Big Horn Coal Company *and* Anton J. Bocek *and* David L. Jelly *and* George E. Buszkiewic *and* Craig R. Hanson *and* Charles E. Smith *and* Wayne L. McKenzie *and* Kenneth M. Barker *and* John R. Johnson *and* Edwin O. Wartensleben *and* Edward L. Feaster *and* M. O. Worthington *and* Kenneth D. Copp *and* Bennie M. Campbell *and* Robert S. Nielsen *and* Michael S. Doyle *and* Ross E. Sadler, Jr. *and* Dale Condos *and* John R. Harris. Cases 27–CA–10702, 27–CA–10702–2, 27–CA–10702–3, 27–CA–10702–4, 27–CA–10702–5, 27–CA–10702–6, 27–CA–10702–7, 27–CA–10702–8, 27–CA–10702–9, 27–CA–10702–10, 27–CA–10702–11, 27–CA–10702–12, 27–CA–10702–13, 27–CA–10702–14, 27–CA–10702–15, 27–CA–10702–16, 27–CA–10702–20, and 27–CA–10702–21

October l6, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On May 7, 1992, Administrative Law Judge James S. Jenson issued the attached decision. The General Counsel and the Charging Parties filed exceptions and supporting briefs. The Respondent filed a brief in reply to the exceptions.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Big Horn Coal Company, Sheridan, Wyoming, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] While we agree with the judge's conclusion on the issue of disparate treatment, we also note that the facts of this case are distinguishable from those in *Community Motor Bus Co*., 180 NLRB 677 (1970), enf. denied 439 F.2d 965 (4th Cir. 1971). In *Community Motor Bus*, the employer made statements effectively condoning the unprotected activity engaged in by the strikers. In contrast, the Respondent in this case never indicated that it would condone any misconduct or unprotected activity by the strikers. An employer, of course, may not discriminate among those engaged in like unprotected conduct for unlawful reasons. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

Member Raudabaugh notes that the Respondent declined to reinstate strikers who could be positively identified as having engaged in the misconduct. The Respondent reinstated all others. Thus, this case does not involve unexplained disparity in the treatment of various strikers. For this reason, Member Raudabaugh finds *Community Motor Bus* distinguishable and he does not pass on whether there would be a violation if such disparity were shown.

Sheridan, Wyoming, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Albert A. Metz and *Michael T. Pennington*, for the General Counsel.

Jeffrey T. Johnson (Holland & Hart), of Denver, Colorado, and *Hayden F. Heaphy (Burgess, Davis, Carmichael & Cannon)*, of Sheridan, Wyoming, for the Respondent.

William O. Shults, of Washington, D.C., for the United Mine Workers of America.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. This case was heard in Sheridan, Wyoming, on March 12 and 13, 1991, pursuant to a consolidated complaint, as amended, which issued on December 7, 1989. The consolidated complaint alleges, in substance, that the Respondent violated Section 8(a)(1) and (3) by refusing to reinstate certain economic strikers following an unconditional offer to return to work. The Respondent denies engaging in any unlawful conduct and claims it terminated the strikers because they engaged in serious strike-related misconduct, thereby relieving it of the obligation of rehiring them. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs were filed by the General Counsel, the Union, and the Respondent, all of which have been carefully considered.

On the entire record in the case, including the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Big Horn Coal Company, a subsidiary of Kiewit Mining Group, Inc., which is a subsidiary of Peter Kiewit & Sons, Inc., is engaged in surface coal mining approximately 8 miles north of Sheridan, Wyoming. It is admitted and found that it annually sells and ships goods, materials, and services valued in excess of $50,000 directly to points and places outside the State of Wyoming, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and found that United Mine Workers of America, Local 2055 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

Respondent is engaged in operating a surface coal mine near Sheridan, Wyoming. It and the Union have had a collective-bargaining relationship for many years, the most recent collective-bargaining agreement being for a term of 3 years which expired March 23, 1987. Prior to its expiration, however, the parties agreed to an extension to June 1, 1987. Although no agreement was reached by the latter date, the parties continued to bargain. Failing to reach agreement, on July 1, 1987, the Respondent implemented its final offer. The employees continued working until October 5, 1987, when 41 of the 44 bargaining unit employees went out on strike. The mine continued to operate with the three nonstrikers, supervisors, and a few temporary employees. No permanent replacements were hired. Picketing was conducted 7 days a week on a 24-hour basis at the Acme and the Country Nightclub entrances to the mine. Normally two to four pickets were present at each gate. A trailer was located near the Acme gate for the strikers' convenience. Picketing continued until June 23, 1988, when the Union made an unconditional effort to return effective June 27. On June 24, the Respondent sent a telegram to the Union seeking a clarification of the unconditional offer and stating it did not intend to reinstate those employees who had engaged in strike-related misconduct. The decision as to which strikers were not reinstated due to strike-related misconduct was not made until after receipt of the Union's unconditional offer to return. By letter dated June 28 the Respondent advised the Union of the names of the 18 strikers, the charging parties herein, whom it contends had engaged in strike misconduct and would not be reinstated. Due to a reduction in demands for coal, the Respondent rehired only 18 bargaining unit employees. At the time of the instant hearing, Respondent employed only seven bargaining unit employees. The reinstatement rights of only those individuals the Respondent claims engaged in strike-related misconduct are at issue here.

B. *November 11, 1987*[1]

1. The Acme gate

November 11 was Veterans Day, normally a holiday under United Mine Workers contracts. John Rueb, Respondent's manager, testified it was a day when most of the mine crews didn't work but some did. Since at least 1973, it had never been a full workday. The morning of November 11 was extremely cold with temperatures ranging between 0 and 10 degrees above zero. The record shows that a group of about 50 people consisting of striking Big Horn employees, their wives and children, employees on layoff, retirees, and striking employees of Decker Coal Company located in Montana a few miles to the north of the Big Horn mine, had gathered and were milling around at the Acme entrance. The record shows that the gate to the entrance was locked with a padlock not belonging to Respondent, and that a pickup truck belonging to striker John Johnson was parked crosswise blocking the right-hand lane that enters the gate. Displayed part of the time across the driver side door of the pickup was a large white sign reading ''UMWA Remembers Our Veterans.'' In addition to a number of American flags, pickets also carried signs reading:

SCAB
GO
HOME

and

ON STRIKE
U.M.W.A.
LOCAL 2055
NO
CONTRACT
NO
WORK

As was their practice throughout the period of the strike, about 6:30 a.m. on November 11, a convoy of 11 vehicles containing supervisory personnel and mineworkers, left Sheridan en route to the mine. Mine Manager Rueb was in the lead vehicle. Upon passing the Jensik Hill interchange, Rueb call Ken Tobach, the mine graveyard shift supervisor, on the radio. Tobach told him there was a large gathering of strikers at the Acme gate which was locked with a noncompany lock and couldn't be opened. Nevertheless, the convoy proceeded on to the Acme gate, arriving about 6:45 a.m. Rueb stopped his vehicle about 150 feet short of the gate and again called Tobach on the radio and instructed him to call the sheriff and tell him the road was blocked, and also call Baker and Associates, a firm Respondent had hired to film any incident that took place. Sheriff Johnson and Undersheriff Moore were apparently at the lead and rear respectively of a convoy on its way to the Decker Mine located several miles north across the state line in Montana when they received word of the Acme gate activity. Both left the convoy for the Acme gate, with the undersheriff arriving first. Undersheriff Moore asked Rueb ''if he had made an attempt to go through,'' with Rueb responding that it would be better that he didn't because he didn't feel the group would open up and let him through. The undersheriff then talked to a group of demonstrators and asked if they would allow the convoy to go through and received a negative response. While he was acquainted with most of the people there, he was unable to recall anyone he talked to. He then went back and told Rueb ''that I felt that we should make an attempt to go through. That we wouldn't know for sure unless we did make the attempt to go through.'' Sheriff Johnson arrived shortly and also asked a group of demonstrators if they would let the convoy enter to go to work. He testified that 8 to 15 people hollered back that they wouldn't move. He was unable to single out anyone that responded in that manner. He told Rueb he didn't feel it was safe to try to enter. About 8:02 a.m., the company cut the locks on the gate. At 8:24 and 8:30, respectively, the demonstrators parted and permitted two large coal trucks operated by mine customers to enter. No attempt was made to enter by the company convoy. At some point the sheriff placed a call over the radio for assistance. Several deputies, three city police, and two state highway patrolmen responded. Rueb asked the sheriff to clear the gate so the convoy could go through. However, because of doubt as to whose property the dem-

[1] All dates hereafter are in 1987 unless stated otherwise.

onstration was taking place on, the sheriff didn't think he could arrest anyone. Although Rueb tried to find out through the company landman who owned the land, he wasn't able to do so. Consequently, the sheriff told Rueb he didn't want him to try going through the gate.

A few minutes before 9 a.m., Rueb decided to try entering through another gate. The vehicles in the convoy turned around in place with Plant Superintendent McKenzie, who had been at the back of the convoy as it approached the Acme gate, now in the lead vehicle and with Rueb bringing up the rear. Instructions were given by the sheriff to the supporting officers to block any attempt by the demonstrators to follow. Rueb told McKenzie to try and enter through the Tongue River Stone gate, one of several other entrances through which mine access could be gained by crossing over neighboring pasture land.

2. The Tongue River gate

Rueb testified that the Tongue River Stone Gate had never before been used to gain access to the mine. Nevertheless, he told McKenzie, who was to be in the lead vehicle, to try and enter that gate. As McKenzie approached a railroad crossing located about a quarter of a mile from the Tongue River Stone gate, he observed a pickup truck belonging to, and driven by, M.O. (Pinky) Worthington, parked 50 or 60 feet in front of the gate on the left shoulder of the road facing downhill toward the convoy. There is a cattleguard across the single lane roadway at the entrance to the gate. A padlocked cable is sometimes suspended across the cattleguard to deny access to the private property on the other side. Worthington testified that it wasn't possible to enter the gate that morning because of the cable. McKenzie testified that as he proceeded toward the railroad crossing, he observed the pickup pull forward another 30 feet and stop diagonally across the road. Worthington testified he had backed up and parked a few feet in front of the cattleguard and off to the right side of the road and that when the convoy turned left he pulled onto the road to leave since, ''There's no use sitting here anymore, they've already . . . got by.'' He denied he stopped diagonally across the road or that it was blocked at any times. Thus, it is seen that there is a direct conflict between the testimony of McKenzie and Worthington as to which side of the road Worthington's pickup was parked on, its proximity to the gate, and whether it blocked the road after it moved forward. In deciding whose version to credit, I have considered the fact that there were a number of potential witnesses in convoy vehicles and also that striker Pete Oliver, was with Worthington, none of whom were called to testify with the exception of Rueb in the last vehicle. Contradicting both McKenzie and Worthington as to the location of the pickup, Rueb testified the pickup was parked on the cattleguard. His testimony is not credited in this respect. The evidence shows Worthington's pickup was someplace between the gate and 80 or or 90 feet in front of the gate when McKenzie crossed the railroad track and took a sharp left turn that led the convoy down a road located on the railroad right-of-way, which appears to have been a more direct route to the mine, the convoy arriving about 9:15 a.m. Again, no actual attempt was made by the Respondent to enter the Tongue River Stone gate.

After arriving at the mine, Rueb directed Personnel Director Hutchinson and Terry Hoyt, a supervisor, to prepare lists of those persons they had seen that morning at the Acme gate.[2]

C. *The Decision Not to Rehire*

As noted at the outset, on June 24, 1988, the Union made an unconditional offer for all strikers to return to work, and on June 28, the Respondent gave the Union the names of the 18 employees whom it would not reinstate due to strike misconduct which had taken place on November 11, 1987. The decision as to which strikers would not be reinstated was not made until after the unconditional offer to return, and was based upon the personal observation of Respondent's supervisors, the lists prepared by the supervisors after arriving at the mine on November 11, 3-by-5-inch photographs and video tapes then available.[3] Only those persons who could be positively identified as having actively participated in blocking the road for a ''substantial period'' of time were replaced on the misconduct list. Rueb testified he was conservative in putting people on the list, i.e., no one who was off to the side of the road or who went on to the road and left was considered to have been engaged in blocking for a ''substantial period'' and was left off the list. People later identified from the Daniel's tape or from enlarged still photographs were not added to the list. It consisted of 17 names whom Respondent concluded had engaged in misconduct at the Acme gate, and Worthington for his conduct at the Tongue River Stone gate.

Positions of the Parties

The General Counsel argues there must be some element of confrontation at the point of entry before there is a blockage serious enough to justify a discharge. In this case the Respondent didn't approach the Acme gate closer than 150 feet and consequently no attempt was made to enter the mine premises through that gate. It is claimed that ''Indicative of an intent not to block is the fact of allowing other vehicles to enter the mine, no need to move because the company did not approach them, no arrests, no violence, no sit downs, no damage to persons or property, and no criminal charges being filed.'' Further ''The men testified they would have let the Respondent enter.'' It is argued that the ''Respondent's supposition cannot substitute for the requirement of actual misconduct,'' and since Respondent never tried to drive through the gate, it doesn't know what would have happened. Making note of the fact that entry to the mine was gained through another route that morning, the General Counsel also contends that this single incident was of minimal disruption in a 9-month strike and should not outweigh the long-term interest of employment that the 18 discharged strikers had committed to Respondent. He further claims that all strikers should receive equal treatment for equal behavior and here

[2] G.C. Exh. 2.

[3] The 3-by-5-inch photographs were enlarged for purposes of the hearing and are in the record as R. Exhs. 1–1 through 1–36. The following videotapes used in identifying demonstrators are also in the record. R. Exhs. 5 and 7 are the complete and excerpted tapes respectively taken by Baker & Associates; R. Exh. 4 is identified as the Keller tape. Not available until after the decision was made as to which of the demonstrators would be terminated, and also in the record, are the Daniels tapes, R. Exhs. 3 and 6, the latter consisting of excerpts from the former.

the Respondent engaged in disparate treatment when it selected the charging parties for discharge to the exclusion of others who had engaged in similar conduct. The General Counsel also argues that Worthington's truck was not blocking the Tongue River Stone gate, and in any event, the Respondent's convoy never tried to enter the gate and in fact didn't come within a quarter of a mile of it.

Respondent claims the record clearly shows that the strikers blocked the Acme gate on November 11, and the reason no attempt to enter was made was because Rueb, not wanting to provoke an incident, complied with the sheriff's instructions. Regarding the two coal trucks that entered the mine premises, Respondent points out they were admitted only after negotiations with law enforcement officials, and as soon as they passed through, the strikers again filled the roadway, pointing up the fact that the strikers decided who would be allowed access to the mine. In this regard, they had told Sheriff Johnson they wouldn't let the convoy enter. Respondent argues that Rueb was cautious and conservative in putting together the misconduct list and that the record clearly shows each of the 18 charging parties was positively identified as having actively participated in the November 11 block for a substantial period of time. Denying access to management and working employees, it is argued, has long been held to be unlawful by the courts and the Board. Respondent also contends it neither engaged in disparate treatment of the charging parties nor condoned the conduct of other strikers that engaged in similar conduct since it was unable to identify them at the time the decision to discharge was made.

Discussion

Paragraphs 7 and 8 of the consolidated complaint allege that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to reinstate 18 strikers following an unconditional offer to return to work. The Respondent claims it refused them reinstatement because they engaged in mass picketing blocking access to its mine premises, thereby relieving it of the obligation to reinstate them. Thus, the first issue is whether the 18 charging parties engaged in blocking ingress, and if so, the second question is whether the Respondent treated them disparately because it didn't discharge others who engaged in similar conduct.

1. Whether ingress was blocked

The first question, whether the strikers engaged in mass picketing and blocking ingress, is clearly proven by the video tapes and photographs taken on November 11, and the fact the strikers told the sheriff that they would not let the convoy containing nonstriking employees and supervisory personnel enter. There are other persuasive factors. The pickets carried signs stating, and yelled on numerous occasions, ''Scabs go home.'' They also yelled repeatedly ''No contract, no work.'' After the locks to the gate had been cut, a picket is heard to say at 8:36 a.m. on Respondent's Exhibits 7 and 5, ''Next time we'll weld the gate shut.'' At 9:01 a.m. on Respondent's Exhibits 3 and 6, after the convoy had turned around and started to leave, a picket is heard to say, ''We won, victory, even if they go in the back way, we still won one.'' At this time the pickup truck was moved and the people that had been massed in front of the gate dispersed. The fact that the pickets were milling around does not detract from the fact that the entrance was blocked by a mass of people with the common goal, clearly, of preventing access to the mine. Moreover, the evidence belies the testimony of the witnesses who claimed they would have permitted the convoy to enter if an actual attempt had been made.

In *Tube Craft*., 287 NLRB 491, 492 (1987), cited in briefs by each of the parties, the Board stated:

> The plurality Board opinion in *Clear Pine Mouldings*, . . . states that peaceful picketing does not include the right to block access to the employer's premises. 268 NLRB at 1047. Both the plurality and the concurring opinion adopt as the general standard for striker misconduct serious enough to permit the employer to refuse reinstatement, that which, ''under the circumstances existing . . . may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'' Id. at 1046, 1048, quoting *NLRB v. W. C. McQuaide, Inc*., 552 F.2d 519, 527 (3d Cir. 1977). In unanimously adopting this standard the Board also extended it to include coercion or intimidation of persons who do not enjoy the protection of the Act, such as supervisors. 268 NLRB at 1046 fn. 14 (plurality), id. at 1048 (concurrence).

In *Metal Polishers Local 67*, 200 NLRB 335 (1972), the driver of a vehicle drove away after being blocked by a picket for 2 or 3 minutes. The trial examiner concluded that ''a delay of one to five minutes under peaceful circumstances hardly constitutes blocking or barring ingress so as to constitute a violation of the Act.'' In reversing the trial examiner, the Board stated:

> Such a construction is at variance with established Board law.[9]
>
> Section 7 of the Act guarantees to all employees the right to refrain from participation in union activities, including strikes. Clearly, by physically blocking access to the plant of cars in which nonstriking employees and other persons were seeking to enter the gates, Respondent has interfered with the nonstriking employees in their exercise of these rights.[10]

[9] *Lithographers and Photographers International Union, AFL–CIO, CLC and Memphis Local 223, Lithographers and Photoengravers International Union, AFL–CIO, CLC (Holiday Press, a Division of Holiday Inns, Inc.)*, 193 NLRB No. 9.

[10] The absence of physical violence does not lessen the restraining effect of Respondent's conduct. Here, as in *Sunset Line and Twine Company*, supra at 1506: [79 NLRB 1487 (1948)]

> [t]he car drivers were faced with the choice of running down the pickets, at the risk of inflicting serious injury, or driving away. This interposition of passive force to prevent employees from going to work is, we believe, a form of restraint proscribed by Section 8(b)(1)(A).

In *Carpenters (Reeves, Inc.)*, 281 NLRB 493 (1986), Judge Robert T. Snyder, whose findings and conclusions were adopted by the Board, stated at 498:

> Blocking of ingress to and egress from an employer's facility, mass picketing, and threats of unspecified reprisals issued to employees seeking to work at pick-

> eted worksites for crossing a picket line, each constitute forms of coercive conduct violative of Section 8(b)(1)(A) of the Act. *Longshoremen ILA Local 1291 (Trailer Marine)*, 266 NLRB 1204 (1983). Blocking of ingress and egress of employees even for a short period of time until broken up by police to allow entrance or exit has likewise been held to be violative of the Act. *Iron Workers Local 455 (Stokvis Multi-ton)*, 243 NLRB 340 (1979).
>
> Mass picketing—the congregating of a large group of individuals at a particular site out of proportion to the number that would be reasonable in making known to the public and employees involved the nature of the Union's dispute at the site—tends to place employees in fear of penetrating through the group to enter or leave their workplace.

He went on to find that where 20 to 25 individuals congregated at and near the single entrance to the worksite when employees appeared for work, individuals were massed in such numbers as to intimidate the small group of employees from exercising their Section 7 rights to work and refrain from assisting the union in its labor dispute and was clearly coercive and restrained employees. In *Iron Workers Local 455 (Stokvis Multi-ton)*, cited by Judge Snyder, the Board stated: ''blocking an entrance or an exit even for a short period of time constitutes restraint and coercion within the meaning of the Act.'' There can be no question then that the mass picketing and blocking of the Acme gate the morning of November 11, constitutes restraint and coercion within the meaning of the Act, and I so find. The Respondent has met, therefore, its burden under *Rubin Bros.*, 99 NLRB 610 (1952), of demonstrating an honest belief that 17 of the 18 charging parties had engaged in strike misconduct at the Acme gate the morning of November 11. Moreover, the General Counsel doesn't contend that any of the 17 didn't engage in the alleged misconduct. Worthington, however, wasn't at the Acme gate, and the Respondent has failed to convince me that he engaged in any strike misconduct. Thus McKenzie, who was a quarter of a mile away, claimed Worthington was parked on the shoulder of the road 50 or 60 feet in front of the gate. Rueb claimed Worthington's truck was parked on the cattle guard. Worthington claimed there was a locked chain across the gate, that he was parked on the shoulder of the road and moved forward onto the road when the convoy turned left and drove down the railroad right of way. Had he indeed stopped crossway in the road when he moved forward, surely Rueb would have seen it and so testified. Instead as noted above, he placed Worthington some 80 to 90 feet from the location McKenzie placed him. While it may have been Worthington's intention to block access to the gate, or otherwise inconvenience or harass the convoy, that was not established. It may well be, as Worthington testified, and I have no reason to doubt his testimony in this respect, that the landowner had placed the locked chain across the roadway and that entry to the mine through that gate was not possible. In that event, I doubt it could be claimed that he had blocked access even if his truck had been parked on the cattle guard, which I find it was not. Accordingly, I find that the General Counsel has met the *Rubin Bros*. burden in proving that Worthington did not engage in the alleged misconduct.

2. Whether Respondent engaged in disparate treatment

The General Counsel and Union argue that since strikers Denton Alley, Bruce Hochhaus, Russ Laird, Mike McClure, Bill Reinke, Al Shreve, John Sturtz, and Gene White appear in some of the still photos and on some of the video tapes taken of the picketing, and engaged in activities similar to those of the charging parties, the Respondent engaged in disparate treatment by terminating only the latter. Cited as principal authority to support this theory of disparate treatment is *Community Motor Bus Co*., 180 NLRB 677 fn. 1 (1970). There the Board held that 12 employees whom the Respondent refused to reinstate did not in fact engage in conduct more offensive than 6 employees whom the Respondent was willing to reinstate. It therefore concluded that the Respondent could not raise the conduct of the 12 as a defense to a finding of a violation on the refusal to reinstate. In denying enforcement on this point in *NLRB v. Community Bus Co.*, 439 F.2d 965, 968 (4th Cir. 1971), the court stated:

> We decline to enforce these provisions of the Board's order because the mass picketing that blocked access to the work site exceeded the permissible scope of economic strike activity and relieved the company of the obligation to rehire the strikers.
>
> The pickets were not engaged in trivial acts of misconduct, but were interfering with a basic right guaranteed by statute—the right of non-striking employees to continue working. The right to strike, guaranteed by Section 7 of the Act, is the most powerful weapon of organized labor, but Section 7 also imposes a duty on strikers not to interfere with the right of other employees to refrain from concerted activities. *Oneita Knitting Mills v. NLRB*, 375 F.2d 385 (4th Cir. 1967), holds that blocking free access to the plant violates this right and is grounds for denying reinstatement. The facts of this case present a stronger argument for denial of reinstatement than in Oneita. There the strike had been precipitated by the unfair labor practices of the employer. The court held the strikers to a less stringent standard of conduct than that of economic strikers, applying the balancing test of *NLRB v. Thayer Co*., 213 F.2d 748, (1st Cir.) cert. denied, 348 U.S. 883, 75 S.Ct. 123, 99 L.Ed. 694 (1954). The distinction between economic strikers and unfair labor practice strikers disposes of most of the cases cited by the Board where picket line misconduct was held not to forfeit reinstatement rights. [citations omitted] Since the picket line misconduct in *Oneita* forfeited the reinstatement rights of unfair labor practice strikers, similar conduct by economic strikers in this case is to be at least as strongly condemned.
>
> . . . .
>
> Although we accept as supported by substantial evidence the Board's findings concerning the conduct of the 18 employees, we believe its conclusion overlooks the distinction drawn by *NLRB v. Fansteel Metallurgical Corp*., 306 U.S. 240, 259, 59 S.Ct. 490, 83 L.Ed. 627 (1939), between what an employer may do and what it must do. In *Fansteel*, the Court held illegal strike activity absolved the employer of any duty to reemploy, but the company ''was nevertheless free to

> consider the exigencies of its business and to offer reemployment if it chose. In so doing it was simply exercising its normal right to select its employees.'' 306 U.S. at 259, 59 S.Ct. at 498.
>
> The same is true here. The company was free to discharge or rehire any or all of the strikers whose misconduct forfeited reinstatement rights. Any other rule, especially in the absence of anti-union animus, would confront the employer with an all-or-none rehiring choice, which is not required by the Act or by the doctrine of condonation. *Kohler Co*., 128 NLRB 1062, 1105 (1960), enf'd in part and remanded sub nom. *Local 833, UAW–AFL–CIO, International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America v. NLRB*, 112 U.S. App.D.C. 107, 300 F.2d 699, cert. denied, 370 U.S. 911, 82 S.Ct. 1258, 8 L.Ed.2d 405 (1962).

I find the other cases relied on by the General Counsel and Union to be inapposite. The doctrine of ''disparate treatment'' is applicable, not as between strikers found to have engaged in unlawful conduct, but between them and nonstrikers or replacements that have also engaged in questionable conduct. As stated by the Board in *Aztec Bus Lines*, 289 NLRB 1021, 1027 (1988), cited by both the General Counsel and Respondent, ''Although an employer does not violate the Act by refusing to reinstate strikers who have engaged in serious misconduct, it is not free to apply a double standard. It may not tolerate behavior by *nonstrikers or replacements* [emphasis added] that is at least as serious as, or more serious than, conduct of strikers that the employer is relying on to deny reinstatement to jobs. *Garrett Railroad Car & Equipment v. NLRB*, 683 F.2d 731, 740 (3d Cir. 1982).'' Neither nonstrikers nor replacements were involved in the instant case. See also *Chesapeake Plywood*, 294 NLRB 201 (1989), where it held at 203 fn. 9:

> The General Counsel also argues that the Respondent's discharge of certain strikers was disparate in light of its reinstatement of striker *Cornell Roberts*, who also allegedly engaged in strike misconduct. We find no merit in this contention, noting that the General Counsel has failed to cite any authority to support this position. Because Roberts and the strikers who were discharged by the Respondent were all similarly engaged in strike activity, any variance in discipline within this group of employees would be insufficient as evidence to show that the disciplined employees were treated disparately because of their protected activity.

In sum, the ''disparate treatment'' argument is without merit. Having found that the charging parties, with the exception of Worthington, engaged in strike-related misconduct relieving the Respondent of the obligation to reinstate them, I recommend dismissal of all of the consolidated complaint with respect to each of them. Having found that Worthington did not engage in the alleged misconduct, I shall recommend an appropriate remedy consistent with Board policy in Case 27–CA–10701–11.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following strikers are not entitled to offers of reinstatement because of their strike misconduct:

Anton J. Bocek	Edward L. Feaster
David L. Jelly	Kenneth D.Copp
George E. Buszkiewic	Bennie M. Campbell
Craig R. Hanson	Robert S. Neilsen
Charles E. Smith	Michael S. Doyle
Wayne L. McKenzie	Ross E. Sadler, Jr.
Kenneth M. Barker	Dale Condos
John R. Johnson	John R. Harris
Edwin O. Wartensleben	

4. By failing and refusing to reinstate M. O. (Pinky) Worthington, the Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The Respondent has not otherwise violated Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully refused to reinstate M. O. (Pinky) Worthington following an unconditional offer to return to work following the strike, I shall recommend that Respondent offer him immediate and full reinstatement to his former job, dismissing if necessary any replacement or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of such discrimination from June 27, 1988, the effective date of the offer to return, to the date of Respondent's offer of reinstatement less net earnings, in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), to which shall be added interest to be computed, in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It shall be further recommended that Respondent remove from its files any reference to its unlawful refusal to reinstate Worthington.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Big Horn Coal Company, Sheridan, Wyoming, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to offer reinstatement to striker M. O. (Pinky) Worthington on the ground of misconduct during the strike.

(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.

[4] 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) Offer M. O. (Pinky) Worthington immediate and full reinstatement of his former job or, if it no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, dismissing, if necessary, any employee hired as a replacement and make him whole for any loss of earnings in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the refusal to reinstate him and notify M. O. (Pinky) Worthington in writing that this has been done and that the refusal to reinstate will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Sheridan, Wyoming facilities copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 27, 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.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint be dismissed insofar as it alleges violations of the Act not found herein, specifically Cases 27–CA–10702 through 27–CA–10702–10 and 27–CA–10702–12 through 27–CA–10702–21.

[5] 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.''

APPENDIX

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

After a hearing at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to offer reinstatement to M.O. (Pinky) Worthington on the ground he engaged in strike misconduct.

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 offer M. O. (Pinky) Worthington immediate and full reinstatement to his former job or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other right or privilege previously enjoyed, and WE WILL make him whole for any loss of earnings or other benefits resulting from our failure to reinstate him, and WE WILL notify him in writing that we have removed from our files any reference to our refusal to reinstate him, and that that refusal will not be used against him in any way.

BIG HORN COAL COMPANY