

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

DAY & ZIMMERMAN NPS, INC.

and

JEFFREY NEWMAN, an Individual

Case GR-7-CA-52733

and

JAMES STRANG, an Individual

Case GR-7-CA-52941

Richard Czubaj, Esq.,
for the General Counsel.
David L. Christlieb and Allison List Kheel, Esqs.
(Littler Mendelson, P. C.) of Chicago, Illinois,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Stevensville, Michigan on January 19, 2011. Charging Party Newman filed the charge in GR-7-CA-52733 on February 16, 2010, and an amended charge was filed on April 12, 2010.¹ Charging Party Strang filed the charge in GR-7-CA-52941 on May 24, 2010. The General Counsel issued a complaint in Case GR-7-CA-52733 on May 28, 2010. On July 20, 2010, the Acting General Counsel issued an order consolidating cases, and consolidated amended complaint (the complaint) in these cases.

¹ All dates are in 2010, unless otherwise indicated.

5 On December 3, 2010, the Regional Director for Region 7 issued an order withdrawing paragraphs 6, 7 and 8 of the complaint. As amended, the complaint alleges that on January 7, 2010, the Respondent suspended and discharged its employees Jeffrey Newman and James Strang in violation of Section 8(a)(1) of the Act.

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

15 FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Lancaster, Pennsylvania has maintained offices and places of business in various states throughout the United States, and has been engaged as a contractor specializing in the maintenance and repair of nuclear facilities, including the D. C. Cook nuclear facility owned by American Electric Power in Bridgman, Michigan. Annually, the Respondent, in the course of its business operations, derives gross revenues in excess of \$500,000 and provides services valued in excess of \$50,000 in states other than the state of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

30 *THE FACTS*

Background

35 The Respondent performs construction and maintenance work at nuclear power plants nationwide. The instant dispute involves work performed by the Respondent at the D.C. Cook nuclear power plant (the Cook plant) located in Bridgman, Michigan, which is owned by the American Electric Power (AEP). On January 7, 2010, the Respondent's highest-ranking supervisor at the Cook plant was site manager Kevin Glascock. Timothy Guerrant was the lead superintendent and Richard Byrd was the field supervisor.

40 During the material time, all of the Respondent's employees at the Cook plant were covered by the terms of a collective-bargaining agreement with various craft unions known as the General President's Project Maintenance Agreement. This contract contains an exclusive hiring hall arrangement. Charging Parties Newman and Strang are pipefitters who were referred to the Respondent by Plumbers and Pipefitters Union, Local 190, which has jurisdiction over

5 pipefitting work at the Cook plant. As of January 7, 2010, both Newman and Strang had been employed at the Cook plant for approximately 6 months.²

10 There are stringent security requirements regarding access by an individual to the Cook plant. In this connection, AEP and the Respondent, as one of its contractors, follow the procedures set forth in AEP's Access Authorization Program (AAP). The purpose of this program "is to provide assurance that individuals are trustworthy and reliable, such that they do not constitute an unreasonable risk to public health and safety or the common defense and security, including the potential to commit radiological sabotage." (GC Exh. 7, p.3.) The AAP provides that a contractor such as the Respondent is responsible for monitoring employees for "aberrant behavior" which is defined as "changes in the individual's normal or usual functioning in terms of work related activities and/or interactions with other employees in the workplace." AEP also has a Fitness for Duty Program (FFD), which is a protocol that contractors like the Respondent apply to determine whether employees are mentally and physically fit to work in a nuclear power plant. (R. Exh. 2).

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The Events of January 7, 2010, and the Respondent's Investigation

25 On the morning of January 7, 2010, Strang and Newman were working together on level 569, which is the lowest level of the Cook plant. They started work at 6 a.m.; after attending a shift meeting they arrived at their workstation at approximately 6:45 a.m. Their assignment that morning was to drill holes in the cement ceiling in order to install pipe hangers as part of the renovation project at the Cook plant that the Respondent was engaged in. They were standing on scaffolding to perform this work. Both Strang and Newman testified that the temperature in the area that they were working was very warm.³

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35 After working approximately 45 minutes, Strang said to Newman "let's take a break and get some water." Both men left the scaffolding and went to the elevator area on level 569 where the water containers were normally located. Foreman David Tafelski and several members of his crew, including employee Mike Brahm, were present in the area when Strang and Newman arrived. When he saw that the water containers were not present, Strang stated "Man, this is fucking bullshit. It's hot down here and again there is no water." (Tr. 61)⁴ While Strang was making that statement, the elevator door opened behind him and Larry Weber⁵ an AEP manager⁶

² Newman has been employed as a pipefitter for 15 years and has worked in the nuclear industry for the past 4 years. Strang has been employed as a pipefitter for approximately 26 years and has worked in the nuclear industry for the past 2 years.

³ According to readings taken by the Respondent on January 7, 2011, a year after the events in question, the temperature in the elevated scaffolding area where Newman and Strang were working was approximately 88°.

⁴ January 7, 2010 was a Thursday. Strang testified that there had been a problem getting water every day that week on level 569. The Respondent's Work Rules Package indicates under Safety and Health Rules, Section 8c "Drinking water is available at all times. Where fountains are not furnished, water containers will be provided with disposable drinking cups." (GC Exh. 2, p.10). The record establishes that there is a drinking fountain in the elevator area one level above level 569.

⁵ In their brief the Respondent's counsel assert that this is the correct spelling of Weber's name, as

5 exited the elevator and tapped Strang on the shoulder. Strang turned toward Weber, who asked Strang what the problem was. Strang replied that there was no water again and added “It’s hot and this is fucking bullshit.” When Weber asked Strang what he was going to do to resolve the matter, Strang replied “Well, the only thing I can do is to go to my foreman and have him push it up the ladder and see if we can’t get water down here sooner.” (Tr. 61). Newman testified that at
 10 that point he recognized Weber as a high-level AEP manager and tried to make light of the situation by grinning and taking off one of his work gloves and throwing it on the ground stating “Jimmy, this is bullshit. Let’s just go back to work.” (Tr. 20). While Strang was speaking to Weber, another employee who was in the area handed Strang a small bottle of water. Shortly after the brief conversation between Strang and Weber the employees responsible for supplying
 15 the water arrived with water containers. After getting a drink Newman and Strang returned to their work area.

David Tafelski testified on behalf of the Acting General Counsel regarding this incident.⁷ According to Tafelski, on January 7, 2010, he was working as a foreman and was talking to some
 20 members of his crew by the elevator on level 569 when Newman and Strang arrived. Tafelski saw Weber exit the elevator and heard Strang say “It was bullshit and there was no water down here.” (Tr. 77). Tafelski testified that while Strang was talking to Weber, Newman threw his glove down in a joking manner and told Strang “Come on. Let’s Get out of here. Let’s get back to work.” (Tr. 78). Finally, Tafelski testified that he did not hear any profanities directed toward
 25 Weber.⁸

Approximately 15 minutes after Newman and Strang returned to the area where they were working, they determined that they needed a ladder, Newman left to obtain one and ran into
 30 Weber. Weber stated to Newman that he had found Newman and Strang’s supervisor and told him to get them some water because it was too hot to work in these conditions without adequate water intake. Newman thanked Weber who then asked him if he knew where Strang was. Newman pointed Weber in the right direction and went to retrieve the ladder.

35 Strang testified that Weber approached him in his work area and told Strang that he had spoken to Strang’s foreman and individuals with AEP and that “we’re going make sure you guys stay hydrated down here.”

opposed to “Webber”, which is how it appears in the transcript. I accept the representation of the Respondent’s counsel as to the correct spelling.

⁶ At the time, Weber was an AEP vice president of nuclear energy and the second highest ranking official at the Cook plant.

⁷ At the hearing, counsel for the Acting General Counsel withdrew, with my approval, the complaint allegation that Tafelski was a supervisor within the meaning of Section 2(11) of the Act. Since there is no evidence to the contrary, I find that Tafelski was a statutory employee during the material time.

⁸ Weber did not testify in this proceeding. I credit the testimony of Strang and Newman regarding the incident involving Weber. Their testimony was mutually corroborative and their demeanor while testifying reflected confidence in their recollection of the facts. In addition, it is consistent with the written statements they gave to the Respondent on January 7. GC Exhs.4 (Strang) and 6 (Newman). Their testimony was also corroborated by that of Tafelski in all material respects.

5 Kevin Glascock, the Respondent's site manager, testified that on the morning of January
7, 2010, AEP's department construction manager, Denny Willemin, informed Glascock that
Weber had told Willemin that there were two of the Respondent's employees on the 591 level of
the plant using inappropriate language, including the term "mother fucker." (Tr. 84, 109).⁹
10 Willemin added that Weber had indicated to him that in his (Weber's) opinion the two
employees were not safe to be in the plant. Willemin told Glascock to look into the situation
immediately. Glascock testified that he called Judy Doerer, AEP'S fitness for duty supervisor,
and told her what had been reported to him by Willimen. After conferring with Doerer, Glascock
concluded that the reported conduct could be considered "aberrant behavior". Glascock then
15 spoke to Willemin again and told him that he wanted to be sure before he went any farther. He
asked Willemin regarding the incident with respect to Weber "Was those individuals using
profanity, MF, whatever you want to call it? Did it happen just like you told me? I need to
know." According to Glascock, Willemin told him "Yes. Are you doubting Larry Weber? (Tr.
104–105). Glascock replied that he just wanted to make sure. Glascock then instructed the
20 Respondent's lead superintendent, Timothy Guerrant, to investigate the matter along with field
superintendent Richard Byrd.

Guerrant spoke to Tafelski and determined that Strang and Newman were the two
employees who had spoken to Weber. Newman and Strang were then asked to provide written
statements regarding the incident with Weber and were required to submit to fitness for duty
25 testing, including drug and alcohol screens. Guerrant and Byrd also obtained statements
regarding the incident from Tafelski and employee Mike Brahm. Byrd also provided a statement
regarding a conversation he had with Weber after the incident with Strang and Newman had
occurred.

30 All of the statements were provided to Glascock for his review. The statements of Strang
and Newman are consistent with their testimony at trial regarding the incident with Weber,
which has been set forth above.

The relevant portion of Tafelski's statement (GC Exh. 9) indicates:

35 I was in the area 569. I just walked off the elevator. When I did I saw a couple
of fitters talking about the lack of water down on 569. I really did not hear what
exactly was said. I do know they were not talking directly to Larry Webber.
They where (sic) in a joking matter when one fitter threw [h]is gloves down. In
40 many times he does that in a joking matter (sic). I did not take any of their
action or words to be in any way being disrespectful towards me or any other
people down on 569.

Brahm's statement (GC Exh. 8) indicates, in relevant part, that there was no water at the
45 elevator area when Newman and Strang arrived and Strang stated "What, no water, this is
bullshit." Brahm's statement also confirms that when Weber asked Strang what he was going to
do about the situation, Strang replied he was going to go back to his foreman and run it up the

⁹ Willemin did not testify at the hearing. On the other hand, Strang, Newman and Tafelski credibly testified at the hearing that the term "mother fucker" was not used in any way during the discussion with Weber.

5 chain of command. Brahm's statement makes no reference to any profanity being directed toward Weber.

Byrd's statement (R. Exh. 5), in relevant part, indicates that on the morning of January 7, 2010, Weber asked him who was in charge of the water and Byrd replied that the laborers were
10 responsible for that task. Byrd's statement then indicates "He informed me that we needed to take care or of the no water situation because he was not going to tolerate any more ----language from the craft." (Deletions contained in the original.)¹⁰

15 Glascock did not contact Weber directly or obtain a statement from him before he decided to suspend Strang and Newman.

Glascock testified that after reviewing the statements noted above, on January 7, 2010, he decided to suspend Strang for 90 days for "being loud and using as far as I was concerned, inappropriate language." (Tr. 90) Glascock made the decision to suspend Newman for 60 days
20 on January 8, 2010.¹¹ Glascock admitted that at the time he made the decision to suspend Strang he was aware that Strang and Newman were concerned about the lack of drinking water (Tr. 90). Glascock testified that he gave Strang a 90 day suspension because he "was doing the majority of the profanity." (Tr. 109). Glascock testified he gave Newman a 60 day suspension because "it was my understanding that he was in compliance with what was going on and threw the gloves."
25 (Tr. 109; 80-89).¹²

The notice sent to Strang by the Respondent regarding the termination of his employment reflects "Date Terminated: 1/7/10." It also indicates that he was eligible for rehire after 90 days "with SM approval." (GC Exh. 3.) The notice issued to Newman reflects "Date Terminated:

¹⁰ At the hearing Byrd testified that Weber told him to check into the water situation and take care of it because he "will not be MF'd over the water jugs again." (Tr. 125, 132). Obviously, Byrd's testimony regarding what Weber said to him is hearsay and has extremely limited probative value regarding what Strang and Newman actually said to Weber. As I have noted previously, I credit the testimony of Newman and Strang as to what they said to Weber.

¹¹ Both individuals were terminated /suspended before the results of their fitness for duty tests were received, which normally takes 3 days

¹² Glascock testified that on January 7, he notified Alfred Culbreath, the business agent for the Plumbers and Pipefitters, Local 190, that there had been an incident with Newman and Strang using profanity, including the term "MF", in front of Weber. Glascock informed Culbreath that he had suspended Strang and Newman pending the completion of an investigation. Culbreath asked Glascock if he had spoken to Weber and Glascock indicated that he had not. On January 8, Glascock again called Culbreath and told him that he had suspended Strang for 90 days and was in the process of finalizing a decision on Newman. Glascock testified that Culbreath told him that he had contacted Weber who told him "pretty much exactly" what Glascock had relayed to Culbreath initially (Tr. 108). Culbreath testified as follows regarding his conversation with Weber "I don't remember exact words, but the information I had received from him that two pipefitters were using profanity and he felt that it was out of--one gentleman was out of control and that's all the information I got out of him from that." (Tr. 137). I find Culbreath's testimony to be of little probative value. His recitation of what Weber told him is obviously hearsay. Beyond that, Culbreath admitted that he could not remember exactly what Weber had told him and gave a very generalized recollection of the conversation at the hearing.

5 1/8/10.” It further indicates that he was eligible for rehire after 60 days “with SM approval.” (GC
Exh. 5). The record does not reflect what the reference to “with SM approval” means.¹³

10 On January 10 Glascock prepared a document entitled “Employee Project Work Rules
Violation Report” (R. Exh. 4). This document reflects the following:

15 Work Rules & Regulations Violation, Page 17, Category II-Paragraph “b, f, q”-
Unacceptable Behavior. Incident involved Mr. Jeff Newman and Mr. James Strang
regarding drinking water resulting in unacceptable behavior. Incident happened on 569
Level of the Turbine Building with AEP Senior Management witnessing the actions of
both employees.

The Respondent’s work rules referred to in Glascock’s report are as follows:

20 b. Negligent violation of security rules . . .
f. Engaging in horseplay
q. Any behavior which violates Owner’s procedures or work rules or which
undermines to the reputation, standing or favorable perception of the Company
by the Owner

25 With regard to the use of profanity by Respondent’s employees generally, Glascock
testified that crude or profane language was not commonly used by the Respondent’s employees
when he was in the work areas. Culbreath testified that he visited the area in the Cook plant that
was undergoing renovation once or twice a month and that he did not hear any profanity. On the
30 other hand, Tafelski testified that the language used by Strang on January 7 was not abnormal
and he heard it everyday. Newman also testified the language used by Strang and himself that
morning in their conversation with Weber was common in the work areas. As I have indicated
earlier, I found Tafelski and Newman to generally be credible witnesses and I credit their
testimony on this point based on their demeanor and the inherent plausibility of their testimony.
35 However, I also find Glascock’s testimony to also be plausible. I find it likely that while crude or
profane language may be used commonly in work areas, it would not normally be used in the
presence of the Respondent’s highest ranking supervisor at the site. Since Culbreath only made
occasional visits to the areas of the Cook plant that were under renovation, his testimony on this
issue has limited value.

40 The Union did not file a grievance over the terminations of Newman and Strang.

¹³ While Glascock testified that he suspended Strang and Newman, the notices issued to them by the Respondent indicate that they were, in fact, terminated, but were eligible for rehire after the specified time periods. I do not believe that being terminated with the eligibility for rehire under unknown conditions is the equivalent of a suspension. I find therefore that the Respondent terminated Strang and Newman but that they were eligible for rehire after 90 and 60 days respectively.

5

ANALYSIS

Section 7 of the Act indicates that employees have the right “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Section 8(a)(1) of the Act is violated by an employer if it interferes, restrains or coerces employees in the exercise of Section 7 rights.

The Board’s present definition of protected concerted activity is set forth in *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), reaffirmed on remand 281 NLRB 882 (1986) (*Meyers II*) affirmed 835 F. 2d 1481 (D.C. Cir. 1987). Accord *NLRB v. City Disposal Systems, Inc.* 465 U. S. 822, 835 (1984). In *Meyers I*, at 497 the Board concluded:

In general, to find an employee’s activity to be “concerted,” we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8 (a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee’s activity, the concerted activity was protected by the Act and the adverse employment action at issue (e.g., discharge) was motivated by the employee’s protected concerted activity.

In *Meyers II* the Board held that the determination of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. 281 NLRB 882 at 886.

The General Counsel asserts that Strang and Newman were engaged in protected concerted activity on the morning of January 7, 2010, with respect to the incident with Weber regarding the lack of drinking water. The Respondent contends that Strang expressed his individual concern about the lack of water and that Newman’s actions were not in furtherance of Strang’s complaint. Accordingly, the Respondent argues that Strang and Newman were not engaged in concerted activity.

In the instant case, I find that Strang and Newman were engaged in protected concerted activity on the morning of January 7. In the first instance, they left their work area together after deciding they wanted to get a drink of water. When they arrived together at the elevator area of level 569, they discovered that water containers were not present. Upon discovering this, Strang registered his objection to the lack of water by exclaiming to Newman and the other employees present in the area “this is fucking bullshit. It’s hot down here and again there is no water.” Just as he made that statement, Weber exited the elevator doors behind Strang and overheard the statement. When Weber asked Strang what the problem was, Strang told him there was no water again, that it was hot and that “this was fucking bullshit.” Weber then asked Strang what he was going to do to resolve the issue. Strang replied that he would see if his foreman could get water to the 569 level sooner. At that point, Newman made it clear that he supported Strang’s complaint by throwing his glove down and saying to Strang “this is bullshit. Let’s go back to

5 work.¹⁴ While Newman attempted to intervene in a joking manner, it is clear that he was acting
 in support of Strang’s expression of dissatisfaction with the lack of water. After all, Newman had
 come with Strang to get a drink and by his affirmative statements and actions indicated he shared
 Strang’s concern about the lack of water and supported it. He certainly did not stand by mute
 while Strang voiced his objection to lack of water and what action he proposed to Weber as to
 10 how he would resolve it.

That Strang reacted spontaneously with his complaint over the lack of water is of no
 consequence as the Board has indicated that “concertedness under *Meyers I* can be established
 even though the individual was not “specifically authorized” in a formal agency sense to act as a
 15 group spokesman for group complaints.” *Herbert F. Darling*, 287 NLRB 1356, 1360 (1988). In
 this connection, I note that the Board has repeatedly held that when an employee, in the presence
 of other employees, complains about working conditions, such complaints constitute protected
 concerted activity. *Hahner, Foreman & Harness, Inc.*, 343 NLRB 1423 (2004); *Cibao Meat
 Products*, 338 NLRB 934 (2003); *Avery Leasing, Inc.* 315 NLRB 576, 580 at fn. 5 (1994).
 20

I believe that the only reasonable construction of Newman’s action in throwing his glove
 down and agreeing with Strang that the lack of water was “bullshit”, while at the same time
 urging him to go back to work, is that he was united with and joined in Strang’s complaint. I find
 that while Newman shared Strang’s concerns, he was cognizant of Weber’s position as a high-
 25 ranking manager of the Respondent’s customer and did not want their complaint to escalate any
 further and thus urged Strang to return to work with him.

The fact that Strang and Newman voiced their objection regarding the lack of drinking
 water to Weber, a representative of the Respondent’s customer, and not directly to the
 30 Respondent, does not diminish the fact that they were engaging in protected concerted activity.
 In *Endicott International Technologies Inc.*, 345 NLRB 448, 450 (2005), the Board reiterated its
 policy that employee appeals concerning employment conditions made to parties outside the
 immediate employer-employee relationship are generally protected by the Act. In this
 connection, in *Greenwood Trucking, Inc.* 283 NLRB 789 (1987), an employee made a phone call
 35 on behalf of himself and another employee to a customer of the employer to complain about not
 being paid by the employer. The Board found that the call from the employee to the customer
 constituted protected concerted activity and that by discharging the two employees involved in
 the call, the employer violated Section 8(a)(1) of the Act. *Id.* at 792–793.

40 On the basis of the foregoing, I find that Strang and Newman were engaged in protected
 concerted activity on January 7, 2010, when, in the presence of other employees, they indicated
 their objection to the lack of drinking water to Weber.¹⁵

¹⁴To the extent that there are minor variances in the testimony of Tafelski and that of Strang and Newman,
 I rely on the testimony of Strang and Newman. Tafelski indicated in the statement taken from him by the
 Respondent during its investigation of the matter that he did not hear exactly everything that was said.

¹⁵ In so finding, I note that the Board has held that employee complaints about working conditions are
 protected regardless of the merits of the particular complaint. *Skrl Die Casting, Inc.*, 222 NLRB 85, 89
 (1976). Accordingly, the Respondent’s contention that water was available on the floor above level 569
 and that it was not that hot in the area in which Strang and Newman were working has no bearing on
 whether their complaint was protected.

5

It is eminently clear that at the time he decided to terminate Strang and Newman, Glascock was aware that they were concerned about a lack of drinking water. He specifically testified that Newman was suspended for 60 days because he was “in compliance” with Strang’s actions and threw his glove. Finally, the work rules violation report he prepared on January 10, specifically referenced that both employees were disciplined for the incident regarding drinking water that resulted in unacceptable behavior. It is clear from this evidence that Glascock was of the belief that the two employees had acted together in complaining about the lack of drinking water when he made the decision to terminate them. The Board has relied on an employer’s perception that employees were engaged in protected concerted activity in finding a violation of Section 8(a)(1) in administering discipline for such conduct. *Berle Industries, Inc.*, 300 NLRB 498, fn. 2 (1990) enfd. 932 F. 2d 958 (3d Cir. 1991).

Having found that Strang and Newman were engaged in protected concerted activity on January 7, 2010, and that the employer was aware of the concerted nature of the conduct and disciplined them for engaging in such conduct, I must determine whether the manner in which they engaged in that activity removed them from the protection of the Act.

The Acting General Counsel contends that the manner in which Strang and Newman registered their complaints regarding the lack of drinking water was not so egregious as to remove them from the Act’s protection. On the other hand, the Respondent contends that, if the conduct of Strang and Newman is found to be concerted, it is not protected because their inappropriate behavior deprived them of the protection of the Act.

Both parties argue that an application of the factors set forth in the Board’s decision in *Atlantic Steel Co.*, 245 NLRB 814 (1979) supports their respective positions. In *Atlantic Steel*, the Board found that when an employee is discharged for an outburst that occurred while engaging in concerted activity that is normally protected, opprobrious conduct can remove employees from the protection of the Act. To determine whether the alleged misconduct is sufficient to remove employees from the Act’s protection, the Board considers the following factors: (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 practices. *Id.* at 816.¹⁶ See also *Datwyler Rubber and Plastics Inc.*, 350 NLRB 669, 670 (2007).

With respect to the first factor, the discussion between Strang, Newman, and Weber took place in the area on the 569 level where employees go for a water break. The record reflects that Tafelski was talking to some members of his crew (Tr. 76) but it does not reflect whether he was

¹⁶ Both parties have also discussed in their briefs the applicability of the Supreme Court’s decision in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964) to the instant case. In *Burnup & Sims* the Court held that Section 8(a)(1) of the Act is violated if it is shown that a discharged employee was engaged in protected activity, that the employer had knowledge of the protected activity, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact guilty of the misconduct. *Id.* at 23. In this case, Strang and Newman admittedly engaged in the use of profanity, and Newman acknowledged throwing down his glove. In my view, under these circumstances the appropriate analysis is contained in *Atlantic Steel* and its progeny.

5 speaking about work related matters or was engaging in general conversation while taking a
water break. There is no evidence, however, there was actual construction work going on in the
area when the conversation took place. Thus, the conversation took place in an area generally
used for breaks and there is no evidence that it interfered with any of the Respondent's
construction work. Accordingly, I find that this factor weighs in favor of protection of the
10 conduct of Strang and Newman.

Turning to the second factor, the subject matter of the conversation, this also weighs in
favor of protection, since the discussion involved the lack of drinking water, which is clearly a
condition of employment. In this regard the Respondent's own work rules provide the drinking
15 water is to be available at all times.

With respect to the third factor, I note that Strang's first profane comment about the lack
of water was only directed to Newman and the other employees who were located in the elevator
area. Strang was not aware of Weber's presence because he had exited the elevator behind him.
20 It was in response to Weber asking him what the problem was, that Strang repeated that there
was no water again and impulsively added that "It's hot and this is fucking bullshit." When
Weber asked Strang what his plan for resolving the problem was, Strang replied respectfully that
he would speak to his foreman and see if water could be brought down sooner. Newman's
conduct involved throwing down his glove and agreeing with Strang's statement that the lack of
25 water was "bullshit." In doing so, however, Newman urged Strang to return to work with him.

The use of profanity was brief and was unaccompanied by insubordination, physical
contact or any threat of physical harm. The Board has found that the use of profanity
unaccompanied by the more serious misconduct noted above is protected, particularly where it is
30 part of the "res gestae" of the concerted activity. *Beverly Rehabilitation Services, Inc.*, 346
NLRB 1319, 1322-1323 (2006). Importantly, the Board has found that the brief use of insulting
profanity directly to a supervisor has not deprived employees of the protection of the Act when
such conduct occurred during the course of concerted activity. *Plaza Auto Center, Inc.* 355
NLRB No. 85 (2010); *Felix Industries*, 331 NLRB 144, 145-146 (2000), enfd. in relevant part
35 251 F. 3d 1051 (D.C. Cir. 2001), supplemented 339 NLRB 195 (2003); *Burle Industries, Inc.*,
300 NLRB 498 (1990), enfd. 932 F. 2d 958 (3d Cir. 1991). In the instant case it is clear that the
use of profanity was not directed at Weber. It was used to characterize a working condition, the
lack of water, which Strang and Newman found objectionable. In addition, Newman's act in
throwing his glove down was not done in a threatening or insubordinate manner. Accordingly, I
40 find that neither the language used by Strang and Newman nor the throwing of the glove
deprived them of the Act's protection of their concerted activity.

I find the cases relied on by the Respondent to be distinguishable. In this connection, in
Verizon Wireless, 349 NLRB 640 (2007) an employee, while soliciting employees for a union,
45 made two separate, profane and insubordinate statements to other employees which the Board
found rendered his conduct unprotected. These comments occurred in a confined location in
close proximity to an area filled with both supervisory and nonsupervisory personnel. The Board
found that the employee's profane references to supervisors would have necessarily drawn
attention and had a detrimental effect on workplace discipline. As noted above, in the instant
50 case the profanity used here was not directed, in any way, toward Weber and there is no evidence
that it had a detrimental effect on workplace discipline.

5 In *Trus Joint MacMillan*, 341 NLRB 369 (2004), an employee's conduct was deemed
 unprotected because it involved a planned, vituperative, personal attack with foul language
 against the employee's supervisor, in the presence of other supervisors. In *Piper Realty Co.*, 313
 NLRB 1289 (1994), an employee's conduct was found to be unprotected when he directed
 10 profane and insubordinate remarks to his supervisor while repeatedly resisting a work
 assignment.

Clearly, in the instant case, the brief use of profanity by Strang and Newman was not
 directed at Weber. The language that Strang and Newman used, and Newman's action in
 15 throwing down his glove, was clearly impulsive in nature. The Act permits some leeway for
 impulsive behavior which must be balanced against an employer's right to maintain order and
 discipline. *Thor Power Tool Co.*, 148 NLRB 1379 1380 (1964), enfd. 351 F. 2d 584 (7th Cir.
 1965); *Beverly Health & Rehabilitation Services*, supra at 1323; *American Steel Erectors, Inc.*,
 339 NLRB 1315, 1316 (2003). I find that none of the conduct of Newman and Strang interfered
 20 with the Respondent's legitimate right to maintain discipline and order. Accordingly, I conclude
 that this factor also favors the actions of Strang and Newman being protected.

Since the Respondent had not committed any prior for labor practices to provoke Strang
 and Newman, this factor is neutral with respect to finding the conduct to be protected.

25 In sum, after considering the *Atlantic Steel* factors, the first three factors all weigh in
 favor of finding the conduct of Strang and Newman to be protected, and the fourth one is neutral.
 Accordingly, I find that by terminating Strang and Newman for their conduct on January 7, 2010,
 the Respondent violated Section 8(a)(1) of the Act.

30 CONCLUSIONS OF LAW

1. By terminating James Strang on January 7, 2010 and Jeffrey Newman on January 8,
 2010,¹⁷ the Respondent has engaged in unfair labor practices affecting commerce within the
 meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

35 REMEDY

40 Having found that the Respondent has engaged in certain unfair labor practices, I shall
 order it to cease and desist therefrom and to take certain affirmative action designed to effectuate
 the policies of the Act.

45 The Respondent, having discharged employees James Strang and Jeffrey Newman
 because they engaged in protected concerted activity, must offer them full and immediate
 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 and privileges previously
 enjoyed and to make them whole for any loss of earnings and other benefits suffered as a result
 of the unlawful action against them. Backpay shall be computed in the manner set forth in *F. W.*
Woolworth Co., 90 NLRB. 289 (1950); with interest at the rate prescribed in *New Horizons for*

¹⁷ While Newman was formally terminated, subject to eligibility for rehire after 60 days, on January 8,
 2010, he was suspended pending completion of the Respondent's investigation on January 7, 2010.

5 *the Retarded*, 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). This Order is subject to resolution at the compliance proceeding of the issues outlined in *Dean General Contractors*, 285 NLRB 573 (1987); *Casey Electric. Inc.* 313 NLRB 774 (1994); and *Laben Electric Co.*, 323 NLRB 428 (1997).¹⁸

10 Consistent with those decisions, if necessary, the Respondent will have the opportunity in compliance to attempt to show that, under its customary procedures, Strang and Newman would not have been transferred to another project after the one for which they were hired was completed, and therefore no backpay and reinstatement obligation exists beyond the time when the project from which they were discharged was completed.

15 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

20 The Respondent, Day & Zimmerman NPS Inc., Lancaster Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

25 (a) Discharging or otherwise discriminating against employees because they engaged in protected concerted activity in order to discourage employees from exercising their rights under the Act.

30 (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.

35 (a) Within 14 days from the date of the Board's Order, offer James Strang and Jeffrey Newman 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.

40 (b) Make James Strang and Jeffrey Newman whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

45 (c) Within 14 days from the date of the Board's 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.

¹⁸ The record does not indicate whether, as of the date of the hearing, the Respondent's pipefitting work at the Cook plant had been completed.

¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5

(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.

10

(e) Within 14 days after service by the Region, post at its worksite in Bridgman, Michigan copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 7, 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. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 January 7, 2010.

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(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.

30

Dated, Washington, D.C., May 12, 2011.

35

Mark Carissimi
Administrative Law Judge

²⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

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

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 concertedly complaining about terms and conditions of employment or otherwise engaging in protected concerted activity.

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

WE WILL, within 14 days from the date of this Order, offer James Strang and Jeffrey Newman 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 James Strang and Jeffrey Newman whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of James Strang and Jeffrey Newman, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

DAY & ZIMMERMAN NPS INC.

(Employer)

Dated

By

(Representative) (Title)

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

477 Michigan Avenue, Room 300, Detroit, MI 48226-2569

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.