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Kiewit Power Constructors Co. and Brian Judd. Case
17-CA-24192

August 27, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER
AND PEARCE

On December 31, 2008, Administrative Law Judge William L. Schmidt issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging employees Brian Judd and William Bond. The judge dismissed the complaint, finding that the discharges were a lawful response to unprotected physical threats made by Judd and Bond. The General Counsel has excepted to the dismissal, contending that Judd and Bond made the statements while engaged in a protected concerted protest about working conditions and, as such, they did not lose the Act's protection. We find merit in the General Counsel's exceptions.

II. FACTS

In 2008,² the Respondent was engaged in the construction of a turbine and related structures at a Missouri powerplant. Electricians working there for the Respondent were represented by the International Brotherhood of Electrical Workers Local 124 (the Union). Although the collective-bargaining agreement covering the electricians working on the project only referenced a lunch-break, the Respondent agreed that the electricians could

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

² All dates are in 2008.

also take 15-minute morning and afternoon work breaks. The electricians typically took these breaks in trailers known as "dry shacks," which were located outside of the turbine building construction area. As construction of the turbine building progressed to upper-floor locations, the electricians left their work areas in advance of the scheduled breacktime and spent a full 15 minutes in the dry shacks before returning to work. This practice resulted in actual down time of 25 to 30 minutes for each break.

In mid-May, the Respondent decided to require the employees to break in place at their workstations in order to limit the break periods to the intended 15 minutes. The electricians rebuffed the Respondent's initial efforts to secure compliance with this policy. Nonsupervisory crew foremen objected that breaking in place was neither sanitary nor safe. Union Steward Mike Potter expressed the same concerns to the Respondent's management. The electricians continued to take breaks in the dry shacks.

On May 20, the Respondent informed the electricians that they would be disciplined if they continued to take breaks in the dry shacks. Steward Potter discussed this policy with several electrician crews, including the crew led by Foreman Andy Holloway, and reiterated the Union's opposition to the break-in-place policy. Afterwards, Holloway's crew and others took their morning break in the dry shacks and exceeded the 15-minute breacktime. The Respondent's officials observed this activity and prepared written notations of verbal warnings for each of the electricians involved.³

At about 11 a.m., Electrical Superintendent Kendall Watts set out to distribute the warnings. Steward Potter accompanied him as the electricians' union representative. Watts first convened the crew of Foreman Tim Walker where it was working on an upper floor of the turbine building. After Watts distributed the warnings, Potter told the crewmembers that he and the Union disputed management's action. Some of the crew also expressed to Watts their disagreement with the Respondent's break-in-place policy.

Watts and Potter next visited the area where Holloway's crew was working. As before, Watts distributed the warnings and Potter stated the Union's position. One crewmember asked if the employees would be written up again if they repeated their conduct during the afternoon

³ The Respondent maintains a system of progressive discipline providing that an employee will receive a verbal warning for a first offense, a written warning for a second offense, and either suspension or termination for a third offense. However, an employee may be terminated for serious misconduct without regard to the progressive discipline system.

break. Watts answered affirmatively. At this point, according to Watts' credited testimony, electrician Brian Judd responded in an angry tone that he had been out of work for a year, that "it was going to get ugly" if he were terminated, and that Watts had "better bring [his] boxing gloves." Electrician William Bond then said that he had been out of work for 8 months and it was going to get ugly.

Watts testified that he considered the statements by Judd and Bond to be physical threats against himself and his superiors. He made no response to them, "just kind of got away from the situation." Watts did not mention the incident as he and Potter walked to the worksite of a third electrician crew. After delivering warning notices to this crew, Watts reported the incident with Judd and Bond to the Respondent's electrical general superintendent, Roger Holmes.

The next day, the Respondent terminated Judd and Bond for threatening Watts. In addition, the Union's business agent and the Respondent's officials toured the turbine building, identified a location where electricians could take their breaks, and agreed that the Respondent would rescind its May 20 warnings.

III. JUDGE'S DECISION

The judge found that Judd, Bond, and other electricians who protested the break-in-place policy and discipline for violations of this policy on May 20 were engaged in protected concerted activity. Nevertheless, he found that the Respondent did not violate the Act by terminating Judd and Bond. The judge applied the four-factor test set forth in *Atlantic Steel Co.*⁴ to determine whether employee misconduct that occurs during the course of otherwise protected activity is so opprobrious as to lose the protection of the Act. The four factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employees' outburst; and (4) whether the outburst was provoked by the employer's unfair labor practice. The judge summarily concluded that each of these factors weighed against finding that the angry remarks by Judd and Bond were protected.

IV. DISCUSSION

We agree with the judge that Judd and Bond were engaged with other electricians and their union steward in a protected concerted protest of the Respondent's break-in-place policy and disciplinary action enforcing that policy. We also agree that the multifactor *Atlantic Steel* test applies in determining whether Judd and Bond engaged in misconduct that cost them statutory protection and per-

⁴ 245 NLRB 814 (1979).

mitted their discharge. For the reasons that follow, however, we find contrary to the judge that the *Atlantic Steel* factors weigh in favor of finding that the employees did not lose the Act's protection by their remarks to Watts.

The judge found that the first factor of the *Atlantic Steel* test—the place of the discussion—weighed against protection, because the employees' remarks were made "in a work area in front of other employees." The Board has found that an employee's outburst against a supervisor in a place where other employees could hear it would tend to affect workplace discipline by undermining the authority of the supervisor.⁵ Obviously, the remarks by Judd and Bond were heard by other crewmembers. However, *the Respondent* chose to distribute the warnings in a group employee setting in a work area during working time, and should reasonably have expected that employees would react and protest on the spot.⁶ Thus, the Respondent is hardly in a position to complain that other employees overheard Judd's and Bond's remarks.⁷ We therefore find that the factor of the location of Bond's and Judd's protests tends to favor protection. At the least, it is neutral.

As to the second *Atlantic Steel* factor—the subject matter under discussion—the judge found that the work break issue was subject to the Respondent's unilateral control and that it had previously informed the electricians that it was going to mandate a 15-minute break-in-place policy. This may be true, but the subject matter under discussion on May 20, and the remarks by Bond and Judd during this discussion, directly related to the electricians' union-supported protest of the Respondent's use of discipline to enforce that policy and to working conditions that they reasonably considered to be unsafe and unsanitary. Notably, this protest culminated the next

⁵ E.g., *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005).

⁶ See *Noble Metal Processing, Inc.*, 346 NLRB 795 (2006) (an employee meeting called by the respondent to announce impending changes that affected employees' working conditions was a forum where employees could be expected to express their views). See also *Cibao Meat Products*, 338 NLRB 934, 934–935 (2003), *enfd.* 84 Fed Appx. 155 (2d Cir. 2004), *cert. denied* 543 U.S. 986 (an employee who protests a change in the terms and conditions of employment during an employee meeting in which the employer announces the change does not lose the protection of the Act by virtue solely of the forum in which he protests).

⁷ See *Brunswick Food & Drug*, 284 NLRB 663, 665 (1987) (finding that an employee was provoked in front of customers and, "[i]n any event, the Respondent selected the setting for this confrontation, and it is thus hardly in a position to object that customers were drawn into it"), *enfd. mem. sub nom. NLRB v. Kroger Co.*, 859 F.2d 927 (11th Cir. 1988); see also *NLRB v. Southwestern Bell Telephone Co.*, 694 F.2d 974, 978 (5th Cir. 1982) (*per curiam*) (observing that the employer "deliberately chose to begin the dispute in the workroom" in view of other employees and therefore "can hardly be heard to complain about the public nature" of that part of the discussion).

day in an agreement between the Union and the Respondent to rescind the May 20 warnings and to identify a specific location within the turbine building where electricians could take their 15-minute breaks. Thus, this factor weighs in favor of the protection of Bond's and Judd's conduct.

Turning to the third *Atlantic Steel* factor—the nature of the employees' outburst—the judge found that Bond's and Judd's remarks amounted to “an outright threat . . . uttered in anger toward their immediate supervisor.” However, the Board has long recognized that “disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.” *Consumers Power Co.*, 282 NLRB 130, 132 (1986). In assessing whether an employee's protected, concerted activity loses the protection of the Act, the Board has found that a line “is drawn between cases where employees engaged in concerted activities that exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service.” *Prescott Industrial Products Co.*, 205 NLRB 51, 51–52 (1973).

Consistent with the foregoing principles, we find that the remarks by Judd and Bond fall short of the kind of unambiguous physical threat that would render them unfit for service. All that happened after Watts distributed warning notices and confirmed that continued violations of the break-in-place policy would lead to further disciplinary action is that Judd angrily said the situation could “get ugly” and Watts had “better bring [his] boxing gloves,” and Bond then agreed that things could get ugly. These were single, brief, and spontaneous reactions by each employee, not premeditated and sustained personal threats against Watts.⁸ Although intemperate, they were not unambiguous or “outright” (as the judge put it) threats of physical violence. To the contrary, the employees' prediction that things could “get ugly” reasonably could mean nothing more than that the Respondent's continuation of the disciplinary enforcement of its break-in-place policy would engender grievances or a labor dispute. Judd's additional remark that Watts had “better bring [his] boxing gloves” is more likely to have been a figure of speech, emphasizing employees' opposition to the break-in-place policy, rather than a literal invitation to engage in physical combat.

⁸ Contrast this case with *Trus Joist MacMillan*, 341 NLRB 369, 371 (2004) (Board majority concluded that an employee lost the protection of the Act where he planned and deliberately launched a personal attack on his superiors that included a series of profane verbal insults).

Nothing about the context of this incident suggests that the remarks portended physical confrontation. There is, for instance, no evidence that either Judd or Bond made any accompanying physical gestures or movement towards Watts. In fact, there is no evidence that they said or did anything further. Moreover, although Watts testified that he subjectively perceived the remarks to be a personal threat, he made no response to them at the time and did not even mention the incident to Steward Potter as they walked to the location of the next electrician crew.

The Board has previously found that statements similar to those at issue, without more, were not so opprobrious as to warrant removal of statutory protection. For example, in *Leasco, Inc.*, 289 NLRB 549, 549 fn. 1 (1988), the Board found that an employee's statement to a supervisor that “If you take my truck, I'm kicking your ass right now” made in the course of engaging in concerted activity, was “a colloquialism that standing alone does not convey a threat of actual physical harm.”⁹ Similarly, in *Fairfax Hospital*, 310 NLRB 299, 300 (1993), the Board found that an employee's statement that her supervisor could expect “retaliation” as a result of the unlawful enforcement of no-solicitation/no-distribution and bulletin board rules was inherently ambiguous and could have meant no more than that the union would respond in kind to the respondent's propaganda. The Board reasoned that “[u]nless accompanied by threats of egregious or outrageous conduct,” this “oblique” statement was protected.

Based on this analysis, we find that the statements by Judd and Bond were ambiguous and, in the absence of any accompanying conduct, cannot be construed as unprotected physical threats. We therefore find that this factor weighs in favor of the employees' conduct retaining the protection of the Act.

Regarding the fourth *Atlantic Steel* factor—provocation—the conduct at issue was not provoked by an unfair labor practice by the Respondent. Accordingly, this factor does not weigh in favor of protection of the employees' conduct.

In sum, under *Atlantic Steel*, supra, we find that the factors of subject matter and nature of the outburst favor protection of Judd's and Bond's conduct, that the factor of place tends to favor protection or is at least neutral, and that only the factor of provocation does not favor protection. Thus, contrary to the judge, we find that these two employees did not lose the protection of the Act when they spontaneously uttered their statements in

⁹ Accord: *Vought Corp.*, 273 NLRB 1290, 1295 (1984), aff'd. 788 F.2d 1378 (8th Cir. 1986) (employee's statement to a supervisor that “I'll have your ass” was no more than a threat to file a grievance, or a Board charge, or to report the supervisor to higher management).

opposition to the imposition of discipline enforcing the disputed break-in-place policy. Accordingly, we conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating Judd and Bond.

Under longstanding Board precedent, this case is governed by the *Atlantic Steel* analysis applied above. Our dissenting colleague makes a gesture toward applying *Atlantic Steel*, but essentially views this case as being controlled by: (1) the crediting of Supervisor Watts that he felt threatened by the employees' statements; (2) the Respondent's asserted zero tolerance for threatening behavior; and (3) the need for the Board to accommodate a growing employer concern about workplace violence. As to point 1, Watts' subjective perception is not dispositive in determining whether employees have forfeited their statutory rights. "Rather, the question is an objective one; i.e., whether the alleged misconduct is so serious that it deprives the employees of the protection the Act normally gives for engaging in concerted activity." *Shell Oil Co.*, 226 NLRB 1193, 1196 (1976), enf'd. 561 F.2d 1196 (5th Cir. 1977).

Second, the legal question presented here cannot be answered by reference to the Respondent's asserted zero tolerance for claimed workplace threats. As the judge observed, this is not a *Wright Line*¹⁰ case. Therefore, whether the Respondent consistently disciplined or discharged employees in similar circumstances is beside the point. Rather, it is for the Board to determine whether Bond's and Judd's intemperate conduct, committed in the course of otherwise protected activity, cost them the protection of the Act. See *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). By making that determination, we do not substitute our judgment for that of the employer, as our colleague claims, but apply settled Board and court precedent.

Finally, there is no basis for our colleague's lamentation that we are discouraging employers from responding effectively to legitimate threats of workplace violence. The Board has recognized the legitimate need of employers to guard against workplace violence, and we do so here. Cf. *Pactiv Corp.*, 337 NLRB 898 (2002), rev. denied sub nom. *Operating Engineers Local 470 v. NLRB*, 350 F.3d 105 (D.C. Cir. 2003) (affirming judge's finding that an employer did not unlawfully contact a local sheriff about an employee's threatening behavior). Unlike our colleague, however, we are unwilling to adopt an essentially per se limitation on the Board's traditional protection of Section 7 rights whenever an employer claims concern about violence. Instead, we shall con-

tinue to examine each case on its merits, balancing such claims against the rights of those engaged in protected activities. That is the essence of Board adjudication, not "activism."

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by discharging Brian Judd and William Bond we shall order that the Respondent remove from its files any reference to their unlawful discharges, and notify them in writing that this has been done. We shall also order that the Respondent offer Brian Judd and William Bond reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of a 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).

ORDER

The National Labor Relations Board orders that the Respondent, Kiewit Power Constructors Co., Weston, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in union or other concerted protected activities.

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

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

(a) Within 14 days from the date of this Order, offer Brian Judd and William Bond full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Brian Judd and William Bond whole for any loss of earnings and other benefits resulting from the discrimination against them, in the manner set forth in the remedy section of this decision.

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

¹⁰ 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

(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 Weston, Missouri facility copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 17, 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 21, 2008.

(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.

Dated, Washington, D.C. August 27, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
MEMBER SCHAUMBER, dissenting.

An unfortunate development of our times has been the escalation and severity of workplace violence and the proliferation of litigation flowing from such incidents. Behavior that might once have been accepted as part of the "rough and tumble" of labor relations must now be

¹¹ 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."

viewed through a different lens by employers confronted with the task of protecting both the safety of their employees and the corporate fisc against protracted and expensive lawsuits alleging a host of claims from negligent supervision and hiring to hostile work environments. In this case, after a pattern of open defiance of employer directives to break "in place," two employees, faced with a verbal reprimand, told their supervisor that if they received additional discipline, things would "get ugly." One employee stated that if his supervisor was going to discipline them further, he "better bring [his] boxing gloves." Both men asserted that, before their job with the Respondent, they had been out of work for a significant period—adding a sense of desperation to their threats. Their supervisor—the person in the best position to gauge the intensity of the employees' threats—testified that he felt physically threatened by the confrontation. The Respondent, applying a uniformly followed zero-tolerance policy against threats, terminated the employees. The judge—the person in the best position to evaluate the witnesses' conflicting versions of events—was persuaded by the supervisor's testimony and found the employees' conduct unprotected and the discipline warranted. In my view, the Board should not, on the basis of a cold record, substitute its judgment for that of the judge and the Respondent. Therefore, I respectfully dissent.

On May 19 and again on May 20, 2008, the Respondent specifically informed its foremen and their crews that they must take their breaks "in place" because walking to the "dry shacks" as they usually did was extending the breaks from 15 to 30 minutes. The men were warned that they would be disciplined if they did not comply. Nonetheless, on May 20, the men chose to take their morning break in the "dry shacks." Superintendent Ken Watts visited each crew separately and issued notices of a verbal warning. In one of these meetings, employee Judd told Watts, "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." Watts testified that Judd's tone was angry. Employee Bond supported Judd and stated, "I've been out of work for 8 months, it's going to get ugly." Watts felt and heard the force of the men's statements, their tone of voice, and their body language. He stated that he felt physically threatened, and he reported this to his supervisor.

Under the *Atlantic Steel*¹ factors, the place of the discussion and whether the employees' conduct was provoked by the Respondent's unfair labor practice are neutral factors. As to the subject of the discussion, the judge

¹ 245 NLRB 814 (1979).

found against protection because the 15-minute breaks at issue, which were not provided by the contract, were exclusively within management's right of control. The majority, however, argues in favor of protection because the principal point of discussion was safety, and employees claimed that breaking in place was unsafe and unsanitary. Regardless of the merits of these opposing views, I do not find that the subject of the discussion is dispositive. Rather, the dispositive factor, consistent with most cases analyzed under the *Atlantic Steel* factors, is the nature of the employees' outburst. As the judge observed, "[T]his case ultimately boils down to which of the sharply conflicting versions of testimony of the witnesses" should be credited and what inferences a trier of fact can reasonably draw from that testimony.

In resolving the testimonial conflicts, the judge considered "numerous factors," including "witness bias, consistency, corroboration, the inherent probabilities, reasonable inferences available from the record as a whole, the weight of the evidence, and witness demeanor." The judge, who observed Watts on the witness stand, credited his testimony and discredited contrary testimony by Judd and Watts. The judge, recognizing the legitimate prerogatives of management to ensure safety and discipline in the workplace, found the conduct unprotected, and the Board should defer to that demeanor-based judgment.

Instead, my colleagues speculate, on the basis of a cold record transcript, that Judd's "boxing glove" threat was "more likely to have been a figure of speech . . . than a literal invitation to engage in physical combat." And they conclude that the employees' statements were "ambiguous." But Watts did not find them ambiguous; they were clear threats. The judge credited Watts, and my colleagues identify no reasoned basis for overturning that credibility resolution.

The cases the majority cites are no substitute for the credited testimony of witnesses and careful balancing of the evidence by the trier of fact. One can easily cull from the hundreds of volumes of Board case law decisions in which statements found to be protected may, on paper, appear more menacing or profane than those used here. However, it is not the words themselves, but the manner in which they are delivered and the surrounding circumstances that convey the speaker's intent. Here, we know that the message delivered was a clear threat—the words make that manifest, and if there were any doubt as to how the words were perceived, Watts dispelled them to the satisfaction of the judge. We know that the Respondent had a zero-tolerance for such threats, and there is no evidence that policy was disparately applied. My col-

leagues simply substitute their judgment for that of the Respondent and the judge.

I further disagree with the majority's characterization of Watts' testimony as "subjective perception." As an eyewitness to the employees' conduct, Watts was uniquely positioned to *objectively* judge the severity and intent of the employees' outbursts. Conversely, the majority is uniquely unqualified, on the basis of the cold record, to objectively evaluate the strength of the employees' threats toward Watts. Watts provided the "best evidence" and I, like the judge, find his testimony dispositive of the nature of the employees' threat.

It is not the province of the Board to discourage employers from responding forcefully to employees' threats, or to substitute its subjective and speculative judgment for the measured and thoughtful findings of a trial judge. Were this simply an isolated instance of such curious activism, it might be less troublesome. Instead, however, it appears to be a growing and disturbing trend.² I therefore dissent.

Dated, Washington, D.C. August 27, 2010

Peter C. Schaumber, Member

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 has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

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

² See, e.g., *Plaza Auto Center*, 355 NLRB No. 85 (2010).

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

WE WILL, within 14 days from the date of the Board's Order, offer Brian Judd and William Bond full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, make Brian Judd and William Bond whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

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

KIEWIT POWER CONSTRUCTORS, CO.

Anne C. Peressin, Atty., for the General Counsel.
Kimberly Seten, Atty., with *Robert J Janowitz, Atty.*, on the brief (*Constangy, Brooks & Smith, LLC*), of Kansas City, Missouri, for the 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 (the 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 posthearing briefs. After carefully considering the record² in light of my

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 Tr. 43,L. 9, witness Potter's reference to "Ken Watts" should have been to Ken Gibson. Accordingly, I correct the record in that respect. In addition, a transcript anomaly appears at Tr. 179,LL. 1 through 3 preceding the letter "Q" in that the material there should appear immediately before the word "witness" at Tr. 182,L. 9. The examination of witness Dwayne Teeters that appears from the letter "Q" at Tr. 179,L. 3 through Tr. 182, L. 8 was conducted

credibility determinations, and the argument contained in posthearing briefs filed by the General Counsel and Respondent, I have concluded that Respondent did not violate the Act based on the following

FINDINGS OF FACT

I. JURISDICTION

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 powerplants. 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.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Kansas City Power and Light (KCPL) owns and operates the IATAN powerplant 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.

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 million. 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 R. Exh. 6.) It applies similar agreements with other building trade unions whose members work at that job.

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;

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.

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

The NMA provides employees with a 30-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 prejob or markup 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 break periods each day, one in the morning from 9:30 to 9:45 a.m. and one in the afternoon from 3 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 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 (art. VI Grievances) that culminates in binding arbitration. Kiewit maintains a 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 jobsite by a local union representative, and for the appointment by the local union business manager of a jobsite union 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.

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 in December 2007; Bond started in mid-May 2008.

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

The bulk of Kiewit’s electricians worked on the turbine building.⁶ At breacktime, 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 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.

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 breacktime 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 2 to 4 minutes early so they would be at their chosen dry shack at the start of the scheduled breacktime. Others provided similar estimates: Foreman Holloway said it took 3 or 4 minutes to reach the dry shack at breacktime (Tr. 87, LL. 21–23); Billy Bond said a couple of minutes (Tr. 151, LL. 5–6); and Brian Judd estimated 3 to 5 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.

Superintendent Watts noticed that the breacktimes 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 breacktime should be brought 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 breacktime 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

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.

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.”

⁵ Art. XV, par. 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 the vacuum compressor building a short distance from the location where KCPC stockpiles fly ash, a semitoxic residue left from burning coal for the boilers. During that day, a serious fly ash spill occurred at the dumpsite that required the workers to evacuate the building.

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.

complained about the Turbine building 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.

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 some of the other craftsmen were doing.

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 breaktime 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. 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 breaktime and that management planned to write up (reprimand) employees if they did.

Superintendents Holmes and Watts closely monitored the morning break period on May 19. They observed that the electricians were away from work for about 20 to 25 minutes at the breaktime. 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 jobsite, 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 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

⁸ Contrary to Holloway, Watts claimed the safety rules permitted employees to remove their protective equipment at breaktime if an overhead deck or roof existed to shield against falling objects. At this time, 90 percent of the decking had been installed in the turbine building.

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 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 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, 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

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 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 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 breaktime. Foreman Holloway and Union Steward Potter both supported the position taken by the crewmembers.

At the morning breaktime on May 20, Potter positioned himself in the turbine building where he could observe what occurred. About 5 minutes before break, he saw the electricians as well as the ironworkers, pipefitters, boiler-makers, carpenters, and laborers in the vicinity leave for the break shacks. At the end of the scheduled breaktime, the workers began coming out of the break shacks and walking back to their workstations.⁹

Watts also monitored the morning break period on May 20 and concluded there had been no improvement. When he

⁹ In his testimony, Potter said the employees began returning at 9:30 a.m. Tr. 35,L. 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.

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 Volentine about Holmes’s decision 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. 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 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:

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?

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?

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?

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.

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?

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.

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—

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. [Tr. 282, L. 9–Tr. 283, L. 24.]

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.” [Tr. 39, L. 23–Tr. 40, L. 1.]

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 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 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 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 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 Holmes about his observation and the two agreed that written warnings should be issued to the electricians for again extending their breaktime 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 Hutchins, said he learned about the threat allegation (probably from Gibson) and spoke to Watts about it. Watts confirmed that he been

¹⁰ Under the Agreement’s grievance procedure, grievances at step one are handled between the Employer’s supervisor and the local union steward. R. Exh. 6, 4.

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 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 jobsite 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 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, "[H]e'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, "[H]e (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 reprimands 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, "[Y]ou know they're going to fire those guys." Watts implied that information caught him by surprise so he did not answer Pot-

ter'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 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."

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.

At 7 a.m. the following morning, Union Business A-gent 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 superintendents and that Bond and Judd would be terminated for that reason. Raya agreed that threats should be taken seriously and should not be tolerated.

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

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.

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

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.

representation. At that point, Raya and Potter were called into the meeting. Gibson apparently followed.

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.

Following a meeting between the employees and Raya outside the office facility, Bond and Judd left the jobsite. 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 their rest breaks and that they occasionally took more than the 15 minutes allowed, no further warnings have been issued by Kiewit at this jobsite over this issue.

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.

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).

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 noncompliance 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 369 (2008). For example, it cannot be seriously argued that temperate protests by Walker's crewmembers charging that the verbal warning no-

tices were undeserved and unfair lacked protection under the Act.

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 the 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 Co. of America*, 338 NLRB 20, 22 (2002). See also *Tracer Protection Service*, 328 NLRB 734 (1999).

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 Co.*, 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.

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 8 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.

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:

- Watts' changed his testimony repeatedly about who actually made the "boxing gloves" statement.

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

- Watts and Holmes's testimony concerning the former's initial report about the incident is inconsistent.
- 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.
- 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.

Respondent argues that Watts' 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.

This dispute arose in the context of a stable, harmonious, and respectful labor relations setting. Details about the day-to-day 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' 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' 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' 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 jobsite electricians' steward and employees were informed of the specific disciplinary measures that Kiewit planned to take to achieve compliance with the rest breaktime 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

CONCLUSIONS OF LAW

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.

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.

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

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

²⁰ 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

ORDER

The complaint is dismissed.

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

adopted by the Board and all objections to them shall be deemed waived for all purposes.