction. Maintenance Shop Steward Norman Brown testified without contradiction that the Union and NFS have been "arguing … for 25 years" regarding such assignments and that from 100 to 150 grievances had been filed over the past five years regarding the assignment to subcontractors of what the Union considered to be unit maintenance work. Work performed by Lauren constituted approximately one half of those grievances. Various Lauren employees, including leadman Chuck Reifsnyder and employee Seth Jones, testified that they were aware that the Union had filed grievances regarding their performing work that had been assigned to Lauren rather than to NFS unit employees.

A document titled Subcontract Work Checklist was developed by NFS in an attempt to reduce controversies with the Union regarding maintenance work. Adapted from the contract,

the document was prepared by NFS managers. It sets out the engineering estimate of work hours and contains eight blocks as follows:

1. Repair or replacement of equipment in plant system to restore to “as-was” condition.
2. Replacement and restoration of existing equipment, systems, and structures to put them in an “as-was” condition with total direct labor less than 450 man-hours.
3. Modification of … equipment, systems and structures … less than 450 man hours.
4. Installation of modified equipment, systems, and structures.
5. Modification of existing equipment, systems, and structures … greater than 450 man hours.
6. Combination of small (≤ 450 man-hour) unrelated jobs without single objective.
7. Work requiring special skills and/or equipment.
8. Construction and/or installation of new facilities and systems.

Items 1, 2, 3, and 6 constituted normal maintenance, bargaining unit work. If the work met the criteria of items 4, 5, 7 or 8, it could be subcontracted. The document was signed by various NFS supervisors and managers. Until June 7, Laurens personnel were unaware of the existence of the foregoing checklist. Shop Steward Brown explained that, when a grievance arose concerning assignments, NFS would present the Subcontract Work Checklist in support of its position. A continuing concern of the Union was the single objective language, that jobs were “not to be multiplied together" in an attempt to meet the 450 hour contractual threshold.

B. Facts

On May 15, Project Manager Jeff Campbell met with the Lauren employees, approximately 28, who had skills in various crafts including carpentry, electrical, pipefitting, and welding, as well as helpers. He informed them of the strong possibility of a strike and advised that, if a strike occurred, arrangements had been made to have them park off site and be bussed across the picket line. Employees expressed concerns about crossing the picket line and performing the work of striking employees. Campbell told the employees that Lauren had work, that “[w]e're going to do Lauren's work. We're not going to do any of Nuclear Fuel's work, no maintenance work, no yard work. Just what Lauren has on the books.”

Employees Ronnie Bowen and Larry Ragle expressed concerns about crossing the picket line. Bowen specifically asked whether “we [the employees] have to cross the picket line.” Bowen, corroborated by employees Robert Parton, Wayne Haun, and Tony Shaver, recalled that Campbell responded that “if you abandoned your job for two days, that you was a voluntary quit.” Although Campbell testified that he did not recall being asked about the consequences of not crossing the picket line, he claimed that he recited the written company policy, stating that “any unapproved or without notice absences over two days would be considered abandoned [sic] [job abandonment]… that if people had concerns we would heed those concerns.” A position statement filed by Lauren’s former attorney states that Campbell did not recall discussing the foregoing policy and that, if mentioned, “it would have been mentioned only in passing.” Campbell acknowledged that he did not advise the employees that they had the right to honor a picket line. Bowen and Ragle requested time off. Campbell granted the requests. Campbell did not dispute the testimony of employee Parton that Bowen, when he requested time off, stated that he wanted “to think about it.”

The General Counsel points out that Campbell, although not recalling that anyone asked about the consequences of refusing to cross the picket line, offered no explanation for his addressing that issue. The fact that Bowen requested time off “to think about it” and that Campbell granted the request, confirms the threat. If Bowen had not understood that his job

would be in jeopardy if he did not cross the picket line, there would have been nothing for him "think about" since Campbell had assured the employees that they would not be performing the work of the strikers. Campbell's uncorroborated claim that he would heed the employees' concerns is incredible. I credit Bowen and Parton.

Bowen spoke with strikers who told him not to quit, that they had no problem with his crossing the picket line so long as he was "not doing … our work." Bowen returned to work as did all of the Lauren employees. There were no issues regarding performing struck work until June 5 or 6.

Employee Seth Jones worked for Lauren as a "top helper" from March 2003 until June 7. He crossed the picket line and continued to work with leadman Chuck Reifsnyder on a glove box in building 333, work he had been performing prior to the strike. On June 5 or 6, Brian Long, an NFS engineer, approached Reifsnyder and Jones regarding a job that he wanted them to perform installing some Lexan shields adjacent to certain filters. As they were walking to the area where he wanted them to perform the work, Jones noticed that the work request was checked for "maintenance." Jones commented upon this and stated that he was not going to perform that work. This prompted a decision to go to the office that Project Manager Jeff Campbell and foreman Ken White were sharing. In the office, Reifsnyder showed the work request to Campbell and White and told them, "[T]his is checked maintenance, you are not going to get anybody to do this work that is checked maintenance." A discussion ensued which NFS engineer Long interrupted saying "is that all … the fact that it is maintenance." Reifsnyder replied that it was. Long said that he could "fix that right now," whereupon he balled up the request, threw it in the trash, pulled out another request sheet and checked "subcontractor."

Campbell, Long, and Reifsnyder, all of whom testified, did not deny the foregoing occurrence. Foreman White did not testify. White told leadman Reifsnyder to put employees Terry Bell and Kris Thomas on the work. Jones confronted Long stating, "[Y]ou can dress it up as much as you want, nothing changes the fact that that is not our work, it is maintenance work." Reifsnyder sent Jones on some errand and went to give the work to Bell and Thomas.

Long admits that the work request was marked maintenance. When performance of the work became an issue, he asked his superior, Gary Hazelwood, "if we could have this job performed by the subcontractor due to the lack of qualified welders with salaried people filling in for NFS maintenance." At the hearing he contended, "This work could have gone either way."

On June 7, Reifsnyder and Jones were again working on the glove box. They were approached by NFS construction coordinator Bob McFadden and a newly-hired engineer. McFadden took them to a mechanical room with which Jones was not familiar and showed them a stainless steel line that McFadden wanted removed and rerouted before an agent or agents from the Nuclear Regulatory Commission, the NRC, came to the plant. He showed them what needed to be done, including draining the old line, and stated that he wanted them to start the next day. Jones told Reifsnyder, "[T]his ain't going to work, this is maintenance work." Reifsnyder replied that "they" had the paperwork, Jones stated that he had not seen any paperwork and that he wanted to see it. Reifsnyder repeated that "they," NFS, "have it." Jones replied that he was sure that they had a "stack of paperwork … after I seen what Mr. Long did," that "you know as well as I do … that it is not [our work]." Reifsnyder and McFadden went to find Campbell. Jones went to change clothes.

The Information Transmittal for the rerouting is dated June 6. An e-mail advising Lauren of the assignment of this work was sent at 12:47 p.m. on June 7. The Information Transmittal describing the work is stamped as received by Lauren on June 14. A Subcontract Work

Checklist relating to this work contains two undated signatures and approval by an NFS Labor Relations representative pursuant to a telephone call on June 7. The final signature on the Subcontract Work Checklist is approval by the Maintenance Manager. That signature is dated June 6, the day prior to approval by Labor Relations.

John Kramer, an NFS Project Engineering Manager, testified that the rerouting of the stainless steel tubing, which he identified as a deionized water line, was properly assigned to a subcontractor because it was "a new line that had to be installed on this tank." Two work requests related to this work. Although estimated to take a total of 12 hours, the Subcontract Work Checklist justifies assignment of the work to a subcontractor by classifying it under "[c]onstruction and/or installation of new facilities and systems." Both of the work requests refer to "modification of JSC." Kramer admitted that the rerouting was necessitated by safety or security reasons, that it did not create some new system, and that, after rerouting, the new line performed the same function as the old line. Kramer did not explain how removal of the old water line constituted "[c]onstruction and/or installation of new facilities and systems." Under the expired contract, although new installations could be subcontracted regardless of the number of hours of work involved, the modification of exiting systems was unit maintenance work unless it was estimated to exceed 450 hours.

Jones acknowledged that he had installed Lexan shields but that this work had been in conjunction with Lauren construction projects. He testified without contradiction that the installation of the shields would have taken, at most, two days. He also acknowledged that, when performing construction, Lauren employees would put together new tubing and tie it into existing lines. Jones pointed out that the work McFadden was requesting related to an "existing line which could be everything in the building," that "maintenance would be the ones that perform work on existing lines like that," and that the job would have taken "way under 450 man hours." McFadden did not testify.

Jones went to the changing room where he encountered employee Kris Thomas, who had been assigned to the Lexan shield job that Jones had refused to perform. He informed Thomas of Brian Long's tearing up the work request that classified the Lexan shield work as maintenance and checking subcontractor on a new one. Thomas indicated that he was going to speak to Campbell. Thomas did not testify.

Campbell, who did not deny that Long had thrown away the work request that Jones had protested, testified that, upon hearing from Thomas that he was being asked to perform struck work, told him that he "would get to the bottom of this." Contrary to that testimony, there was nothing for Campbell to "get to the bottom of." The uncontradicted testimony of Jones establishes that Campbell was present when Long threw away the original work request and White directed Reifsnyder to assign Thomas and employee Bell to the job.

Following Campbell's receipt of the complaint from Thomas, Campbell sought a meeting with representatives of NFS. Campbell and Lauren's Engineering Project Manager Alan Ollis met with NFS Engineering Director Gary Hazelwood and Paul Johnson, Hazelwood's superior. At that meeting, Hazelwood and Johnson provided to Campbell and Ollis the Subcontract Work Checklist that NFS had been using with regard to assessing whether work being assigned was normal maintenance work or work that could be assigned to a subcontractor. This was the first time that anyone with Lauren had seen that form.

At the time of the strike, NFS had more than 20 maintenance unit employees. During the strike, NFS had a maximum of eight salaried employees performing this function. Long confirmed that there was a lack of qualified welders. The contract under which Lauren provided

services to NFS had expired on May 22 but had been extended to June 26. Campbell admitted that, in a different meeting, Paul Johnson asked him "how far Lauren was willing to go" with regard to performance of maintenance work. He testified that he told Johnson that "once the contract is settled … we [Lauren] would be willing to talk." Whether an understanding between NFS and Lauren was reached is not established. Comments that were thereafter made to employees by Engineering Project Director Ollis are uncontradicted.

The parties stipulated that about 1 p.m. on June 7, Campbell called a meeting of the Lauren employees. The meeting took place in what is referred to as the break trailer which contains a locker room and break area in which three 12 foot long tables with benches were located. Approximately 28 employees were present. There is no need to burden this decision with a detailed summary of the meeting, which included discussion about safety and directions for how to respond to any threat made by a striking employee. All witnesses agree that the meeting addressed concerns regarding the work the employees were performing. Employee Seth Jones and Robert Parton recalled that, in the meeting, Campbell rhetorically asked, "[W]hat is maintenance work?" and then began answering his own question by referring to "changing light bulbs" and a "gray area." Campbell pointed out that "those people out on the [picket] line don't have a job, they don't have a contract … and NFS has a lot of work that needs to be done and we need to do it … , if we don't do it they are going to get somebody who can." Jones recalled that Bowen responded that Campbell had told the employees that they "wouldn't have to do it and now here you are telling us that we are going to have to."

Employee Robert Parton recalled that Ollis informed the employees that they, referring to himself and Campbell, had been up to the NFS office and had "devised a way of putting these jobs together where we could do them." He referred to the Subcontract Check List that he and Campbell had been given. Parton stated that he "thought it was a bunch of shit because anybody could go make up a damn document, because I'd never seen any of these in the first place." Employee Wayne Haun recalled that Ollis explained that the Subcontract Check List "gave us [Lauren] the right to do maintenance work because there wasn't no contract with maintenance to do maintenance work because they was on strike," that the form would determine whether the work was maintenance work or subcontract work. Campbell testified that Parton became quite "frustrated" and said,"[T]hose people can put anything they want to on that paper." Campbell did not deny that Ollis made the foregoing statements. Ollis did not testify.

Jones stated that he had worked for Lauren for over three years and had "never done a job that has lasted a day or two without being [having] a grievance filed by the Union." He recalls that Thomas complained about having been assigned with employees Bell to perform the job that Jones had refused and stated that "if we are going to have to do maintenance work I believe we all should have to do it and not just one or two of us." Campbell, without addressing whether the work was maintenance work, repeated that "we are going to do the work that NFS hands to us and that is the work that needs to be done, we are going to do it. … [W]e are all going to do it or go home. If you don't like to do it, go home." Campbell referred only to "the work that NFS hands to us." He did not say "maintenance work."

Employee Robert Parton recalls that Campbell told him that he had one of three choices: quit, refuse to the job and be fired for insubordination, or see if Lauren had a job at another location out of state. No employee corroborated that testimony. Employee Wayne Haun recalled that Campbell stated that "if you feel uncomfortable about working here, I can put you in for a transfer for another … job to work. Would you like for us to place you somewhere else." Parton replied that he did not want Campbell to find him a job out of state. Campbell commented that Parton should do "what you've got to do."

Parton remained. He acknowledged that he was angry, but "under control." Parton admitted that he did not recall everything that he said. Parton sought to have his fellow employees present a united front to management, but did not succeed in doing so. He referred to some of his fellow employees as "chickenshits." I credit the testimony of employee Sam Effler that Parton left, stating, "I'm not going to work for this chicken shit company no more … get me a ride out of here, I'm gone."

Parton admitted that he had not performed any maintenance work and had not been asked to perform work that he considered to be maintenance work. On the basis of the statements of Campbell and Ollis, he anticipated such an assignment, but not at that time, that it "was in the making … , not then." He admitted that, on a previous occasion, he had refused to work with a specific employee and had been threatened with discharge, but he thereafter sat down with Campbell, "and we talked about it and we worked it out."

Several employee witnesses presented by Lauren recalled that, in the course of the meeting, Campbell stated that it was not his intention that the Lauren employees be asked to do maintenance work.

All witnesses agree that the meeting did not come to a formal conclusion. Employees began engaging in discussion among themselves and leaving. Electrical leadman Jim Miller recalled that Jones informed him that he was going to quit "because he was going to have to do some kind of work the next day." Miller advised him not to quit, "just let them fire you." He recalled that, at that time, Jones replied, "No," stating that he was going to go back to school.

Jones walked up to the front of the room where Campbell was sitting. Alan Ollis was there. Jones stated to Campbell that the job McFadden had assigned, "the job you want me and Chuck [Reifsnyder] to start tomorrow is maintenance and it is not right. … I am not going to do it." Campbell replied that the refusal constituted insubordination. Jones asked what that meant, and Campbell replied, "[I]t means you are fired unless you want to go somewhere else to work with Lauren and we won't say you are fired."

Jones remained in the area, trying to "cool down and basically think about the next step." He commented to Campbell that he was thinking of returning to school and asked where Lauren was operating. Campbell stated that he would have to check the computer, which was located in his on-site office. Jones went to the on-site office, but the computer was not functioning. Campbell told Jones that he would have Director of Human Resources Ken Porter, who is located at Lauren's headquarters in Abilene, Texas, call him.

Thereafter, Jones cleaned out his locker. Employee Sam Effler was present and recalls that Jones informed him that "he got fired for insubordination." As Jones was waiting with leadman Sam Nave for the bus to return them to the employee parking lot, Forman Ken White approached them and asked Jones if he had quit. Jones replied, "[N]o, Ken, I am not quitting, you have to fire me. Jeff [Campbell] said I was fired." Nave confirms that Jones informed White that he was not quitting, stating, "I'm not going to quit, you'll have to fire me."

Although Jones told White that he had been fired, a friend of Jones informed him that White was saying that he had quit. Jones immediately called White, who repeated that he thought that Jones had quit. Jones again informed him that he had not quit and that he would come by the next day to pick up his paperwork or would return to work on Monday.

Director Porter did call Jones, but the only Lauren location at which work was immediately available was across the country in Las Vegas, Nevada.

On Friday, June 9, Jones went to the main Lauren office, which had been relocated to the nearby city of Johnson City, Tennessee, during the strike. He met with Ken White in White's office. White suggested that Jones return to work, stating that, if he would come back and "do that job you are supposed to do you can have your job back." Jones replied that he was sorry, but "that job is maintenance and I am not going to do it." White then walked out of the office, told a clerical employee to fill out a termination slip, and stood behind her as she did so, telling her what to place on the document. The document, signed by White, reflects that Jones was involuntarily terminated for insubordination on June 7.

Project Manager Campbell testified that he had only one conversation with Jones and that it was in his on-site office. According to Campbell, Jones informed him that he was quitting to return to school. Campbell claims that he informed Director of Human Resources Porter that Jones had quit. Porter learned of the existence of the termination slip signed by Foreman White but did nothing to change it, supposedly because he did not think it was "a big issue at that time … [s]o I took it upon myself to not do anything to correct it." I do not credit either Campbell or Porter. Campbell, on June 27, signed a document, Joint Exhibit 1(a), filed with the Division of Employment Security, Gatlinburg, Tennessee, that reported that Jones was discharged for insubordination and stating, "Employee declined to perform future work assignments."

The Respondent, in its brief, does not mention or discuss that document which states that Jones was discharged for insubordination because he "declined to perform future work assignments." Jones did not decline "future work assignments." Jones told Campbell that the rerouting of the water line was "maintenance and it is not right" and that he would not perform that job.

C. Analysis and Concluding Findings

1. The Alleged Threat

The complaint alleges that Campbell "threatened employees with discharge if they engaged in protected concerted activity." Refusal to cross a picket line is protected concerted activity. I have credited Bowen's testimony that, when he expressed concern about crossing the picket line, Campbell stated "that, if you abandoned your job for two days, that you was a voluntary quit." Threatening employees with termination for engaging in the protected activity of refusing to cross a picket line violates Section 8(a)(1) of the Act. *Bunting Bearings Corp.*, 343 NLRB 479, 483 (2004).

2. The Alleged Discharges

The complaint alleges that Robert Parton was constructively discharged and that Seth Jones was discharged for engaging in protected concerted activity. As the evidence reveals, the discharge of Parton relates to his anticipatory refusal to perform struck work, and the discharge of Jones relates to his refusal of a specific job assignment.

Project Manager Campbell admitted that NFS manager Paul Johnson spoke with him regarding Lauren performing maintenance work, a request to which he did not agree. Whether an understanding was reached is not established, but it is undisputed that Engineering Project Manager Ollis informed the employees that he and Campbell had met with NFS managers and "devised a way of putting these jobs together where we could do them," that the Subcontract Check List "gave us [Lauren] the right to do maintenance work." The Respondent's brief does not mention the foregoing comments made by Ollis who did not testify.

Campbell was obviously in an uncomfortable position. He wanted to respect the concerns of the Lauren employees who had crossed the picket line with the understanding that they would not have to perform work that would have been done by the strikers, and he wanted to protect the status of Lauren as a subcontractor to NFS but was being requested to perform maintenance work. The form solved his dilemma. If NFS was willing to certify that work requested was subcontractor work rather than maintenance work, he felt that he was not being disingenuous by telling the employees that the work was subcontractor work. The fact that there was no steward from the Union to challenge the NFS decision was not his problem.

Despite Campbell's stated intent not to have Lauren employees perform struck work, his two hour meeting with all employees suggests the reality of what was going to occur. If the only issues had been the requests to install the Lexan shields and to reroute a stainless steel line there would have been no need to have conducted a two hour meeting with all employees. Campbell could have simply spoken with Jones and Thomas, the only two employees who had protested any assignment. Leadman Reifsnyder made no protest when, following the complaint by Thomas, Foreman White directed him to assign Thomas and Bell to the job. Bell, so far as the record shows, did not protest the assignment. The fact that Campbell called a meeting at which Ollis told the employees that a way had been devised whereby "we could do" these jobs confirmed to employees that they would be assigned work that they believed to be maintenance work. The employees had no confidence that the Subcontract Check List assured that they would not be assigned maintenance work. NFS could "put anything they want to on that paper."

a. Robert Parton

General Counsel argues that Parton "reasonably believed that he was ordered to perform struck work." I do not agree. Parton anticipated that he would, at some point in the future, be assigned struck work. Parton admitted that he was never assigned any work that he believed to be maintenance work, that no assignment was made at the meeting, but that he anticipated that such an assignment would be made in the future, that it was "in the making." The imminence of the assignment is critical to the determination of whether Parton's anticipatory quit constituted a discharge.

Board precedent recognizes two types of constructive discharge in which a quit is treated as a discharge. The first, and typical situation, involves the imposition of intolerable working conditions. See *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976). The second, in what the Board refers to as the "Hobson's Choice" doctrine, involves situations in which the "employer conditions the employee's continued employment on the employee's abandonment of his or her Section 7 rights." *Intercon I (Zercon)*, 333 NLRB 223 (2001). Neither situation permits an anticipatory quit. The Board, in *Manhattan Day School,* 346 NLRB No. 89, slip op. at 5 (2006), points out:

> … [W]hen an employer threatens "some future action which may or may not be carried out," the employer has not imposed intolerable working conditions sufficient to establish constructive discharge until the threat is actually carried out. *Groves Truck & Trailer*, 281 NLRB 1194, 1195 (1986). In such a situation, "no matter how reasonable an employee's feeling of insecurity may be," a violation of Section 8(a)(1) is not converted into an unlawful discharge. Id. at 1195-1196. See also *White-Evans Service Co.*, 285 NLRB 81, 82 (1987) (no constructive discharge where employee resigned prematurely, "anticipating that he would face the choice [between quitting and foregoing union representation] that subsequently confronted other unit employees").

The foregoing principle is consistent with a long line of precedent. In *Marquis Elevator Company, Inc.*, 217 NLRB 461 (1975), the Board held that an employee who quit two months prior to the employer's unlawful withdrawal of recognition from the union was not constructively discharged although his quitting occurred after the employer made statements that caused the employee to believe that the employer was going to become nonunion and that he could see that he "was going to get in bad with the Local." The Board stated that the quit was not a constructive discharge because, "[w]hile resigning in the face of the unlawful withdrawal of union recognition and termination of existing union benefits and membership is one thing, quitting in anticipation that such may take place later on is an entirely different matter."

The General Counsel cites *Controls Division/Lexington, Ohio Plant*, 221 NLRB 742 (1975) for the proposition that Parton was constructively discharged. In that case the employer informed its data processing employees that they would be required to perform struck production work. Four employees concertedly agreed that they would not perform the struck work. One of those employees, Ewers, was assigned such work and was discharged. The other three employees quit. The Board, in finding in the circumstances of that case that the three employees who quit were constructively discharged, adopted the decision of the administrative law judge who found that the "Respondent's insistence on a decision [by the three employees who quit], coupled with the demonstrated discharge of Ewers and its expressed intention to discharge such employees if they refused to perform struck work, reveals that Respondent intended the termination of the employees one way or the other." Id. at 745.

Unlike the situation in *Controls Division/Lexington, Ohio Plant*, the Respondent did not, on June 7, require employees make a decision or commitment to perform struck work. I have not credited Parton's uncorroborated recollection that he was given three choices: quit, refuse the job and be discharged, or transfer. The employees were not informed that they were going to be asked to perform struck work. Indeed, Campbell, who rhetorically asked what maintenance work was, disingenuously contended that the employees were not going to be assigned struck maintenance work. At the time of the June 7 meeting, no employee had been discharged for refusing to perform struck work. Although Parton and other employees anticipated that they would, at some time in the future, be assigned work that they considered to be maintenance work, they would not know that they were being assigned what they considered to be struck maintenance work until the assignment was actually made.

As the Respondent argues, citing *ComGeneral Corp.*, 251 NLRB 653, 658 (1980), "[i]t is not a constructive discharge to quit in anticipation of the mere possibility that one might be discharged." Parton was never assigned and never refused to perform any work that he believed to be maintenance work. Although Parton anticipated that such an assignment would be made in the future, that assignment had not occurred. Parton believed that it was "in the making." Parton had previously refused a work assignment and maintained his employment after speaking individually with Campbell. No one knew when the strike would end. If the strike ended prior to any assignment of work that Parton considered to be maintenance work, there would have been no issue because the Union would have, consistent with past practice, asserted its right to normal maintenance work. Parton's anticipatory quit was not a constructive discharge. I shall recommend that this allegation be dismissed.

b. Seth Jones

The General Counsel argues that Jones reasonably believed that he was being asked to perform struck work and was discharged for his refusal to perform that work. The Respondent argues that Jones quit and, assuming that it be found that he was discharged, that the work that he refused to perform was not struck work.

I have found, contrary to the testimony of Campbell but consistent with the termination documents signed by White and Campbell, that Jones was discharged. The discharge of an employee for refusing to perform work that the employee reasonably believes is struck work violates the Act. *Supermarkets General Corp.*, 296 NLRB 1138 (1989). Thus, the determination of whether the Respondent violated the Act by discharging Jones is dependent upon whether Jones reasonably believed that the work he refused to perform was struck work.

The strike removed from the NFS employee complement its skilled maintenance employees. Despite the strike, NFS sought to maintain production and compliance with NRC requirements. The actions of Long and McFadden in seeking to have Lauren employees install Lexan shields and reroute a water line confirm that NFS was unable to perform necessary work with the 8 salaried individuals who were attempting to cope with the work formerly performed by the more than 20 unit employees. On June 5 or 6, when NFS engineer Brian Long assigned to Jones and Reifsnyder the installation of the Lexan shields, the work request stated that it was maintenance work. NFS engineer Long threw it into the trash.

On June 7, NFS construction coordinator McFadden began showing Reifsnyder and Jones the work involved in rerouting what, at the hearing, was identified as a deionized water line. Jones asked to see the paperwork regarding the assignment but no paperwork was shown to him. Although the e-mail advising Lauren of this work was sent at 12:47 on June 7, there is no evidence that Campbell received it prior to his convening the meeting with Lauren employees. There is no contention that the Subcontract Work Checklist relating to this work was ever shown to Jones. The Respondent, in its brief, argues that Jones refused the assignment "without reviewing the paperwork," but does not address the uncontradicted testimony that he requested to see the paperwork and was told that "they," NFS, had it. The various documents relating to the rerouting of the water line are not stamped as received by Lauren until June 14.

Jones reasonably believed that he was being assigned struck work. Under the expired contract, the modification of exiting systems was unit maintenance work unless it was estimated to exceed 450 hours. The Respondent, in its brief, refers to the Subcontract Work Checklist and argues that the rerouting of the water line was properly assigned to a subcontractor because it was classified under "[c]onstruction and/or installation of new facilities and systems," although it was projected to take only 12 hours of work. I agree with Jones that NFS would have a "stack of paperwork" classifying the work as construction or installation, but, as the employees knew, NFS could "put anything they want to on that paper." NFS Project Engineering Manager Kramer admitted that the new line performed the same function as the old line, thus, it would appear to be a modification. Neither Kramer nor the Respondent's brief addresses the removal of the existing old line. Even if installation of the new line were to be considered installation of "new facilities and systems," rather than a modification, the removal of the old line was neither construction nor installation of new facilities and systems. It was struck work. I find that Jones reasonably believed that he was being asked to perform struck work and that his reasonable belief was fully justified.

Campbell discharged Jones on June 7 when Jones stated that he was not going to perform the rerouting work because it was unit maintenance work. White offered to permit Jones to return to work if he would agree to perform the work. Jones persisted in his refusal. The record establishes that Jones' belief that the work was struck bargaining unit work was reasonable. The Respondent, by discharging Seth Jones for refusing to perform struck work, violated Section 8(a)(1) of the Act.

Conclusions of Law

1. By threatening employees with termination for job abandonment if they engaged in the protected concerted activity of refusing to cross a lawful picket line, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging Seth Jones for engaging in the protected concerted activity of refusing to perform lawfully struck work, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and 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 Seth Jones, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from June 7, 2006, 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).

The Respondent must also post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Lauren Engineers & Constructors, Inc., Erwin, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge for job abandonment if they engage in the protected concerted activity of refusing to cross a lawful picket line.

(b) Discharging or otherwise discriminating against any employee for engaging in the protected concerted activity of refusing to perform lawfully struck work.

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

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

[3] 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.

(a) Within 14 days from the date of this Order, offer Seth Jones full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Seth Jones whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

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

(d) 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.

(e) Within 14 days after service by the Region, post at its facility in Erwin, Tennessee, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 May 15, 2006.

(f) 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.

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

Dated, Washington, D.C., January 22, 2007

_____
George Carson II
Administrative Law Judge

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had 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 threaten you with discharge for job abandonment if you engage in the protected concerted activity of refusing to cross a lawful picket line.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in the protected concerted activity of refusing to perform lawfully struck work.

WE WILL, within 14 days from the date of the Board's Order, offer Seth Jones full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Seth Jones and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

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

LAUREN ENGINEERS & CONSTRUCTORS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

233 Peachtree Street NE, Harris Tower, Suite 1000, Atlanta, GA, 30303-1531
(404) 331–2896, Hours: 8:00 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (404) 331–3292