

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

KIEWIT POWER CONSTRUCTORS CO.

and

17-CA-24192

BRIAN JUDD, an Individual

Anne C. Peressin, Atty., NLRB Region 17,
Overland Park, KS, for the General Counsel.

Kimberly Seten, Atty., with Robert J Janowitz, Atty.,
on the brief, Constangy, Brooks & Smith, LLC,
Kansas City, MO, for Respondent.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. This case concerns the May 21, 2008,¹ termination of two journeyman electricians, Brian Judd (Judd) and William R. Bond IV (Bond), by Kiewit Power Constructors Co. (Respondent or Kiewit). Judd instituted the proceeding by filing an unfair labor practice charge on June 11. He amended his charge on July 25, and the Regional Director issued the formal complaint on July 31. The complaint alleges that Kiewit violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) by discharging Judd and Bond because they engaged union and other activities protected by the Act. Kiewit filed a timely answer denying that it committed the unfair labor practices alleged.

I heard this case at Overland Park, Kansas, on October 7 and 8, 2008. All parties had the full opportunity to call and examine witnesses, to introduce relevant documentary evidence, to argue procedural and substantive issues and to file post-hearing briefs. After carefully considering the record² in light of my credibility determinations, and the argument contained in post-hearing briefs filed by the General Counsel and Respondent, I have concluded that Respondent did not violate the Act based on the following:

¹ Unless shown otherwise, all further dates refer to the 2008 calendar year.

² The record contains a few incidental errors that are of little or no significance. However, I find that at R43: 9, witness Potter's reference to "Ken Watts" should have been to Ken Gibson. Accordingly, I correct the record in that respect. In addition, an transcript anomaly appears at R179: 1 through R179: 3 preceding the letter "Q" in that the material there should appear immediately before the word "witness" at R182: 9. The examination of witness Dwayne Teeters that appears from the letter "Q" at R179: 3 through R182: 8 was conducted by counsel for the General Counsel. Accordingly, I hereby correct the record as described in order to accurately reflect the full scope of Teeters' direct examination.

Findings of Fact

I. Jurisdiction

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The Respondent, a Delaware corporation, with an office in Overland Park, Kansas, and a jobsite at the IATAN Power Plant in Weston, Missouri, is engaged in the design and construction of power and mechanical process facilities, including coal-fired power plants. In the 12-month period ending May 31, 2008, Respondent purchased and received at its Weston, Missouri, jobsite goods valued in excess of \$50,000 directly from locations outside the State of Missouri. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it would effectuate the purposes of the Act for the Board exercise its jurisdiction to resolve this labor dispute. Respondent also admits, and I find, that the International Brotherhood of Electrical Workers, Local 124 (Local 124) has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

A. Background

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Kansas City Power and Light (KCPL) owns and operates the IATAN power plant in Weston, Missouri, a coal-powered facility generating electricity. Currently, it is engaged in constructing a second turbine and related structures at that plant. KCPL retained Alstrom Power Company to design and build the new boiler and air quality control systems.

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KCPL contracted with Kiewit to construct all portions of the project not included in the Alstrom contract such as the turbine building, the cooling tower, the related peripherals, most of the electrical installations, and even some of the piping inside of the Alstrom areas portion of the project. Kiewit's contract for its portion of this expansion project is valued at approximately \$400,000,000. For its work, Kiewit has primarily employed tradespersons skilled as pipefitters, boilermakers, electricians, ironworkers (both structural steel and rebar specialists), carpenters, and laborers. Kiewit maintains and applies the terms of the International Brotherhood of Electrical Workers' (IBEW) National Maintenance Agreement (NMA) to its electrical workers at IATAN. See Respondent's Exhibit 6. It applies similar agreements with other building trade unions whose members work at that job.

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Ron Hutchins managed Kiewit's IATAN construction work from the start of the project. Dale Keech, the operations manager, reported to Hutchins. Kiewit's supervisory hierarchy below Keech for the electrical work included, in descending order, the following persons: Ken Gibson, the electrical general superintendent, Roger Holmes, the lead electrical superintendent, and two electrical superintendents, Kendall (Ken) Watts (also an engineer), and Don Volentine.³ A general foreman, Roger Allen, oversaw the four electrical crews. Each crew consisted of a working foreman and three or four journeyman electricians plus an apprentice here and there.⁴

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³ Both Gibson and Holmes work for Massachusetts Electric Construction Company, a Kiewit subsidiary in Boston. Gibson did not testify. By the time of the hearing, he had returned to his home base in Massachusetts.

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⁴ All agree that general electrical foreman and the crew foremen belong in the electricians' bargaining unit. The NMA covers all electrical employees except "General Superintendents, Superintendents, Assistant Superintendents, office and clerical Employees, watchmen, or other professional or supervisory Employees as defined in the National Labor Relations Act."

Superintendent Volentine directly supervised the crews headed by foreman Vince Schilling; Watts supervised the crews of foreman Andy Holloway, James Sowerby, and Tim Walker.

5 The NMA provides employees with a thirty-minute lunch period from 12 to 12:30 p.m. or at other times mutually agreed upon for employees assigned to shift work. See Article XV Work Hours Per Day, paragraphs 1 and 2. However, that agreement does not require signatory employers to provide other breaks during the regular workday. At the pre-job or mark-up conference he conducted before work started, Hutchins told the union officials present (including those from Local 124) that Kiewit would provide all employees with two additional
10 break periods each day, one in the morning from 9:30 to 9:45 a.m. and one in the afternoon from 3:00 to 3:15 p.m. Kiewit provided a number of “dry shacks” equipped with microwave ovens, coffee pots, and other small appliances for use by employees during their break periods. The various tradesmen gravitated to particular dry shacks for their breaks and did not mingle with workers from another trade. Under the NMA, employees must be at their workstations at
15 the starting time.⁵

An NMA employer may discharge, suspend, or discipline employees for proper cause. See Article XXIII, Management Clause. The agreement contains a five-step grievance procedure (Article VI Grievances) that culminates in binding arbitration. Kiewit maintains a
20 system of progressive discipline that generally provides for an oral warning initially, a written warning for the next offense, and suspension, or termination for a third offense. However, in the case of an egregious offense, an employee may be terminated immediately.

The NMA also provides for “reasonable access” to the job site by a local union representative, and for the appointment by the local union business manager of a jobsite union
25 steward. See Article VII, Union Representative, paragraphs 1 and 2. At relevant times, Mike Potter served as the electricians’ union steward at the IATAN job. Throughout his tenure, Potter had regular interaction with the Kiewit supervisory hierarchy. Most generally, however, Potter conferred with the electrical general superintendent Ken Gibson about jobsite issues.
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Watts began working on the IATAN project as the lead electrical engineer in June 2007. He received a promotion to a field superintendent position in late April or early May 2008 shortly before the events giving rise to this case unfolded. Judd and Bond worked on foreman Holloway’s crew under superintendent Watts’s direct supervision. Judd started at the IATAN job
35 in December 2007; Bond started in mid-May 2008.

B. The Dispute over the Length and Location of Rest Breaks

40 The bulk of Kiewit’s electricians worked on the turbine building.⁶ At break time some of the electricians went to the dry shacks located directly across a dirt road north of that jobsite while others used dry shacks on the east side of the turbine building about 100 yards away. As indicated below, the crews became insistent about using the dry shacks rather than remaining at or near their workstations for their breaks ostensibly because many felt the atmosphere in the

45 ⁵ Article XV, Paragraph 5, states: “Employees shall be at their posts prepared to start work at the regular starting time.”

⁶ However, the electrical crews perform work at other plant locations on an as needed basis. Notable among those occasions occurred on May 15 when foreman Holloway’s crew worked in
50 the vacuum compressor building a short distance from the location where KCPC stockpiles fly ash, a semi-toxic residue left from burning coal for the boilers. During that day, a serious fly ash spill occurred at the dump site that required the workers to evacuate the building.

turbine building contained too much dust and fly ash, and because they wanted a safe location where they could remove their personal protective equipment during the rest break.

5 As the turbine building began to take shape, and the electricians' work locations moved on to the second and third floors of the building, the amount of time required to reach the dry
shacks at break time began to concern management. Those on the upper floors could only
reach ground level by way of two narrow stairwells on the exterior of the building. According to
Union steward Potter, workers would leave their work area perhaps two to four minutes early so
they would be at their chosen dry shack at the start of the scheduled break time. Others
10 provided similar estimates: foreman Holloway said it took three or four minutes to reach the dry
shack at break time (R87: 21-23); Billy Bond said a couple of minutes (R151: 5-6); and Brian
Judd estimated three to five minutes. After they arrived at the dry shacks, the workers made a
practice of remaining there for the full 15-minute break period before starting their return to their
assigned area.

15 Superintendent Watts noticed that the break times among the electricians had been
extended to about 25 or 30 minutes at times and mentioned it to his immediate superior, lead
superintendent Holmes.⁷ Holmes, who also estimated the electricians rest breaks lasted half an
hour, as well as several other managers began to suggest that the break time should be brought
20 under control. Around May 15, Watts spoke to electrical general foreman Allen a couple of
times about reducing the amount of time the men took at break time in hopes that the crew
foremen could resolve the problem without the need for any disciplinary action. Watts failed to
see any results after his first conversation with Allen. When Watts again spoke to Allen, he
suggested that the electricians break in place but Allen complained about the Turbine building
25 being too dirty to use as a break area. Later, Kiewit arranged to have some tables and chairs
put around various areas of the turbine building for the workers to use on their breaks. Neither
Watts discussions with Allen nor installation of tables and chairs had much of an impact as most
of the electricians continued to use the dry shacks for their break periods.

30 Union steward Potter did not work the week of May 12. When he returned, Louie
Brinkoetter, Potter's substitute as steward, told him that an issue had arisen that week about the
break periods. Brinkoetter told Potter that management had moved tables and chairs into to
turbine building because they did not want the workers using the dry shacks for breaks any
more. But supposedly no direct order had been given for the electricians to break in place as
35 some of the other craftsmen were doing.

40 At a May 19 meeting attended by the superintendents, engineers, and foremen, lead
electrical superintendent Holmes told the foremen that Kiewit wanted the workers to take their
breaks in the turbine building rather than the dry shacks. Foreman Holloway told Holmes that
he had no intention of taking breaks in the turbine building work areas because it would have
been unsafe and unsanitary. As Holloway saw it, the safety rules prohibited the workers from
taking off their personal protective equipment at break time because other trades worked
overhead.⁸ In addition, Holloway said that fly ash present on the site from the plant operations
blew around constantly. The other foremen agreed with Holloway's assessment of the situation.
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⁷ Watts said the length of break periods was less of a problem among other crafts because
the ironworkers had a dry shack in the turbine building and some, but not all, of the other
tradesmen would "stop and drop," meaning they would take their breaks in their work areas.

⁸ Contrary to Holloway, Watts claimed the safety rules permitted employees to remove their
50 protective equipment at break time if an overhead deck or roof existed to shield against falling
objects. At this time, ninety percent of the decking had been installed in the turbine building.

Although Holmes appeared “a little angry,” he dropped the subject. After the meeting, Holloway told his crewmembers that Kiewit did not want the employees going to the dry shacks at break time and that management planned to write up (reprimand) employees if they did.

5 Superintendents Holmes and Watts closely monitored the the morning break period on
May 19. They observed that the electricians were away from work for about 20 to 25 minutes at
the break time. Before taking any action, Watts again spoke the general foreman Allen. Allen
told Watts that the workers did not want to break in place because of the amount of fly ash
around the area. Although Watts acknowledged that fly ash was present throughout the job
10 site, neither he nor any other manager perceived that it posed such a hazard as to preclude
breaking in place at the turbine building.

Later that day, Potter spoke to electrical general superintendent Gibson about the break
issue. Gibson told Potter that Kiewit had put tables and chairs at various locations in the turbine
15 building and that the employees should take their breaks at or near their workstations. Although
Potter agreed with Gibson’s assertion that the employer could fix the time and location of the
break periods, he told Gibson that the turbine building was not a clean enough or safe enough
location for the employees to take their breaks. At the conclusion of their discussion, Potter told
Gibson that the employees would not take their breaks in the turbine building. Following their
20 conversation, Potter claims that he consulted the stewards for some of the other trades and
learned that he planned to continue taking breaks in the dry shacks.

After speaking with Gibson, Potter also talked with lead electrical superintendent Holmes
about the break issue. Holmes explained to Potter that the amount of time required to get to
25 and from the dry shacks had become an issue for Kiewit. Potter told Holmes that the issue was
coming to a head and that if Kiewit could come up with something clean and safe inside the
turbine building, it would not be a problem for the employees. Potter suggested that Kiewit
enclose some of the rolling scaffolding or build some other type of break room inside the turbine
building but Holmes rejected those ideas. According to Potter, the electricians wanted a safe,
30 clean location to use for their break periods. As he saw it, the transit time to that location should
not be considered as a part of the break period because “we wanted to sit our butts in a chair
and have 15 minutes to drink coffee and eat a roll.”

C. The Rest Break Warnings and the Discharges

35 Shortly after starting time on May 20, electrical superintendent Volentine told members
of Sowerby and Schilling crews that they could no longer take their breaks in the dry shacks.
Union steward Potter, who was present because he worked on the Shilling crew, argued that
the workers should not have to take their breaks in the turbine building because conditions there
40 were neither safe nor clean. Volentine told Potter simply that Kiewit planned to issue
reprimands if employees went to the dry shacks for their breaks.

The other electrical crews already knew about the break-in-place order when Potter
spoke to them following Volentine’s warning. Potter informed those workers that the IBEW
45 Local 124 business agent told him that the Kiewit had to provide a clean and safe place for a
break and that the employer could not treat the electricians different than the other trades on the
job. After discussing the question for a short while, at least Holloway’s crewmembers decided
to ignore the break-in-place demand and continue using the dry shacks at break time. Foreman
Holloway and union steward Potter both supported the position taken by the crew members.
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At the morning break time on May 20, Potter positioned himself in the turbine building
where he could observe what occurred. About five minutes before break, he saw the

electricians as well as the ironworkers, pipefitters, boilermakers, carpenters, and laborers in the vicinity leave for the break shacks. At the end of the scheduled break time, the workers began coming out of the break shacks and walking back to their workstations.⁹

5 Watts also monitored the morning break period on May 20 and concluded there had been no improvement. When he reported his observations to Holmes, the two managers decided that, as many opportunities had been provided to correct the problem, “enough was enough,” and that verbal warning notices (also called “tickets” by management) should be issued to the electricians, including the foremen. Watts told Valentine about Holmes’s decision
10 and a clerical employee prepared the verbal warning notices.

Watts set out to distribute the warning notices around 11 a.m. As was the custom, union steward Potter accompanied him. They started with Walker’s crew on the upper level of the turbine building. After Walker gathered the crew, Watts began distributing the warning notices.
15 Potter told the crewmembers that neither he nor the union’s office agreed with the action management was taking. Some of the workers told Watts that they did not agree with the reprimands and argued that Kiewit was not being fair.

After finishing with Walker’s crew, Watts and Potter moved on to a lower level where
20 foreman Holloway’s crew worked. Those present when Watts began to distribute the reprimand notices were Potter, Holloway, Judd, Bond, and Dwayne Teeters, an apprentice electrician. As Watts began distributing the notices, Potter again expressed his and the union’s disagreement with the warning notices. Then, according to Watts, the following occurred:

25 Q What happened then?

A Then that’s when one of them — don’t quote me on which one but one of them said, are we going to get written up if the same thing happens in the afternoon? And I said yes.

Q Okay and what happened then?

30 A Then Bond pipe(d) up and said well, I’ve been out of work for a year. If I get laid off it’s going to get ugly and you better bring your boxing gloves.

Q What was his tone of voice when he said that?

A Angry, obviously.

Q Did anyone else say anything?

35 A Yeah. Bond. Yeah. Bond. As soon as Judd said it Bond piped up and said, yeah, I’ve been out of work for eight months, it’s going to get ugly.

Q Okay.

A So.

Q So, Brian Judd is the one who made the initial statement?

40 A Yeah.

Q What did you take that to mean?

A I took it as a threat towards me and also Roger Holmes, my boss, and Kenny Gibson, his boss.

45 Q Did you think that meant that he was going to physically — that he was physically threatening you?

A Yeah.

Q Did you think that meant both of the individuals were physically threatening you?

50 ⁹ In his testimony, Potter said the employees began returning at 9:30 a.m. R35: 13. I find Potter merely misspoke and that he intended to say 9:45 a.m., the time when the morning break period normally ended.

A Yeah.

Q Did you say anything to them in response?

A No. I just kind of said okay and got away from the situation.

5 Q Why didn't you say anything? Why didn't you respond to them or tell them that, that wasn't appropriate language?

A I guess if I responded to them it might have escalated further and we're kind of taught to -- if something does happen to just get away.

Q Okay.

A So, I mean I was outnumbered five to one by grown men, so --

10 Q You didn't want to escalate the situation.

A No. I would have been in trouble if it got -- if it did go further.

R282:9-283: 24.

15 By Potter's account, Bond spoke up first by asking Watts where he took his break. After Watts answered, Bond purportedly told Watts, "[W]ell, I've been out of work for about eight months and . . . if I get fired over this, there's going to be consequences." Potter said Judd then added, "[Y]eah, there will be repercussions from it." R39: 23-R40: 1.

20 Judd, who knew the electricians risked being fired for a third offense, claimed that he merely told Watts that "there'd be repercussions" because he thought the location of the break area was a safety issue that the union would not stand for. He recalled that Bond told Watts there would be "consequences." Bond recalled that he told Watts the reprimand was "bullshit" because the managers took their breaks in their offices "away from the fly ash and all the other debris" present in the turbine building. Both Judd and Bond denied saying anything about
25 boxing gloves or that things would get ugly if they lost their jobs over the break issue.

No evidence shows that Watts or Potter spoke about the remarks made by Judd or Bond on the way to Sowerby's crew on a lower level. Likewise, Potter said nothing about filing a
30 grievance over the rest break issue or the warnings.¹⁰ After the two finished with Sowerby's crew, Watts returned to superintendents' office facility with the intention of reporting what had occurred to Holmes. When Watts finally located him around 1:00 p.m., he told Holmes what Judd and Bond had said, and said explained that he felt their words amounted to a threat. Holmes agreed with that assessment but the two discussed little else about the situation as
35 Holmes left to take care of another matter. Watts then returned to his other work.

Later, Watts monitored the afternoon rest break and concluded that the verbal warnings had little impact on the length of time taken from work for the rest period. He reported to
40 Holmes about his observation and the two agreed that written warnings should be issued to the electricians for again extending their break time for an undue amount of time.

Meanwhile, Holmes informed Gibson about Watts' report of being threatened. Operations manager Keech joined their discussion. Kiewit's construction manager, Ron
45 Hutchins, said he learned about the threat allegation (probably from Gibson) and spoke to Watts about it. Watts confirmed that he been threatened (Hutchins said Watts told him about the boxing gloves statement) and Hutchins then went to Gibson's office where a meeting was taking place. Hutchins said he stuck his head in the door and told the group, "I don't know who made

50 ¹⁰ Under the Agreement's grievance procedure, grievances at step one are handled between the employer's supervisor and the local union steward. Respondent Exhibit 6: 4.

the threats, but I want them gone off the jobsite.”¹¹ Hutchins asserted, in effect, that he has a zero-tolerance for threats on the job site and that earlier on this project a superintendent resigned knowing that Hutchins was about to fire him for threatening an employee. No evidence shows that Watts knew of the decision to terminate Bond and Judd when he set out to distribute the second warnings that afternoon.

Around 4:00 p.m., Gibson summoned Potter to his office and told him about the decision to terminate Bond and Judd for threatening Watts. Holmes was present throughout this conference. Both Keech and Hutchins entered Gibson’s office as the meeting progressed but neither remained to the end. According to Potter, Gibson advised that Kiewit intended to fire Bond and Judd because Watts reported that they had threatened him when he gave out the verbal warning notices earlier in the day. Gibson said that they told Watts “he’d better bring his boxing gloves” if Kiewit fired them over the rest break issue. Potter agreed that Kiewit should not tolerate workplace violence but added that he did not hear the men threaten Watts.¹² He asked Gibson to speak to with Holloway and Teeters because they also had been present. Gibson refused; he told Potter “he (Watts) wouldn’t lie” and that his account was all they needed.¹³ Gibson said the two men “had to go” and suggested to Potter that he try to get them to quit.¹⁴ Potter said that he returned to his work area at approximately 4:30 p.m.

By the time the warnings over the afternoon rest break had been prepared, Watts could not locate Potter so he asked general foreman Allen to accompany him to serve as the union representative.¹⁵ As before, Watts intended to begin by distributing the repriamands to Walker’s crew on the upper level of the turbine building but when he reached that level, the workmen were preparing to quit work and leave for the day. Seeing that, Watts decided to wait until the following day to distribute the written warnings.

On his way back to his office, Watts met Potter who asked him whether he felt threatened by what Bond and Judd had said earlier in the day. Before he answered, Potter added “you know they’re going to fire those guys.” Watts implied that information caught him by surprise so he did not answer Potter’s initial question. Instead, he claims that he only told Potter, “Mike, I don’t know what you’re talking about.” He told Potter that he would talk to him about it in the morning after he had a chance to “get things figured out.”

Potter remembered a conversation with Watts late day but his recollection differs considerably. Potter said that Watts called him on the radio around 5 p.m. presumably to accompany him while he passed out the written warnings. He provided the following account of his exchange with Watts when he arrived at the location where they were to meet. Potter immediately asked Watts whether he felt threatened by what Bond and Judd had said to him earlier in the day. Potter claimed Watts denied that he felt threatened. Potter said he then asked Watts directly, “[D]id you tell them . . . (at) the office, that they had made a comment to

¹¹ As Holmes could not recall Hutchins’s appearance during this meeting, his testimony suggesting that the termination decision had been made by Gibson, Keech, and himself does not strike me as inconsistent with Hutchins’s claim that he, in effect, decided that question.

¹² Holmes asserted (rather emphatically when pressed) that Potter did not make this claim.

¹³ Holmes provided a similar explanation for not speaking to others allegedly present when the Watts gave the warning notices to Holloway’s crew. As he put it, “Kenny (Watts) is my Superintendent and I have to believe him.”

¹⁴ No evidence shows that Potter attempted to get the two employees to quit.

¹⁵ It is likely that Potter was in the meeting with Gibson and Holmes when Watts attempted to locate him. Allen did not testify.

you about you better bring your boxing gloves if they got fired?” and that Watts “kind of chuckled and said, no.” Potter said he then told Watts that his superiors had told him they were going to fire Bond and Judd because they had threatened Watts with their comment about boxing gloves. Watts, Potter claimed, told him, [W]ell, I’ll clear this up when I get back to the office.”

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Even though Watts’ purportedly provided an assurance to “clear this up,” Potter informed Bond and Judd at the end of the workday on May 20 that they were being accused of threatening Watts and that Kiewit planned to fire them over it. Potter also reported to Pete Raya, the Union’s business agent, about Kiewit’s intention to discharge Bond and Judd. At least Bond spoke with Raya sometime that evening.

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At seven the following morning, Union business agent Pete Raya met Hutchins, Gibson, Holmes, and Potter in Kiewit’s jobsite offices.¹⁶ Hutchins complained to Raya about the cost of the breaks and pointed out that the NMA did not require rest breaks. After Hutchins insisted the electricians had to begin breaking in place, he and Raya agreed they would walk through the turbine building to view conditions there and agree on locations where the workers could take their rest breaks. However, Raya agreed that regardless of the break location, the rest breaks should not exceed 15 minutes inclusive of the time required to walk to and from the location chosen for the break.¹⁷ When the subject turned to the termination of Bond and Judd, Hutchins told Raya that Kiewit would not tolerate workers threatening a superintendents and that Bond and Judd would be terminated for that reason. Raya agreed that threats should be taken seriously and should not tolerated.

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When Holloway entered the jobsite office facility with Bond and Judd, Holmes left the meeting. After retrieving the termination checks prepared for the two men, Holmes took them into Gibson’s office and proceeding to terminate them. After showing Bond and Judd their termination notices, Holmes asked them to sign the forms. They refused. Judd requested union representation. At that point, Raya and Potter were called into the meeting. Gibson apparently followed.

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As the meeting continued, Bond and Judd denied they threatened anyone and requested that the company officials speak with others who had been present. Holmes adamantly refused their request as well as their subsequent request to speak with Watts. During the meeting, Raya insisted that Bond tell the group what he had told Raya the night before. When Bond insisted that he had only told Watts that there would be consequences, Raya remarked that it sounded like a threat to him. This led to another confrontation between Raya and the employees that continued outdoors for a period of time after Holmes insisted that they confirm the accuracy of their final paychecks and leave.

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Following a meeting between the employees and Raya outside the office facility, Bond and Judd left the job site. Raya toured the turbine building with Hutchins, Gibson, and Holmes. During their walk through, Raya agreed that at least one location in the turbine building would be an adequate location for the electricians to use for their rest breaks. Hutchins agreed that Kiewit would rescind all of the other May 20 warnings resulting from the rest break problem. Although Holloway, Teeters, and Potter all claimed that they continued to use the dry shacks for

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¹⁶ Holmes instructed Watts to stay away from the office area that morning until after Bond and Judd left the job site.

¹⁷ When Raya essentially agreed with the management position about the length of the rest breaks, Potter accused him of not sticking up for the workers. This sparked an argument between Raya and Potter in the midst of their meeting with management.

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their rest breaks and that they occasionally took more than the fifteen minutes allowed, no further warnings have been issued by Kiewit at this jobsite over this issue.

5 The Union grieved the terminations of Bond and Judd under the NAM grievance procedure. However, the international representative present on the Union's behalf at the third-step grievance meeting in late May withdrew the grievance. The Union has taken no further action on behalf of the Bond and Judd terminations. Later, Bond returned to work at the IATAN jobsite for another contractor.

10 D. Analysis and Conclusions

Where an employer takes adverse action against an employee for alleged misconduct occurring in the course the employee's protected activities, the employer has the burden of showing that it held an honest belief that the employee engaged in serious misconduct. *NLRB v. Burnip & Sims, Inc.*, 379 U.S. 21, 23 (1964). If the employer meets that burden, then the General Counsel must affirmatively show that the alleged misconduct did not occur in order to establish that the employer violated the Act. *Pepsi-Cola Co.*, 330 NLRB 474 (2000), citing *Rubin Bros. Footwear, Inc.*, 99 NLRB 610 (1952).

20 The General Counsel argues that Bond and Judd were engaged in protected concerted activity by criticizing the management's requirement that they break in place rather than in the dry shacks as they had been doing and by protesting the May 20 verbal warning. To be sure, the Act protects frank, spontaneous responses by employees when their employer changes work rules and warns employees for non-compliance especially where, as here, prior discussions have exposed sharp differences of opinion about a particular working condition. See e.g. *Alton H. Piester, LLC*, 353 NLRB No. 33 (2008). For example, it cannot be seriously argued that temperate protests by Walker's crewmembers charging that the verbal warning notices were undeserved and unfair lacked protection under the Act.

30 However, the Board also recognizes where conduct that begins as protected activity may lose its protection under the Act if it subsequently deteriorates to the point that it becomes opprobrious. *Hawaii Hauling Service, Ltd.*, 219 NLRB 765, 766 (1975). The facts in this case fall into that category. The contention by General Counsel and Respondent that a standard *Wright Line*¹⁸ analysis applies in this case lacks merit. The Board does not utilize that analytical tool when deciding cases where the employer charges that an employee engaged in misconduct in the course of activities otherwise protected by the Act. *Felix Industries*, 331 NLRB 144, 146 (2000). Resort to a *Wright Line* analysis is unnecessary where, as here, a causal connection may be presumed between the discipline and the protected activity. *Aluminum Company of America*, 338 NLRB 20, 22 (2002). See also *Tracer Protection Service, Inc.*, 328 NLRB 734 (1999).

45 If an employer asserts that an employee engaged in misconduct during the course of otherwise protected activity, the Board looks to the factors set forth in *Atlantic Steel Company*, 245 NLRB 814 (1979) to aid in determining whether the employee's conduct became so opprobrious as to lose protection under the Act. The *Atlantic Steel* factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Id.* at 816.

50 ¹⁸ *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)

5 First, however, the factual conflict between Watts and the electricians must be resolved before addressing the *Atlantic Steel* factors. Watts claims that Judd angrily said, in essence, that he'd been out of work for almost a year and if he got fired over the rest break dispute Watts should bring his boxing gloves. Bond, according to Watts, chimed in to say that he had been out of work for eight months and things would get "ugly" if he was fired over the rest break dispute. By contrast, Potter and the Holloway crewmembers claim that either Bond or Judd told Watts said there would be consequences and the other one added that there would be repercussions. Bond and Judd claim that when they used these words, they intended to convey the notion that the Union would not stand for the warnings or the requirement that the employees take their rest break in areas that were dirty and unsafe.

10 Counsel for the General Counsel argues at length that Bond and Judd did not threaten Watts and that both men really intended by these words they used (repercussions and consequences) to convey the notion that they intended to seek some form of union help, perhaps a grievance, with the rest break warning notices. In her view, I should not credit Watts's claims about the "boxing gloves" and "get ugly" statements. In support, she makes these points:

- 20 • Watts' changed his testimony repeatedly about who actually made the "boxing gloves" statement.
- Watts and Holmes's testimony concerning the former's initial report about the incident is inconsistent.
- 25 • All of the unit employees present when Watts issued the verbal warning notices to Holloway's crew corroborated Bond and Judd's account, testified consistently, and denied hearing any "boxing gloves" remark.
- 30 • Watts admitted he had not been threatened when Potter confronted him near the end of the day on May 20 after learning Kiewit planned terminate Bond and Judd.
- Watts contrary account about his engagement at the end of the day on May 20 is not worthy of credit.

35 Respondent argues that Watts's story about who said what when he distributed the verbal warning notices to Holloway's crew should be credited over the varied accounts provided Potter and the Holloway crewmembers. Counsel for Respondent asserts that the accounts provided by Potter, Bond and Judd are riddled with contradictions and that the reliability of their accounts was diminished by the leading questions asked of them.

40 This dispute arose in the context of a stable, harmonious, and respectful labor relations setting. Details about the day to day their interactions show that management recognized and respected the role that Potter played as the union steward. At times, in fact, it almost appeared that the managers were solicitous toward Potter as steward. Some of the key managers in this dispute had lengthy careers as union electricians. Holmes, in particular, worked many years as a journeyman electrician, and continues to pay dues to his home local back in Massachusetts. Likewise, I find it noteworthy in the overall context that Union Business Agent Rhea seemingly concluded at some point on or before May 21 that a threat occurred. As a result, arguments broke out between Rhea on the one hand and Potter, Bond, and Judd on the other.

Both counsel parsed this record carefully for the internal consistency in the testimony of the witnesses and for conflicts between witnesses on the same side of the question at issue. Thus, Watts confused what Judd purportedly said in the critical exchange with what Bond purportedly said. At the same time, the Holloway crewmembers could not agree on who said “consequences” would flow from the warning notices and who said they would produce “repercussions.”

This case ultimately boils down to which of the sharply conflicting versions of the testimony describing what occurred when Watts distributed the first reprimands to the Holloway crew on May 20 and what occurred later that day when Potter spoke with Watts after the Union steward learned of management’s decision to discharge Bond and Judd for threatening Watts. In resolving these testimonial conflicts I have considered numerous factors, including established or admitted facts, witness bias, consistency, corroboration, the inherent probabilities, reasonable inferences available from the record as a whole, the weight of the evidence, and witness demeanor.

My conclusions about witness veracity have been influenced considerably by accounts of the end-of-the-day exchange on May 20 between Watts and Potter. In my judgment, Watts’s version is far more probable and consistent with his overall conduct. By Potter’s account, Watts, in effect, admitted that he had not been threatened and assured Potter that he clear up any misunderstanding harbored by his superiors. I find it impossible to believe that Watts said anything of the kind. The whole termination procedure was set in motion by Watts’s report to Holmes and his reaffirmation of that report to Hutchins. No evidence (apart from Potter’s claim) provides any basis to find that Watts ever sought to put the brakes on the termination process in any fashion, or to recant, modify or explain away the essence of what he said to Holmes and Hutchens that led to their decision about discharging Bond and Judd. The consistency between Watts’s conduct and his description of what occurred on May 20 and 21 convinces me that his account is the most reliable and credible, and that conflicting accounts should not be credited.

Applying *Atlantic Steel* based on the more reliable version of the events provided by Watts leads me to the conclusion that some of the remarks made by Bond and Judd about the verbal warning notices were not protected by the Act. Thus, their remarks were made in a work area in front of other employees. Second, the subject matter involved the rest break issue which management had a contractual right to control unilaterally and which it had previously informed employees it intended to do. Indeed, Kiewit took the added advance step of providing some rudimentary accommodations to employees (tables and chairs near the work areas) so that employees had full knowledge of the company’s expectations. Third, the nature of their remark amounted an outright threat (Judd: stated “bring your boxing gloves”; Bond: by way of agreement added that things would get “ugly”) uttered in anger toward their immediate supervisor with other employees present. Finally, their remarks were not in response to an employer unfair labor practice. Quite to the contrary, Kiewit managers carefully explained their position about the excessive amount of time consumed by the rest breaks to Potter in his capacity as the job site electricians’ steward and employees were informed of the specific disciplinary measures that Kiewit planned to take to achieve compliance with the rest break time limit. In these circumstances, I find the all of the *Atlantic Steel* factors militate against a conclusion that the angry remarks by Bond and Judd were protected. Accordingly, I conclude that Kiewit has carried the burden of establishing misconduct under the *Burnip & Sims* doctrine and that the General Counsel failed to carry his burden of showing no misconduct occurred.¹⁹

¹⁹ Even if *Wright Line* applied here, I would conclude that Kiewit has shown that it would have taken the same action even in the absence of any protected activity.

Conclusions of Law

5 1. By terminating Brian Judd and William Bond on May 21, 2008, Respondent has not engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. The General Counsel has failed to prove the allegations in the complaint issued in this matter on July 31, 2008.

10 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

ORDER

The complaint is dismissed.

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Dated, Washington, D.C., December 31, 2008.

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William L. Schmidt
Administrative Law Judge

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²⁰ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.