Clear Pine Mouldings, Inc. *and* International Woodworkers of America, Local No. 3-200, AFL-CIO. Case 36-CA-3129

SUPPLEMENTAL DECISION AND ORDER

On 9 March 1983 Administrative Law Judge David G. Heilbrun issued the attached supplemental decision. The General Counsel and the Respondent filed exceptions and supporting briefs,[1] and the Charging Party filed a brief in support of the judge's decision.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions[4] only to the extent consistent with this Supplemental Decision and Order, and to adopt the judge's recommended Order as modified.

The present proceeding is concerned with issues of reinstatement and backpay calculation under the terms of the Board's Decision and Order reported at 238 NLRB 69 (1978), enfd. 632 F.2d 721 (9th Cir. 1980). We agree with the judge's determination as to the amount of backpay due to all claimants except Rodney Sittser and Robert Anderson, who shall be denied reinstatement and backpay, and Bruce Reed, who shall be denied backpay. Contrary to the judge, we conclude that Sittser and Anderson engaged in conduct justifying the Respondent's refusal to reinstate them and that Reed was lawfully terminated for failing to report his absence from work before the strike began.

I. THE STRIKE MISCONDUCT OF RODNEY SITTSER AND ROBERT ANDERSON

A. *The Facts*

1. Rodney Sittser

One week prior to the strike Sittser and two other employees "cornered" employee Johnny Webb against a wall at work and told Webb he would have to go on strike as voted by the other employees. When Webb said that he had been on vacation when the strike vote was taken, the employees began shoving Webb, and Sittser stated that Webb should watch out because they might burn his house or garage or something. Webb testified that Sittser repeated this threat to him over the telephone on several other occasions.

Sittser also had a prestrike encounter with employee Don Clark at Clark's home. According to Clark, as the two men discussed the strike and the possibility of employees dropping out of the Union, Sittser became progressively angrier. Clark heard Sittser make a phone call to Union Business Agent Phillip Douglass during which Sittser suggested that a group of union members visit an employee named Cecil Barber to "straighten him out." Sittser also told Clark that the hands of certain knife-grinding personnel should be broken. Clark testified that his experience with Sittser made him so nervous that he put his house up for sale in anticipation of getting a job elsewhere.

The final incident involving Sittser also involved Helen Wright, who had resigned from the Union at the start of the strike. Shortly after the strike began, Wright was leaving work at the end of her shift when Sittser flagged down her car and told

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The General Counsel has excepted to the judge's failure to grant its motion partially to strike the Respondent's answer to the backpay specification. The specification alleged that Robert Anderson and Rodney Sittser are entitled to backpay from the end of the strike to the time the Respondent makes them a valid offer of reinstatement. The Respondent's answer to the specification alleged that neither Anderson nor Sittser had applied for reinstatement. At the backpay hearing, however, the Respondent adduced testimony in support of its argument that neither former striker is entitled to reinstatement and backpay because each had engaged in strike misconduct. The General Counsel now argues that interjecting the strike misconduct issue into the case at the hearing constituted an attempt by the Respondent to change its answer. The General Counsel contends that the Respondent knew of the alleged strike misconduct at the time it filed its answer and that the Respondent should have affirmatively alleged it in the answer. The General Counsel moves to strike the Respondent's so-called amended answer and requests that the Board not consider evidence adduced on the strike misconduct issue.

Even assuming that the Respondent should have affirmatively alleged the strike misconduct in its answer to the backpay specification, we are of the opinion that the General Counsel cannot now complain of this omission. The record reveals that the General Counsel never objected to the introduction of any testimony by several witnesses, including Anderson and Sittser, on the strike misconduct issue. In fact, the General Counsel fully and actively participated in the examination of these witnesses. At this point in the proceeding, the General Counsel is estopped by his failure to object at the hearing. Accordingly, we deny the General Counsel's motion partially to strike Respondent's answer.

[3] The Respondent has excepted to the award of backpay to Larry Sheffield, claiming that, until his reinstatement, Sheffield worked for a company other than the Respondent at a rate of pay higher than the rate the Respondent would have paid him. We find that this fact, standing alone, is irrelevant to whether Sheffield is entitled to an award of backpay, because Sheffield's gross wages for hours actually worked would have been higher than his interim earnings if the Respondent had reinstated him.

The Respondent has excepted to the judge's finding that the Union did not undertake the duty of notifying striking employees when they should return to work. We find it unnecessary to rely on the judge's finding on this point, because the Respondent has not claimed that the Union actually failed to notify any employees or that any particular employee failed to apply for reinstatement due to lack of notice.

[4] The Respondent argues that the Board should apply what it calls the "special factors" doctrine. In so arguing, the Respondent refers to the unfair labor practices that the Board found it committed and claims that it engaged in those activities in detrimental reliance on Board law in existence at the time. The Respondent thus argues that the equities are so compellingly in its favor as to outweigh the imposition of the traditional Board remedy here, i.e., the grant of backpay. We are not persuaded by the Respondent's argument. The Respondent has not demonstrated that this case is so factually or legally extraordinary as to warrant our departure from imposing traditional Board remedies. Moreover, the Respondent's contention is untimely, because it should have been raised at the unfair labor practice stage of this proceeding.

her that she was taking her life in her hands by crossing the picket line and would live to regret it. Wright testified that she took alternate routes to work after this conversation because Sittser's remarks frightened her.

2. Robert Anderson

When the night shift ended at 1 a.m. on 6 August 1977, there were 40 to 50 pickets outside the plant who were carrying baseball bats, tire irons, and ax handles and were accompanied by dogs. Nonstriking employee Don Close testified that picketers stopped a truck belonging to nonstriker Ron Reese, jerked open the doors, and broke the windows. Close identified striker Robert Anderson as using a 2-foot-long club to beat on the truck. Night-Shift Superintendent Jerry Payne testified that he saw the doors of Reese's truck open with people hanging on the doors trying to pull Reese out. In addition, Payne saw nonstriking employee Jerry Sherrer try to leave the plant on a motorcycle when a person Payne later identified as Anderson swung at Sherrer with a club.

As Close proceeded out of the plant, picketers called him names and beat on his truck, causing a dent near a window. Close became so nervous at the prospect of being blocked in by the picketers ahead of him that he backed his truck up, knocking over Anderson in the process, and exited in another direction. Nonstriking employee Tom Tucker testified that Anderson hit Close's truck with a club, was knocked over when Close's truck rolled back, and then looked up from his position on the ground to threaten Tucker with the words, "I am going to kill you, you son-of-a-bitch."[5] Nonstriker Steve Hardt testified that, as he attempted to drive through the picket line, Anderson hit his car with a club, leaving a one-quarter-inch-deep dent in the rain gutter on the passenger side.

B. *The Administrative Law Judge's Decision*

The judge specifically discredited Rodney Sittser's denials and credited the testimony of Webb, Clark, and Wright that Sittser made verbal threats of violence. The judge also credited the testimony of Close, Payne, Tucker, and Hardt, and specifically found that on 6 August 1977 Robert Anderson carried a clublike object with him which he used to hammer on vehicles leaving the plant. Of particular note is the judge's inference, based on all the credited testimony, that Anderson went to the picket line "equipped and ready to engage in pugnacious behavior."

[5] Anderson was still carrying the club when he threatened Tucker, even though he had been knocked to the ground.

Despite these findings, the judge concluded that Sittser's strike-related threats and Anderson's picket line misconduct were not sufficiently serious to disqualify the two strikers from reinstatement. The judge observed that Sittser's verbal threats were not accompanied by any further actions and occurred only during a short period near the beginning of a 4-month strike. The judge also noted that Anderson's threatening conduct on the picket line was limited to a single incident during the first week of the strike. The judge concluded that these were minor, isolated acts of the type that the Board has excused as trivial misconduct not egregious enough to deprive strikers of the Act's protection.

C. *Analysis*

Section 7 of the Act gives employees the right to peacefully strike, picket, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 7 also grants employees the equivalent right to "refrain from" these activities.

Previously, the Board has held that "not every impropriety committed in the course of a strike deprives an employee of the protective mantle of the Act" and that "minor acts of misconduct must have been in the contemplation of Congress when it provided for the right to strike . . . ."[6] However, the Board has also acknowledged that "serious acts of misconduct which occur in the course of a strike may disqualify a striker from the protection of the Act."[7]

The difficulty lies in deciding whether particular strike misconduct results in the loss of statutory protection the employees otherwise would have. In the past, the Board has held that verbal threats by strikers, "not accompanied by any physical acts or gestures that would provide added emphasis or meaning to [the] words," do not constitute serious strike misconduct warranting an employer's refusal to reinstate the strikers.[8] On the other hand, the Board has held that verbal threats which are accompanied by physical movements or contacts, such as hitting cars, do constitute serious strike misconduct.[9] The Board summarized its standard

[6] *Coronet Casuals*, 207 NLRB 304, 305 (1973).

[7] Id. at 304.

[8] *W. C. McQuaide, Inc.*, 220 NLRB 593, 594 (1975), enf. denied in pertinent part 552 F.2d 519 (3d Cir. 1977). See also *A. Duie Pyle, Inc.*, 263 NLRB 744 (1982); *Georgia Kraft Co.*, 258 NLRB 908, 912–913 (1981), enfd. 696 F.2d 931 (11th Cir. 1983), cert. granted 52 U.S.L.W. 3386 (Nov. 14, 1983) (No. 83-103); *Arrow Industries*, 245 NLRB 1376 (1979); *MP Industries*, 227 NLRB 1709, 1711 (1977).

[9] *Hedstrom Co.*, 235 NLRB 1198, 1198–99 (1978), enfd. 629 F.2d 305 (3d Cir. 1980); *Pepsi Cola Bottling Co.*, 203 NLRB 183 (1973), enfd. in pertinent part 496 F.2d 226 (4th Cir. 1974); *Alabaster Lime Co.*, 194 NLRB 1116 (1972).

for finding strike misconduct based on verbal threats in *Coronet Casuals*, where it stated that "absent violence . . . a picket is not disqualified from reinstatement despite . . . making abusive threats against nonstrikers . . . ."[10]

We disagree with this standard because actions such as the making of abusive threats against nonstriking employees equate to "restraint and coercion" prohibited elsewhere in the Act and are not privileged by Section 8(c) of the Act. Although we agree that the presence of physical gestures accompanying a verbal threat may increase the gravity of verbal conduct, we reject the per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts. Rather, we agree with the United States Court of Appeals for the First Circuit that "[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker."[11] We also agree with the United States Court of Appeals for the Third Circuit that an employer need not "countenance conduct that amounts to intimidation and threats of bodily harm."[12] In *McQuaide*, the Third Circuit applied the following objective test for determining whether verbal threats by strikers directed at fellow employees justify an employer's refusal to reinstate: "'whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'"[13] We believe this is the correct standard and we adopt it.[14]

The legislative history of the Labor Management Relations Act supports the adoption of such a standard. Although the Act specifically recognizes the right to strike,[15] and although any strike which involves picketing may have a coercive aspect, it is clear that Congress never intended to afford special protection to all picket line conduct, whatever the circumstances.[16] The legislative history of the Labor Management Relations Act clearly indicates that Congress intended to impose limits on the types of employee strike conduct that would be considered protected. The right to strike embodied in Section 13 of the Act was modified with the passage of the Taft-Hartley Act in 1947. The amendments to Section 13 included a provision that nothing in the Act shall be construed "to affect the limitations of qualifications on" the right to strike. The legislative history of this amendment[17] indicates that it was designed, inter alia, to incorporate into the Act the restrictions on the scope of protected strike activities found by the Supreme Court in *Fansteel Metallurgical Corp. v. NLRB*.[18] In *Fansteel*, although the specific type of striker misconduct was different from that presented in the instant case, the reasoning of the Court is nevertheless applicable here. There, striking employees had seized their employer's plant. The Court held:[19]

> The seizure and holding of the building was itself a wrong apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company . . . *or other unlawful acts in order to force compliance with demands.* To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society. [Emphasis added.]

Interpreting Section 13 (even before modification of that section by Taft- Hartley), the Court held that "this recognition of 'the right to strike' plainly contemplates a lawful strike,—the exercise of the unquestioned right to quit work."[20] The Court went on to state:[21]

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[10] *Coronet Casuals*, 207 NLRB at 304-305.

[11] *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977), denying enf. in part to 227 NLRB 1200.

[12] *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977), denying enf. in part to 220 NLRB 593 (1975). We read the *McQuaide* standard to essentially adopt a "reasonably tends to restrain and coerce" measure for the loss of reinstatement rights.

[13] Id. at 528 (quoting *Operating Engineers Local 542 v. NLRB*, 328 F.2d 850, 852-853 (3d Cir. 1964), cert. denied 379 U.S. 826).

[14] Previous Board decisions that failed to apply this standard, including the cases cited in fn. 8, above, are overruled to the extent they are inconsistent with our decision today.

In accordance with our usual practice, we shall apply the Third Circuit standard to all pending cases in whatever stage. *Midland National Life Insurance Co.*, 263 NLRB 127, 133 fn. 24 (1982).

We would also apply an analogous standard to the assessment of strikers' verbal and nonverbal conduct directed against persons who do not enjoy the protection of Sec. 7 of the Act.

[15] Sec. 13 of the Act.

[16] See generally H.R. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., *reprinted in* Legislative History of the Labor Management Relations Act, 1947 at 542-544. "It is apparent that many forms and varieties of concerted activities which the Board, particularly in its early days, regarded as protected by the Act will no longer be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the Act." Id. at 544. "[I]n section 10(c) of the amended act . . . it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharging were committed in connection with a concerted activity." Id. at 543.

[17] Views of Senator Taft, Rep. No. 105 accompanying S. 1126, 80th Cong., 1st Sess., *reprinted in* Legislative History of the Labor Management Relations Act, 1947 at 434.

[18] 306 U.S. 240 (1939).

[19] Id. at 253.

[20] Id. at 256.

[21] Id. at 257-258.

> There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights.

There is also evidence in the legislative history of the Taft-Hartley Act that Congress was acutely aware of, and concerned with curbing, picket line violence in general.[22]

We believe it is appropriate, at this point, to state our view that the existence of a "strike" in which some employees elect to voluntarily withhold their services does not in any way privilege those employees to engage in other than peaceful picketing and persuasion. They have no right, for example, to threaten those employees who, for whatever reason, have decided to work during the strike, to block access to the employer's premises, and certainly no right to carry or use weapons or other objects of intimidation. As we view the statute, the only activity the statute privileges in this context, other than peaceful patrolling, is the nonthreatening expression of opinion, verbally or through signs and pamphleteering, similar to that found in Section 8(c).[23]

In deciding whether reinstatement should be ordered after an unfair labor practice strike, the Board has in the past balanced the severity of the employer's unfair labor practices that provoked the strike against the gravity of the striker's misconduct.[24] We do not agree with this test. There is nothing in the statute to support the notion that striking employees are free to engage in or escalate violence or misconduct in proportion to their individual estimates of the degree of seriousness of an employer's unfair labor practices. Rather, it is for the Board to fashion remedies and policies which will discourage unfair labor practices and the resort to violence and unlawful coercion by employers and employees alike. In cases of picket line and strike misconduct, we will do this by denying reinstatement and backpay to employees who exceed the bounds of peaceful and reasoned conduct.[25]

Accordingly, we find that the Respondent's denial of reinstatement to Robert Anderson and Rodney Sittser did not violate the Act.

Applying the above standard to the present case, the acts of striker Anderson, in carrying a 2-foot-long club, using it to swing at a nonstriking employee motorcyclist, and using it to beat on vehicles of nonstriking employees, are each sufficient to warrant denial of reinstatement, for each of these acts reasonably tended, under the circumstances, "to coerce or intimidate employees in the exercise of rights protected under the Act." The circumstances clearly indicate that violence or instilling a fear of bodily harm was the reasonably intended use of the club where strikers, at the time, were also carrying tire irons, baseball bats, and ax handles, and were accompanied by dogs. Such conduct is inherently coercive and intimidating with respect to the exercise of employees' Section 7 right to refrain from engaging in protected activities. Likewise, Anderson's verbal threat to kill nonstriking employee Tucker was also unprotected since it was similarly coercive and intimidating with respect to Tucker's exercise of his Section 7 rights. This is particularly true here where Anderson was equipped with a weapon and had in fact been using it. Finally, Anderson's conduct in striking Close's truck with a club, an act of property damage, tended to coerce or intimidate employees in the ex-

[22] For example, the House Committee on Education and Labor, by Congressman Hartley, stated:

> For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American workingman has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in section 1 of the National Labor Relations Act . . . .
>
> The employer's plight has likewise not been happy . . . . He has been required to employ or reinstate individuals who have destroyed his property and assaulted other employees . . . . He has had to stand helplessly by while employees desiring to enter his plant to work have been obstructed by violence, mass picketing, and general rowdyism.

Rep. No. 245, on H.R. 3020, 80th Cong., 1st Sess, *reprinted in* Legislative History of the Labor Management Relations Act, 1947 at 295-296.

[23] This of course does not prevent a union from advising its members of the possible consequences crossing a picket line may have under lawful provisions of the union's constitution and bylaws.

[24] *Coronet Casuals*, 207 NLRB at 305 fn. 15. See also *NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir. 1954), cert. denied 348 U.S. 883 (1955), which holds that, where collective action is precipitated by an employer's unfair labor practice, a finding that the employees' conduct is not protected under Sec. 7 does not, ipso facto, preclude the Board from ordering the employer to reinstate the employees if such an order would effectuate the purposes of the Act, and which uses the same balancing test to determine whether reinstatement is warranted.

[25] Balancing the misconduct of strikers against the seriousness of the employer's unfair labor practice is inappropriate because it condones misconduct on the part of employees as a response to the employer's unfair labor practice and indeed makes it part of the remedy protected by the Act. Retaliation breeds retaliation and, in the emotion-charged strike atmosphere, retaliation will likely initiate an escalation of misconduct culminating in the violent coercive actions we condemn. It would be virtually impossible for all practical purposes for employees to know what is expected of them during a strike because balancing remains illusive and would be applied only long after the operative events have occurred. Likewise we believe that the unclear and permissive standards previously employed by the Board have failed to adequately protect employee rights. Rather, it is our purpose to discourage any belief that misconduct is ever a proper element of labor relations. Only in this way can we honor the Act's commitment to the peaceful settlement of labor disputes without resort to coercion, intimidation, and violence. Therefore, we refuse to adopt a standard which will allow the illegal acts of one party to justify the wrongful acts of another.

ercise of their protected right to refrain from striking.

We also find that the conduct of striking employee Sittser was unprotected. His threat to nonstrking employee Wright to the effect that she was taking her life in her own hands by crossing the picket line, and would live to regret it, clearly had a reasonable tendency to coerce and intimidate her with respect to the exercise of her rights under the Act. Similarly, Sittser's repeated threats to employee Webb, which included threats to burn Webb's house, are egregious examples of statements which reasonably tend to coerce and intimidate employees in the exercise of statutory rights. Sittser's statement to employee Clark to the effect that the hands of certain knife-grinding personnel should be broken is coercive, because, although ostensibly it referred to employees other than Clark, it reasonably tended to coerce and intimidate Clark in the free exercise of his Section 7 rights. In this context, we also find that Sittser's less specific threat made in Clark's presence to "straighten . . . out" another employee likewise reasonably tended to coerce and intimidate Clark.

II. THE TERMINATION OF BRUCE REED

On Friday, 29 July 1977, Bruce Reed was asked to work on Saturday, 30 July, and agreed to do so. Reed never reported for work, however, nor did he call in to say he would not be there. Reed went out on strike with the other employees on 1 August. He also went to the Company on 1 August to pick up a paycheck. At that time he was informed that he had been terminated for failure to report his absence from work. Reed testified that he knew he was supposed to call in if he could not show up for work, but claimed he did not call in because he did not have a telephone and doubted that his supervisor could be reached.

The judge found that "Reed cannot be considered validly terminated prior to acquiring status as an unfair labor practice striker. That was his plain intention, and the intervening circumstance of an overtime assignment should not be available to this employer in frustration of that objective." We disagree.

The record establishes that the Respondent consistently maintained and enforced a policy of terminating employees who fail to report their absence when scheduled to work. The judge noted that two other employees, Chandler and Laudon, had been terminated legitimately for their failure to call in, and he found that they were not entitled to backpay. Bruce Reed falls within this same category. Because he was lawfully terminated, we find that he is not entitled to backpay.[26]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Clear Pine Mouldings, Inc., Prineville, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the Order except that the attached notice is substituted for that of the administrative law judge.

MEMBERS ZIMMERMAN AND DENNIS, concurring.

We join our colleagues in adopting the *McQuaide* [1] test as the appropriate standard for determining whether strike misconduct warrants denial of reinstatement. In so doing, we reject the previous Board rule that a verbal threat could never justify denial of reinstatement in the absence of physical gestures.[2] Furthermore, we agree that the *McQuaide* standard applies not only to misconduct directed at nonstriking employees but also, by analogy, to strikers' retaliation against nonemployees such as supervisors.[3] As the First Circuit held in *Associated Grocers*, the common question is whether the particular strike misconduct "in the circumstances reasonably tends to coerce or intimidate."[4]

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[26] No issue of reinstatement is raised as to Reed, as he has been reinstated.

[1] *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977), denying enf. in part to 220 NLRB 593 (1975).

[2] Member Dennis joins her colleagues in overruling past Board decisions that are inconsistent with the new standard. See fns. 8 and 14, above.

Member Zimmerman participated in the decision in *Georgia Kraft Co.*, 258 NLRB 908 (1981). On further consideration, he believes that, to the extent the Board's test there was described as precluding a denial of reinstatement solely because physical gestures or violence did not accompany the statements under consideration, the test was too narrow. In his view, the absence of physical gestures or violence, though a consideration in such cases, is not dispositive of whether reinstatement of an employee is an appropriate exercise of the Board's responsibility to remedy unfair labor practices. He believes that in adopting a standard that encompasses threats that are wholly verbal, however, the Board must take care not to condemn statements which are not reasonably likely to instill fear of physical harm. Under common law and statute, threats unaccompanied by acts ordinarily are not illegal or actionable. The first amendment protects pure speech from governmental restraint, even protecting a threat to kill where the circumstances show it to be hyberbole. *Watts v. United States*, 394 U.S. 705 (1969). The Board's application of the *McQuaide* test of coercive tendency must be informed by the knowledge that picket line actions often include tense, angry, and hostile confrontations in which emotions run high and threats are hurled that cannot reasonably be interpreted as auguries of violence. The Board must take care not to impose on industrial disputes a code of ethics alien to the realities of confrontational strikes and picket lines and contrary to our national tradition of free speech. See *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d at 528, and cases cited in fn. 20 therein.

[3] See fn. 14, above, and *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1337 (1st Cir. 1977), denying enf. in part to 227 NLRB 1200.

[4] Id. at 1336.

Although we join Chairman Dotson and Member Hunter in adopting the *McQuaide* test, we do not adopt their reasoning in part I, C, including their analysis of the right to strike, Section 8(c) of the Act, and the legislative history of the Act. We rely instead on the circuit court opinions in *McQuaide* and *Associated Grocers.*

Applying this standard, we agree with our colleagues that Sittser engaged in strike misconduct that reasonably tended to coerce or intimidate other employees. Sittser and two other employees "cornered" employee Webb against a wall at work to insist Webb go on strike; when Webb was equivocal about his intentions, the employees began shoving Webb, and Sittser threatened to burn Webb's house or garage. Sittser repeated this threat to Webb over the telephone several times. Sittser also told employee Clark that the hands of certain knife-grinding personnel who might drop out of the Union should be broken. Further, Sittser stopped nonstriker Wright's car as she was leaving work to tell her she was taking her life in her hands and would live to regret it. Sittser's remarks were not ambiguous, but rather were clear threats of property damage and bodily harm.[5]

Similarly, we concur in our colleagues' finding that Anderson's conduct reasonably tended to coerce or intimidate employees within the meaning of the standard we have adopted. Anderson carried a 16-inch-long wooden club on the picket line, brandished it in a menacing fashion toward nonstriking employees leaving the plant, swung it at a nonstriking employee who was driving a motorcycle out of the employee parking lot, and used it to hit at least three vehicles that nonstriking employees were driving out of the employee parking lot, causing at least one dent in a vehicle he hit. Anderson was in the middle of a crowd of 40 to 50 pickets that night, who were blocking egress from the employee parking lot, trying to pull nonstriking employees out of their vehicles, and beating on vehicles with clubs. After being knocked down when nonstriker Close backed up his truck in order to get around the crowd to leave the plant, Anderson threatened to kill nonstriker Tucker, who happened to be nearby at the time. The Act does not extend its protections to such obviously frightening conduct as carrying and swinging a weapon, using it to inflict damage to vehicles, and threatening to kill a nonstriker.[6]

Accordingly, we would deny reinstatement and backpay to Rodney Sittser and Robert Anderson. From an examination of all of the circumstances present in this case, particularly that Sittser and Anderson directed their misconduct against innocent employees who are protected by the Act, we would find that their reinstatement would not effectuate the policies of the Act. See generally *Mosher Steel Co. v. NLRB*, 568 F.2d 436 (5th Cir. 1978); *NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir. 1954), cert. denied 348 U.S. 883 (1955).[7]

[5] Because this conduct warranted denying Sittser reinstatement, we would find it unnecessary to rely on Sittser's statements during a telephone call to Union Business Agent Douglass which employee Clark overheard.

[6] While Anderson's threat to kill arguably may have been associated with Close's knocking him down, Anderson did not direct his threat to Close, but rather threatened Tucker, who had done nothing to provoke him. In finding that Anderson was engaged in misconduct, Member Zimmerman does not rely on the incident involving Anderson and nonstrikers Close and Tucker.

[7] In all other respects we agree with Chairman Dotson and Member Hunter.

APPENDIX

Beverly Bishop	$ 2,548
Juanita Burr	1,212
William Carter	1,467
Roy Chambers	1,175
Larry Chancellor	69
Oliver Chandler	1,409
Allen Dendy	1,158
David Dunn	1,263
Raymond Dunn	1,207
Donna Winget	1,069
Charlotte Evans	1,702
Thomas Ferguson	1,563
Darlene Forseth	1,078
Wanda Freese	3,062
David Fuller	1,033
Alonzo Hayre	1,515
Kenneth Heitz	923
Michael Hensley	1,662
Maximiano Hernandez	1,506
Douglas Holt	1,181
Laura Jones	834
Audrie Jordon	1,033
Lauren Kelhoyoma	1,128
Daniel Kinnear	559
Peter Koutsouris	1,703
Winnie Koutsouris	1,394
Colleen Maw	1,224
Henry McLamb	1,114
Douglas Menges	1,823
Donald Meritt	1,504
Debbie Miller	1,776
Janice Miller	1,308
Arthur Morton	1,017
Mary McKinney	792
Rose Mary Nelson	1,755
Don Pemberton	1,099
Rodney Prewitt	1,703
Karen Pryer	1,304

Eunice Rice	$ 837
Sandra Clem	996
Larry Sheffield	457
Jim Smith	2,682
Maxine Jones	2,992
Lisa Gonser	1,421
Lucille Streetman	972
Thomas Tugman	2,909
Marvin Weger	1,023
Melvin Weger	1,623
Richard Whittenburg	1,281
Jean Williams	1,538
Daniel York	1,188
James Hensley	6,068
Richard Zimmerman	1,033
Carl Chancellor	7,085

SUPPLEMENTAL DECISION

DAVID G. HEILBRUN, Administrative Law Judge: On August 14, 1980, the United States Court of Appeals for the Ninth Circuit entered judgment on its earlier opinion affirming the National Labor Relations Board's Order as reported at 238 NLRB 69. In this earlier case unfair labor practices were found to have been committed by Clear Pine Mouldings, Inc., called the Respondent, the remedy for which required the Respondent to take certain affirmative action, including reinstatement of unfair labor practice strikers with backpay, dismissing, if necessary, employees hired subsequent to the commencement of a strike on August 1, 1977. The Board's Order further required the Respondent to make whole any employee who lost money as a result of unilateral institution of substitute health insurance coverage. The strike was found to have been "direct[ly] caused" by the Respondent's "dilatory, surface bargaining" over a course of negotiations earlier in 1977.

Controversy having arisen over the amount of backpay, if any, due under terms of the Board's Order, the issues raised in a backpay specification dated August 31, 1981, were heard as supplemental proceedings at Bend and Prineville, Oregon, during July and August 1982.

Upon the entire record, my observation of witnesses, and consideration of post-hearing briefs, I outline the following

I. SETTING OF THE CASE

The Respondent is a wood products manufacturer in Prineville, Oregon, employing a work force that at times has exceeded 300 persons. International Woodworkers of America, Local No. 3-200, AFL-CIO (Union), has been certified as exclusive collective-bargaining representative for production and maintenance employees since 1965, and from that time onward has reached a series of labor contracts for the plant. The last of these, having a 2-year duration, expired on June 1, 1977. Renewal negotiations opened with the Union's written request dated March 14, 1977, and proceeded thereafter both before and during the described strike. The Respondent was represented in the process by Vice President and General Manager Thomas S. "Stu" Turner, Personnel Manager Robert Lockyear, attorney Verne W. Newcomb, and others, while the Union's chief negotiators were Business Agent Phillip Douglass, and I.W.A. Western States Regional Council No. 3 Vice President Hugh Kidwell.[1] A five-member committee of the Respondent's employees also participated in the bargaining process on the Union's behalf.

After approximately 3 months of strike activity, Douglass and Kidwell delivered Turner a letter November 21, 1977. It was signed by Kidwell and read:

> The strike against your Company will officially end on November 28, 1977 at 12:01 a.m., your employees are ready, willing and want to return to work.
>
> This letter is on behalf of each and every former striking employee, and it constitutes an unconditional offer and demand by your former striking employees to return to work for your Company.
>
> We re-emphasize that this return to work demand is unconditional. There are absolutely no conditions of any kind—express, implied or otherwise. Any and all prior statements, discussions, letters, agreements and everything else of every kind and nature that can or may be construed as conditions upon return to work of strikers, or in any manner inconsistent with this request, are hereby rescinded, revoked and are of no effect.
>
> Your former striking employees demand that you return them to work on November 28, 1977 or as soon as each employee can receive proper notification. Demand is hereby made that you displace striker replacement workers employed by you curing the strike, if or as may be necessary to ensure return of strikers to work.
>
> Please give this your immediate attention. We stand ready to assist upon request.
>
> Separate and apart from the above, we, the International Woodworkers of America, stand ready to continue contract negotiations with your Company as soon as a meeting can be arranged.

Turner made a written reply to Kidwell on November 25, 1977 reading:

> In answer to your letter dated November 21, 1977, and confirming our telephone conversation of November 23, 1977, with Phil Douglass, we suggest that any individual strikers who apply for re-instatement to contact the personnel office. Re-instatement will of course be conditioned on the availability of suitable employment and resolution of any outstanding charges of strikers' misconduct involving individual applicants.

On the occasion of October 18, 1977, a major effort had been made by the parties to resolve the strike of then over 2-1/2 months' duration. A full complement of individuals assembled for this meeting as scheduled at a

[1] D. C. "Gundy" Gunvaldson, president of Regional Council No. 3, also attended a significant bargaining meeting that occurred on October 18, 1977.

Prineville motel under auspices of a Federal mediator. Douglass testified that Gunvaldson, as experienced president of the entire Regional Council for this area of the industry, traveled to such a particular meeting in an attempt to lend further good offices toward resolution of the stubborn and difficult dispute. In the course of what was recorded as a session spanning more than 3 hours (primarily caucusing time), Gunvaldson voiced a summation of what Kidwell had said respecting a union proposal for ending the strike. According to notes of the meeting, made a part of this record as the Union's only documentary evidence, Kidwell had broached the subject of discontinuing strike action during the last 25 minutes of the session and following an extended caucus. As taken by the Union's negotiating committee secretary, the minutes of this final portion of the meeting read, in part, as follows:

> NEWCOMB: The company hasn't anything further to say at this time.
>
> KIDWELL: For a matter of record we are proposing an unconditional return to work for all employees and continue to bargain in good faith and make every effort to resolve this in the near future.
>
> NEWCOMB: We have no opposition to bargaining in good faith, but we must ask you if that offer is good for the 106 number and if the company advises you that are a number of people who there is no intention to reinstate, and would not offer reinstatement.
>
> KIDWELL: Its our feeling you are prejudging people, who ever they are and those people are entitled to a fair hearing. So our position would include everyone with an unconditional return to work. As far as your proposal we are not necessarily rejecting your proposal in its entirety, but what you proposed on 8% is below all the information that we have been able to compile as to what has been negotiated through out the moulding industry.
>
> NEWCOMB: The principal company that we heard was Doris and that settled with an other organization, the settlement was 8% the first year, and August 1977 cancelled out their pension plan and continued with Company sponsored health & wealth, I've heard of no other moulding companies with settlements, some have secondary, none that are competitive that have exceeded 8%. Only settlement that TOC represents is Doris. LPIW settlement is what you're saying you don't like but not sweeping it off.
>
> KIDWELL: Yes, not.
>
> NEWCOMB: We have no other offer, and not ready or prepared to at this time make offer.
>
> KIDWELL: We are not prepared at this moment to make a counter proposal.
>
> NEWCOMB: We don't have any further offers or proposals to make at this time.
>
> GUNVALDSON: So that it is vividly clear and understood, in order to take and restore relations that must exist with our employee and management, or decision maker, Hugh's statement is correct and should be understood.
>
> We are now making a firm proposal to you for an unconditional return to work that includes all employees and will immediately resume work and continue to organize to affect a settlement that would be economical to the company and to your employees who are now on strike.
>
> NEWCOMB: Are you saying some of your group would return if the rest would not? The company does have, as I have told Hugh, and the mediator, a list of people, who by their conduct, disqualified them, and I won't go into that or the length of the list. Are you saying that some of your group, that if the persons not on this list if, and we have several right now, would everyone be willing to come back to work but those that the company would not take back. Are you saying its everybody or no body?
>
> KIDWELL: You said it right there.
>
> NEWCOMB: We will continue to examine that list.
>
> KIDWELL: You said you have nothing further to offer or say?
>
> NEWCOMB: Not at this time.
>
> KIDWELL: We haven't either, but hope as soon as possible we can continue negotiations subject to call by the mediator.

Gunvaldson died approximately 2 weeks later, and the parties presently stipulate that Kidwell is unable to appear for medical reasons and that no adverse inference is to be drawn from the Union's failure to produce him as a witness. Douglass testified in a manner generally harmonious with these minutes, while committee member Daniel York added that those comprising the rank-and-file negotiating body, including himself, were well aware in advance of what Gunvaldson would propose or confirm. Faye Jordan, a retired employee and former neogtiating committee member, added that the tone of Gunvaldson's brief involvement was based on "something [which] had to be done" about the stalled progress toward a new contract.

Attorney Newcomb, testifying by narration, recalled that following the described meeting Gunvaldson telephoned him to urge a waiving of strike misconduct accusations in the context of all strikers being put back to work. Nemcomb asserted that he told Gunvaldson on this occasion that the Respondent was amenable to restoring all the people as jobs became available, except for two or three special cases involving egregious misbehavior.

It was following this that Douglass and Kidwell devised a course of action from which the November 21, 1977, letter resulted. Once having so decided, a comprehensive array of notification techniques (word of mouth, telephoning, CB radio communications, and union hall notices) was set in motion to marshall members for a needful special meeting. This ensued with Kidwell reading the proposed letter, fielding debate, and conducting a vote which ratified the letter. Delivery of the letter to Turner, with Douglass accompanying, followed immediately. Douglass testified that 1 or 2 days after delivery of the letter he had a conversation with Lockyear (or possibly Turner) having to do with "the mechanics" of people returning to employment. Douglass recalled com-

prehending that the Respondent did not want the total group of strikers to appear at one time and for this reason an agreement arose which contemplated sending the strikers in on a "staggered basis." Douglass was soon to supervise the process by which members gathered at the union hall and were sent into the Company in groups of five or seven on an interval basis that went into a second day. Douglass made the point that in general the persons making up such groups took their lunches on the day of appearance based on the thought of starting back to work.

Turner's version concerning aftermath of the strike was that on delivery of the Union's letter dated November 21, 1977, and Kidwell's accompanying remarks that the strike was over and all individuals "unconditionally" wished to resume work, he had conversed further with Kidwell at the time saying that the Respondent "would bring the people back as jobs become available." He also recalled subsequently speaking with Douglass, probably by telephone, to suggest that the group appearance technique be used because the company office was too small and would generate confusion. Turner added in his testimony that in so speaking with Douglass he pointed out how "it would help" if the Union made contact with strikers and assisted them in applying for reinstatement. Turner denied giving any indication that individuals would actually be put back to work immediately on their appearance.

Turner enlarged on his testimony at a later point in the hearing by recalling how he had focused on the union's letter a day or so after delivery and became "a little bit alarmed" because its wording did not seem to accord with the agreement that we had as to how the strike would end" and embodied the incorrect implication that the Respondent would have the difficult responsibility of making contact with strikers who could be well dispersed after the passage of 4 months from when they had last actively worked. This spurred Turner to write his letter dated November 25, 1977, the contents of which he noted were never objected to by Douglass. Turner recalled the phenomenon of people starting to show up at the plant in small groups to apply for reinstatement at the expectable time, and that many individuals were put back to work as jobs became available. Turner expressly testified that business was good in the fall of 1977, particularly as to October following which an estimated 25-percent drop in business oocurred as continuing through December, but that a spurt then happened resulting in January 1978 being "probably the best [he'd] seen in this business."

Following commencement of the strike on August 1, 1977, Dick Frambes, a retired law enforcement officer and later investigator for the Respondent, became assistant personnel manager under Lockyear. Lockyear's testimony was more definite concerning principles applied by the Respondent, including that interviewees seeking reinstatement were questioned as to their exact availability for return, where they could be located and whether they were free to work any shift. Lockyear denied that the process involved indicating to such persons when they would be called to work. As will be covered in certain individual cases, both personnel functionaries had considerable contact with former strikers both in person and by telephone.[2]

II. PLEADINGS

The backpay specification (as amended) covers 63 persons,[3] and is structured on a "representative employee(s)" theory of calculating gross backpay. The General Counsel contends that the Respondent was under a duty to forthwith reinstate all persons covered by the Union's assertedly unconditional offer to end the strike in contemplation of strikers' returning to work. The underlying litigation established their status as unfair labor practice strikers, as to whom reinstatement would be absolute even to the extent of displacing those previously hired in replacement. The General Counsel alluded to a customary "5-day rule" whereby employers so situated could react to the end of such a strike and incur backpay liability only for any excess over such time. The General Counsel contends that this customary approach should not be applied here, because overall revelations allegedly show that the Respondent did not recognize its duty,[4] and for that reason the underlying purpose of the 5-day rule is not present. Accordingly the backpay specification does not admit of this grace period, and the typical date for commencement of monetary liability is the point of November 28, 1977, when the Union fixed an official termination of its strike.

In fact, most strikers were returned to the plant by early 1978, and this condition constitutes the principal pattern found in the backpay specification. The document shows in comprehensive fashion, by calendar quarter, a tabulation of equivalent earnings from one or more similarly situated (representative) employees associating to what a particular discriminatee would have earned had their reinstatement been prompt and complete, including reestablishment of an appropriate wage rate under all the circumstances. This theory of gross backpay is rendered in detailed appendix sheets to the backpay specification, on which admitted interim earnings and pertinent offsetting expenses of the search for work are also shown. On January 14, 1982, an amendment to backpay specification issued, substituting and modifying appendixes in various regards, including adding Richard Zimmerman and Carl Chancellor to the list of claimants, as well as revising a number of earlier net backpay

[2] They also had extensive contact with numerous individuals before the strike was over, and a number of such contacts give rise to particular issues under the backpay specification. Frambes added his somewhat uncertain recollection that in dealing with a striker's reinstatement prospects the Company tended to use "a seniority list."

[3] Originally 62 former employees were listed, however the General Counsel withdrew Tina Jones from consideration by motion made in the course of hearing. This was counterbalanced, and more, by the later addition of Richard Zimmerman and Carl Chancellor as claimants.

[4] As of late 1977 the underlying unfair practice allegations were about to be heard by Administrative Law Judge James M. Kennedy, and this occurred over the span of December 6–8, 1877. His decision issued June 14, 1978, and the conclusions and recommended Order there embodied thus became the first adjudicative basis for the now-settled characterization that an unfair labor practice strike is what had been underway during the latter months of 1977 (until terminated in late November that year).

amounts in individual cases.[5] The resultant grand total of all claimed monetary liability, after allowing for Tina Jones being dropped from this proceeding and taking into account what her claimed total net backpay had been, is $252,013. The Regional Director expressly reserved the right to compute and claim further gross backpay subsequent to the computation cutoff date of August 31, 1981, in terms of contentions that proper offers of reinstatement have not as yet been made to certain individuals.

The Respondent filed written answers to both the backpay specification and the amendment thereto. Upon commencement of the hearing, the General Counsel moved to partially strike these answers, in particular regard to a failure of proposing any alternative backpay formula to that routinely denied in the answers. The General Counsel cites *Airports Service Lines*, 231 NLRB 1272 (1977), and *3 States Trucking*, 252 NLRB 1088 (1980), in premising an argument based on Section 102.54 of the Board's Rules and Regulations, from which it is contended that this section, and settled doctrine relating thereto, requires a respondent to clearly plead an alternative to any reasonable backpay formula that has been devised, or suffer the consequences of having stated formula admitted as being true. The General Counsel prevailed on this motion, and now seeks to further strike the Respondent's answers insofar as they do not allege defenses that associate to the colloquy made over the entire 6 days of hearing as spanning 5 weeks' time, or to the evidence itself in particular cases. Upon consideration of this point I am satisfied that the Respondent has fairly and fully articulated its position on the numerous individual issues raised in the backpay specification, and I decline to broaden the ruling on the General Counsel's motion to partially strike. Cf. *Sheet Metal Workers Local 13 (Sheet Metal Contractors Assn.)*, 266 NLRB 59 (1983).

III. ISSUES

There are a variety of issues to be resolved from this litigation. In a chronological sense, the process begins with ascertainment of whether certain individuals appearing as claimants in the backpay specification were employed as of the time a strike commenced on August 1, 1977, or were terminated at or soon after such commencement. The major issue of the case concerns events occurring at and shortly after the midnight hour of Friday, August 5, 1977, and through Saturday, August 6, 1977, at the plant premises, as to which the Respondent contends that misconduct as engaged in by Robert (Andy) Anderson was of a character and degree that warranted his termination from employment retroactively to that time, or, alternatively, disqualified him from any right of reinstatement and concomitant entitlement to backpay.[6] Proceeding in point of time as it passed from August into November 1977, there are issues of whether certain individuals were terminated by reason of failure to accept offered employment under circumstances which gave rise to an asserted entitlement for the employer to consider them to have repudiated any desire for further or continued employment, or, as relating to individuals who quit, constructively quit, or abandoned their position of employment, or as related to whether such individuals correspondingly abandoned the strike then in progress.

Beyond this time span the fundamental issue of the case arises in terms of whether or not the Union made *and maintained* an unconditional offer to return to work on behalf of *all* strikers, and an associated issue of whether the Union assumed to itself, gratuitously or otherwise, a responsibility of seeing that all strikers actually interested in participating in a resumption of active employment, as presumably contemplated by the blanket notice of strike termination and desire of strikers to return to work, were notified of steps to be taken and monitored as to whether or not they made an appropriate, timely presentation of themselves. As to this "fundamental" issue, the Respondent contends that the Union agreed to undertake a presentation of all persons covered by the return to work offer, and that any individual instance in which a person did not so appear would relieve the employer of any liability toward that person. Contrarily, the General Counsel and the Union contend that as a matter of fact and law the obligation to respond to an unconditional offer of return to work by unfair labor practice strikers reposed constantly and exclusively with the Employer, and any failure to present oneself (other than where unjustifiably grounded) would not impair the reinstatement rights and backpay entitlement of such individuals. Under the latter contention, it is conceded and confirmed that the Union did, at least, undertake to assemble small five- to seven-member groups of employees, and cause them to appear at the Respondent's place of business but this occurred *only as a convenience to the situation* and as a natural outgrowth of the established collective-bargaining relationship.

Chronologically yet beyond this, there are group and individual issues of the litigation which relate to circumstances such as absence from the labor market area, adequacy of the search for work in mitigation of damages offsetting expenses, poststrike termination, declining of employment in an overt or constructive sense, and an issue concerning whether James (Jim) Smith was physically capable of resuming his former employment at any time from late November 1977 until actually returning to duty on the basis of a medical release dated March 8, 1978.

IV. EVIDENCE

A. *Misconduct Issues*

1. Rodney Sittser

John (Johnny) Webb testified that he had worked for the Respondent since about 1973, and as of August 1977 was a night-shift leadman on re-saws. He recalled that about a week before commencement of the strike he was

[5] These changes represented "technical" adjustments of computation by the compliance officer, and the curing of inadvertence where detected.

[6] A comparable issue with respect to Sittser also embraces his alleged conduct in expressing verbalisms to certain nonstriking employees, both before and after the strike began.

"cornered" by three men while coming down a corridor toward the breakroom. The group, which included Rodney Sittser and Alonzo Hayre, ringed him against a wall, saying he would have to go on strike as recently ratified. Webb testified that he reminded them how he had been on vacation when the vote was taken, at which point they started shoving him with Sittser saying he should watch out because they might burn his house or garage or something.[7]

Don Clark testified that while an employee of the Respondent during 1977 he was also personally acquainted with Sittser. He recalled that on the last weekend of July 1977 Sittser and his family visited Clark and his family at the latter's home. In the course of about 2-1/2 hours the two men talked, with Clark recalling that as they discussed the imminent strike and circumstances of certain employees dropping out of the Union, Sittser became progressively, visibly angrier. Clark testified that Sittser took the telephone and seemingly called Douglass to urge that the "Ochoco boy"[8] visit an employee named Cecil Barber in order to "straighten him out." Clark recalled Sittser continuing with remarks that the hands of key knife-grinding personnel should be broken. Clark testified that the experience with Sittser left him "edgy" to the point that he put his house up for sale in anticipation of looking elsewhere for work. Eventually this did not occur, and he remained on a production job with the Respondent. Nothing untoward happened with respect to any of the allegedly threatened persons.

Helen Wright, a retiree from the Respondent, testified that she knew Sittser in August 1977 as a coworker of close functional proximity. She had resigned from the Union around the start of the strike, and she recalled an occasion a few days after the strike started when while going home for her evening meal around 7:30 to 8 p.m. Sittser had flagged down the car in which she was riding with her late husband. Wright testified that Sittser approached and agitatedly told her with much profanity that she was taking her life in her hands by crossing the picket line and would live to regret it. The experience frightened her to the extent of taking alternate routes on days following so as to avoid a repetition.

Sittser testified that he had started work with the Respondent around 1974 and remained continuously until 1977, ending up as a cutter on the night shift. He recalled formerly being friendly with Clark, and once visiting him prior to the strike. Sittser testified that the possibility of a strike was discussed in general terms between them, with Clark becoming upset over other employees withdrawing from the Union. Sittser remembered how Clark alluded to the many bad things that could happen in a strike, to which Sittser simply expressed a hope that no one get hurt. He also told Clark that individuals could be fined for crossing a picket line. Sittser denied making a call to Douglass, saying instead that he had telephoned only about child care matters, and that he made the "boys from Ochoco" remark passingly. Sittser categorically denied making any statement about the breaking of anyone's hands, and as to Wright denied ever stopping her car on a street or having any conversation of the type described. Sittser had no recall of ever telephoning to Webb in any context that would relate to the strike, or having any conversation with him generally and directly about supporting the strike. Further, he expressly denied ever threatening to burn any home, garage, or other building of Webb's. Hayre corroborated his denials.

2. Robert (Andy) Anderson

The Respondent's plant premises are depicted in an aerial photograph that was received into evidence as that party's Exhibit 5.[9] Orientation to this photo should be made by considering the left (longer) edge as the "bottom" with the main roadway at the front of the facility angling northeasterly from such bottom point of reference. The employee parking lot is thus in the lower center of the photo, and south from the structures. By combining the graphics of the photo with uncontroversial testimony of record, it is seen that a row of landscaping extends southerly from the separate office building near the road, and a slight rise or berm is traversed by cars typically exiting the lot. At a point on the bottom of the photo, a more recognizable exit route leads past a stop sign.

Friday, August 5, 1977, was the ending date for the first full week of the strike. As this day and evening wore on, various rumors materialized concerning what was shaping up when the night shift would end at 1 a.m. (on Saturday, August 6, 1977). From the Union's standpoint Douglass understood there would be "trouble" at 1 a.m., while molder setup man Dan Close, and others, had heard there would be trouble stemming from the union people having clubs and dogs, plus an inordinate number of pickets compounded by extended consumption of alcoholic beverages. In this context the parties advanced their respective witnesses on the issue of what actually happened, and what role, if any, was played by Andy Anderson in a short but tumultuous span of time.

The Respondent's first witness on the episode was Close.[10] He testified to leaving the plant at 1 a.m. quitting time and seeing 40 to 50 pickets as he got in his car to leave work in company of his wife. There were several vehicles ahead of his, including that of Ron Reese, whose pickup truck he saw being stopped by picketers and having its doors jerked open and its windows broken. Close testified that Andy Anderson was one of the persons opening doors and beating on the vehicle with a 2-foot long club. Reese "floor boarded" his way

[7] Webb added that Sittser voiced all such threats to him on the telephone both before and after this occasion, in the course of "pursu[it]" that became "nerve-racking" over several months.

[8] This term applied to several men who worked at Ochoco Lumber Company, a unionized mill in the Prineville vicinity. Individuals popularly believed to be described by this term, and the connotation of toughness that it carried, included Tom Harris and Tom Young who were president and vice president of the Union, respectively.

[9] Identification by the Respondent's counsel was made at p. 709 of the transcript, and the photo was received into evidence at p. 710. As actually appearing in the second folio of the Respondent's documentary exhibits, it is inadvertently marked as "official Exhibit No. GC-4." This numbering is to be disregarded, and the document should correctly be considered R. Exh. 5 as intended and received.

[10] It is to be remembered that activity transpired in full natural darkness, illuminated essentially by vehicle headlights and large industrial lights only one of which shines back into the parking lot.

through, and Close proceeded next as he was called names and had his own pickup truck beaten on resulting in a dent behind the rear passenger window. Becoming nervous and frightened, he felt blocked by men ahead and at that point backed up hitting Andy Anderson.[11] Upon this happening Close exited in another direction and went to the town police station.

Night-Shift Superintendent Jerry Payne testified that he observed employees leaving work when their shift of August 5, 1977, ended, at which time he estimated 30 to 40 pickets were in place. Payne saw Jerry Sherrer as the first person out of the parking lot on a motorcycle, which was swung at with a club by some unidentified person. Payne believed that the next car in line was that of Steve Hardt, and seeing that definite trouble was brewing he hurried back inside the mill to call police. Upon reemerging he saw the Ron Reese vehicle with "a bunch of people hanging on [it]" and the driver's side door open with others trying to get Reese out. Payne associated the person who had swung (or "waved") a club at Sherrer as the same person soon knocked to the ground, and from that circumstance identifiable as Andy Anderson. The club seen by Payne from "approximately 300 feet" away was about 18 to 20 inches long and 2 or 3 inches round.

Jerry Sherrer testified that, as he exited his motorcycle on the occasion, he swerved several feet to avoid a swinging motion made by a person holding an object "like a policeman might carry."[12] Bryan Jones testified that on leaving work he was in a car behind the trucks of both Reese and Close. He and his companion Donny Powell held back in the parking lot for awhile, and during this time he saw that the pickets, including a considerable increase in number from ones present at the 8 p.m. lunch break, were holding little league ball bats, tire irons, and axe handles with which they were hitting on cars. Jones characterized the action as "tapping" and "screaming." He was close by when Andy Anderson was knocked down, and when this happened Jones was near enough to the scene to hear Jim Smith say vengefully to Andy Anderson that Smith was "going to kill the little son-of-a-bitch." Jones added that as all this commotion was occurring, Payne was urging everyone to "break it up" and get out of the parking lot. Vicki Duncan testified that she and her fiance went to the plant at approximately 12:55 a.m. that night in order to see their friend Ron Reese. When the quitting whistle blew she saw Reese driving out, but suddenly several people were around his pickup pulling the doors open and seemingly trying to get him out. She heard yelling and glass breaking in the dark and confusion, estimating that between 30 and 35 pickets were present. Steve Hardt testified that on finishing his shift he attempted to drive through a picket line of approximately 40 persons, at which time Andy Anderson hit his car with a club. He had not known Andy Anderson at the time but knew he was the same person as was soon hit by Close's truck. Hardt's wife was in the car at the time, and he described the damage from the club as being a 1/4-inch deep dent in the passenger's side rain gutter.

Frambes, the first of the Respondent's rebuttal witnesses on this issue, testified that late in the evening in question he had gone outside the office building and from its corner 150 feet away saw a vehicle approach near the stop sign area of the parking lot. Frambes recalled the four or five occupants of that particular car opening its trunk and pulling out clubs or ball bats which they passed along to pickets. After that he heard yelling and banging on cars; however, Frambes could not identify any person involved. Robert Anderson (coincidental name similar to Andy Anderson) was formerly a Prineville police officer and on duty the night of August 5–6, 1977. He was at the scene around 1 a.m. seeing rowdiness and intoxication. The Respondent introduced its Exhibit 8 through Robert Anderson, as being a photograph of an object picked up at the parking lot scene on the night in question and maintained thereafter as police property.[13] Rob Johnson testified that he was a night-shift employee of the Respondent in August 1977, and recalled the "ruckus." He estimated 50–60 pickets as being present when the shift ended, and testified to seeing Ron Reese nearly dragged from his pickup truck as glass in it was broken. He remembered another car also being hit, and the driver, seemingly angered, slamming back into a man knocking him down. Johnson identified him as a person named Anderson, and the same individual as he had seen hitting on cars with a sort of "baton." Webb testified that as a night-shift employee coming off work on August 5, 1977, he saw that the large group of strikers at the edge of the road had clubs, pipes, and several dogs. When departing employees started out of the lot in their vehicles, Webb saw them beaten on in turn, and particularly recalled how the first rig had its windows broken out. After this he saw Close attempt to exit, and have his new pickup truck hit with a club by a person who was later knocked down by Close. Tom Tucker testified that he, too, was a former second-shift employee of the Respondent on the night of August 5, 1977, and had seen 30–40 people standing out along the road when the shift got off. They seemingly had the further exit blocked, causing drivers to start out closer to the plant. Tucker saw Reese's pickup being damaged, and recalled that Andy Anderson was hitting rigs with some kind of a club or stick. Tucker identified "Ochoco" boys Harris and Young as being present along with Larry Stevens as part of the group closed around the Reese vehicle. Tucker testified that Andy Anderson hit Close's pickup and was in turn knocked down when that driver "rolled back." Tucker was only a few feet away, and he testified that Andy Anderson looked up from where he was lying to say, "I am going to kill you, you son-of-a-bitch." Tucker gave a challenging answer, but

[11] Close was unable to identify Andy Anderson as a person beating on his own vehicle.

[12] To the extent that Sherrer's testimony named Andy Anderson as the individual who swung the object, it is disregarded consistent with a granting of union counsel's motion to strike any name identification.

[13] The 16-inch long object depicted in this exhibit is best described as an "Indian club," which is authoritatively illustrated and defined as a "metal or wooden club shaped like a large bottle, used singularly or in pairs for exercising the arms." *The Random House Dictionary of the English Language* (unabridged) 1979, p. 724.

then others ran up including Tom Harris who effectively told Andy Anderson to act unconscious like he was hurt.

The General Counsel's first witness on this issue was James Hensley. He testified that most of the pickets late on August 5, 1977, were grouped at a center point adjacent to the parking lot. Hensley recalled that second-shift employees emerged from the plant that night and seemed to be advancing on the pickets with clubs, conduit, and brick mold taped to their hands. Momentarily he saw Reese's pickup truck "screeching" to a halt, and when its doors flew open he heard a yell to watch out because Reese could have a gun. Hensley then saw an officer of the Union jump in and restrain Reese from reaching under his seat. Reese then backed crazily free, spinning his vehicle, throwing gravel, and soon hitting a stop sign. Hensley denied that Andy Anderson had a club at any time on the night in question. On the matter of whether any picket had a club, Hensley testified that he had not seen any. He termed the number of pickets as not exceeding 40, but in any event perhaps the largest assemblage up to that time. Jim Smith was a picket captain on the night of August 5, 1977. Smith was the person who yelled out that Reese had a gun as he saw the vehicle heading toward and scattering the pickets. He recalled how someone grabbed Reese's arm, and he broke loose and crazily backed away and into the stop sign. Smith denied that Andy Anderson was involved with Reese during these moments, and he administered to his friend when knocked down. Smith testified that about one-third of the emerging night-shift employees had weapons such as pieces of wood casing or metal conduit, and that a "few more than usual" number of pickets were present that night.

Douglass testified that he drove six or seven union members to the picket line, arriving about 12:55 a.m. and parking across the southerly exit road of the lot. His passengers included Tom Harris, Tom Young, Jerry Richardson (the Union's financial secretary and another Ochoco member employee), Andy Anderson, Jim Smith, and possibly Larry Stephens. He soon saw an emerging pickup being driven fairly fast and later "spitting up" dirt and gravel as it hit the stop sign after Harris had been on its running board. Douglass testified that to his knowledge none of the pickets or anybody transported in his car that night had weapons or clubs of any nature. Neither did he see any night-shift employee carrying any weapon or "instrument that could be [so] construed."

Alonzo Hayre testified that he was on the picket line that night and saw emerging employees holding clubs as they prepared to leave. He saw Close respond to being called a scab by "barrelling out," and then backing up abruptly causing Andy Anderson to be struck. Hayre denied that Andy Anderson had had a club at any time during the incident, and similarly denied that any pickets had any clubs or tire irons. Additionally, Hayre did not see or hear cars being hit, but did see a window of the Reese vehicle broken. Melvin Weger testified that he saw vehicles emerging from the parking lot, and that Close had reached the center of McKay Road without facing hindrance at the point that he backed through the picket line knocking Andy Anderson down. He had also observed the Reese vehicle, but saw no one atop it or that its doors were opened (until after it hit the stop sign). Weger denied that a large car of the type driven by Douglass was pulled across the southerly parking lot exit as to block it. In terms of menacing objects, Weger saw no pickets with clubs or tire irons, and believed that even picket signs were cast down when "trouble first started."

The General Counsel produced rebuttal testimony from Allen Dendy, who saw a few of the emerging employees with clubs but emphasized that picketers were mostly concerned with keeping clear of exiting vehicles. Dendy testified that Close had backed up recklessly without provocation, as Andy Anderson had not sported a club, picket sign, or any object in his hand during the incident. Larry Stephens testified that he did arrive in the Douglass car, and noticed Andy Anderson positioned at a more northerly point. Stephens denied that Andy Anderson had anything in his hands, or that any "Ochoco" boy had come around him after he was struck and on the ground. Andy Anderson himself testified that he, too, arrived with Douglass, and soon saw night-shift employees emerging belligerently. He testified to being approximately 25 feet away from the Reese vehicle as it came out, and that he was not carrying any sort of object.

3. Bruce Reed

As of July 1977 Bruce Reed was employed by the Respondent under the supervision of Terry Turner, who headed the shipping and finish departments. Reed testified that he was prepared to go on strike starting Monday, August 1, 1977, yet on the previous Friday he was asked to work on Saturday (July 30, 1977). He agreed to do so, but in fact neither showed up nor called in. He commenced picketing on a regular basis with other strikers on August 1, 1977, and eventually applied for reinstatement when the strike was over in November of that year. Further, he had gone into the Company on the Monday of the strike commencement to pick up the paycheck and was himself informed of having been terminated. Reed testified that he did not call in to advise he would not work on the prestrike Saturday because he did not have a telephone and because he doubted that his immediate supervisor would be there to reach anyway. He conceded to knowing that he was "supposed to call in" under such circumstances.

Terry Turner testified that it was customary to terminate employees for failure to call in after having been scheduled for work, and in Reed's case he personally prepared a "Report of Termination" dated July 30, 1977, with that as a basis. Such action was routed through the personnel office, and Lockyear acknowledged it by entering his initial on the paper.[14]

4. Tim Chandler

The backpay specification sets forth a claim for this individual from August 31, 1977, to July 10, 1978. He did

[14] Reed was reinstated around December 1977, and by March 31, 1978, had reached a point of job position and earnings rate that ended his claimed backpay period.

not testify, and the General Counsel argues his case only tangentially in the posthearing brief where reference made to his "situation being of a similar general category" as others.

The Respondent's Exhibit 11 is a document purportedly bearing Tim Chandler's signature which acknowledges a "final termination check" and was endorsed by Lockyear on August 31, 1977, to the effect that a termination from employment had been made because of "failure to call in as required by company rule." Lockyear also testified concerning Tim Chandler saying that this individual had worked during the strike and that business practice at the time was to solicit a signed slip from a person undergoing termination.

5. Kristie (Allison) Laudon

This individual commenced employment on August 2, 1977, immediately after the strike had begun. On September 12, 1977, she applied for membership in the Union, and thereafter picketed until the strike was over. She went in with others of a small group seeking reinstatement, and was eventually reinstated very early in 1978. The Respondent introduced a "Report of Termination" dated about September 10, 1977, in the handwriting of Supervisor J. E. Puckett. It recorded that Laudon had been "fired" for not calling in on the scheduled workdays of Friday, September 9, and Saturday, September 10, 1977, adding the comment of her being a "poor worker." Laudon recalled that Puckett had been her foreman over the 1-month span of her employment, but she denied having been fired because of, or at the time of, signing up for the Union. She was uncertain whether she had reported for work on the dates noted, or whether she had called in to report any intentions.

6. Janice Grimm

This individual testified that she had participated in the strike from its inception; however, financial difficulties caused her to inquire of Lockyear about returning to work after about a month. Her former job had been on the swing shift, and when Lockyear offered her an opening on the "graveyard cleanup" she declined. She subsequently received a letter dated October 10, 1977, which read:

> A JOB OPENING HAS DEVELOPED IN THE VINYL DEPARTMENT ON NIGHT SHIFT.
>
> AS THIS WAS YOUR DEPARTMENT AND SHIFT, YOU ARE BEING AFFORDED THE OPPORTUNITY TO FILL THAT VACANCY.
>
> ON SEPTEMBER 6, 1977, YOU EXPRESSED A DESIRE TO RETURN TO WORK. SEVERAL ATTEMPTS HAVE BEEN MADE BY TELEPHONE TO ADVISE YOU OF THE OPENING AND ALL HAVE BEEN UNSUCCESSFUL.
>
> THIS LETTER IS TO ADVISE YOU OF THE OPENING, AND TO LET YOU KNOW THAT THE VACANCY WILL BE FILLED IF YOU DO NOT RESPOND BY THURSDAY, OCTOBER 13, 1977.

Grimm testified that she did not respond to this communication, but later in October 1977 had a telephone conversation with Lockyear on the subject of retroactive packpay as had been received by others. He told her she was ineligible by reason of not being on the payroll after she had failed to respond to the letter and her position with the Company was terminated. Grimm continued picketing on a regular schedule until the strike ended; however, she did not apply with other union members because of Lockyear's advice the month before.

7. Kearon Kinsey

This individual participated in the strike from inception onward, but recalled receiving a written notice in October to return to work by a given date or have the job offered to another person. She did not respond to this letter, but about a week later, around early November, went to the company office and spoke with Lockyear and Frambes in the personnel office. She told them of needing her job, and their response was that she would be telephoned if an opening arose. This did not happen, and when the strike ended she reappeared as part of a group. Lockyear told her that she had been terminated because of not responding to the quoted letter.

Lockyear testified that Kinsey called in several times after going on strike wanting to resume work. He conferred with Stu Turner about her situation, and then wrote a letter dated October 11, 1977, which read:

> CONCERNING YOUR REQUEST FOR REINSTATEMENT, WE HAVE CONTACTED YOU SEVERAL TIMES REGARDING JOB OPENINGS, THE LAST TIME BEING TODAY 10-11-77.
>
> IF WE DO NOT HEAR SOMETHING POSITIVE FROM YOU BY 7:30 A.M. THURSDAY 10-13-77, WE WILL ASSUME THAT YOU HAVE FOUND SATISFACTORY EMPLOYMENT, AND ARE NOT INTERESTED IN RETURNING AT THIS TIME.

Stu Turner testified that he had made the decision to terminate Kinsey in November 1977, after she had been given a job at her request for which she failed to report for work or made any explanatory contact.

8. Wanda Freese

This individual testified that she had been a day-shift employee in the Respondent's finish department, and participated in the strike from its inception to its conclusion. She then routinely applied for reinstatement as did others, and recalled being interviewed by Lockyear. She told him in response to inquiry about availability that she would accept any job except that "night work would be almost impossible" because she had children ages 15, 13, and 7 to care for at home. Freese testified that Lockyear was writing all the while, that he did not particularly respond to her remarks about not wanting night work, and that on being thanked she left.

In January or February 1978 Lockyear contacted her about a job opening on nights; however, she adhered to

her point that it would be "really . . . hard." She thus declined the offer, recalled that Lockyear seemed to understand her grounds and left the impression he would call again. In fact, Freese was fully reinstated in mid-April 1978.[15]

9. Jim Smith

This individual was one of the group applicants that appeared in conjunction with the strike being terminated. He testified that when he reported in Lockyear had asked whether he was able to work, to which he answered affirmatively saying only that a bruised knee was causing him to limp slightly. Arrangements were then made for examination by a company doctor; however, Smith recalls that the actual appointment did not materialize until March when the medical release was signed by Dr. Thomas L. Bristol. Smith testified that his injury had occurred while doing work in the woods, which he continued with there for a time. Further, he recalled having been previously seriously injured while an employee of the Respondent in the past and without missing any work.

Smith had been on Employee Benefits Insurance (E.B.I./Workmen's Compensation) from December 13, 1977, to March 5, 1978. A physician's report on occupational injury by Dr. Bristol on October 31, 1977, had diagnosed bruised ligaments of the knee not preventing a return to regular employment; however, a later examining physician, John P. Carroll, had summarized clinical findings with a recommendation of continued physical therapy, weight bearing only as tolerated, and "probably no return to work for 3 to 4 weeks." Dr. Carroll's report was dated December 20, 1977.

10. James Hensley

This individual testified that he made routine application for reinstatement when the strike ended, but was not contacted until at least 3 weeks had passed. He then learned that Lockyear had been trying to reach him, and when he appeared at the company office along with employee Don Pemberton, Lockyear offered him a night-shift job rather than one on days which he had previously worked. Hensley angrily declined, testifying that he left Lockyear's office but first saying his action should not be construed as a quit. He had no contact since, and the General Counsel contends that his backpay period continues to run.

Lockyear testified that he had conversed with Hensley in early January, and had a return to work offer angrily refused. Upon this Lockyear prepared a report of termination dated January 10, 1978, recording that Hensley had "quit" while remaining "very mad" at the Company.

11. Carl Chancellor

This individual testified that he had engaged in the first 2 weeks of the strike and then looked for a job at Dalles, Oregon, about 125 miles from Prineville. He maintained his principal residence in Prineville and frequently returned to the local area over the succeeding months. On two or three such occasions he saw Lockyear personally to inquire about the status of things and chances of returning to work with the Respondent. Additionally, he provided Lockyear with his temporary address at The Dalles. Carl Chancellor did not go in with the main groups of persons seeking prompt reinstatement after termination of the strike; however, he did contact Lockyear further during that general point in time on two separate occasions. He testified that Lockyear told him "that there wasn't any chance of me coming back to work." Carl Chancellor had on at least one occasion bitterly expressed to Faye Jordan and other union members that he would never again take a job with the Respondent, and that he denied ever making such an utterance to anyone in management. The Respondent never made a job offer to him and, as with Hensley, the General Counsel contends that the backpay period continues to run.

Lockyear testified that he knew Carl Chancellor as an employee of the paint line. He recalled that prior to the end of the strike Chancellor had once come to him asking for his job back. Lockyear noted that in such instances over the August-November 1977 time span there were cases in which such individuals were returned to work and other cases in which they were not. On March 7, 1978, Lockyear endorsed Carl Chancellor's employment card with the notation, "failed report to work after strike/Nov. 28, 1978 [sic]." Lockyear testified that around that point in time of March 1978 Carl Chancellor had come into his office saying that he decided to stay with his job at The Dalles where he earned more money than with the Respondent. Lockyear believed that was the last meeting of significance he ever had with Carl Chancellor.

12. Connie and Jerry Miller

These persons are husband and wife. Neither of them testified in the course of the hearing, and evidence concerning their employment status is confined to certain personnel records assembled as the Respondent Exhibit 20. As to Connie Miller a report of termination initially dated "7-2-77" (presumably meaning August 2, 1977) was handwritten by a supervisor. In the portion contemplating a "Reason For Termination" the following was entered:

> Connie would not cross the picket line, sent word in she wanted to quit (by Phone).

A second document purporting to be a handwritten note to the file states:

> Miller's phone has been disconnected, I could not get ahold of Connie.
>
> If she calls in, maybe she will come down and sign this termination.

[15] The backpay specification alleges April 25, 1978, as the date to which backpay is claimed for Freese. However, associated appendix S-2 states that Freese had been reinstated by "p[r]e 4-15-78," which I interpret to mean during a payroll period ending Saturday, April 15, 1978. Further, the appendix states that this reinstatement resulted in "her proper post-strike [hourly] rate" of $4.41. I note this ambiguity, and presume that the appendix controls.

A final document relating to Connie Miller is an employment card showing a "Termination Date" of August 10, 1977, with the notation, "would not cross picket line, sent word by phone she wanted to quit." The sole document in evidence concerning her husband Jerry Miller is another employment card showing his termination date as August 10, 1977, with the notation "joining Police Dept." It was stipulated between the parties that in fact Jerry Miller never joined a police department after commencement of the strike.

13. Dean Churchill

This individual testified that he first worked for the Respondent in the summer of 1976 on a part-time summer basis. He then commenced student status at Central Oregon Community College (C.O.C.C.) as a biology major. In the summer of 1977 he applied for a full-time job and was working the night shift in that status when the strike commenced. When the college semester at C.O.C.C. began in the fall of 1977 Churchill enrolled for 10 credit hours, indicating in his testimony that this was not "a real high credit load" but was what he had elected to do "because I didn't have anything better to do." Churchill testified that when the strike was over he went to a union meeting and was told that persons would be sent back in small groups. Late that same afternoon he was in a group which went to the company office where he talked with a person whom he cannot now recall or identify. He did describe his appearance as being in a reception room, and that the group he was with comprised four to five individuals. He recalled being told at the time that he would be called back, but had no further contact with the Respondent until applying for work sometime during 1978.

Frambes testified that he had contacted Churchill by telephone in early 1978 to offer an available job. He recalled Churchill telling him of not being available for work because he was either attending school at the time or on the verge of going back to school. Frambes later completed a report of termination on Churchill dated January 31, 1978, indicating he was terminated on the following basis:

> When called to work from strike, he said he was back in college & not interested in working at this time . . . .

14. Richard Zimmerman

This individual testified that he went out on strike with the other employees on August 1, 1977, but by the time it ended he was working in Corvallis, Oregon. As of late November 1977 his family was still in the Prineville area, and in connection with a short visit home from his 6-day work schedule in "the valley" Zimmerman learned that union members were starting to go back for their jobs. Zimmerman testified that he went to the company office and found "a bunch of people there" waiting for interviews. Being pressed for time in terms of traveling the approximately 140 miles to reach his workplace in Corvallis, Zimmerman spoke hurriedly with a receptionist, telling her that he was able to resume work at any time and leaving both his then current local and valley address. He saw the receptionist write the addresses down; however, he does not know her name nor can he now make any physical description after the passage of years. Zimmerman testified that about a month after this episode he received a letter from the Respondent and a check for around $100 in "back wages." A job offer was never made to Zimmerman, and the General Counsel again contends that his backpay period continues to run.

B. *Search for Work/Interim Earnings*

As among the several dozen claimants, there is considerable diversity with respect to their efforts at, and success in, obtaining interim employment from and after termination of the strike. Part of this diversity stems from instances in which employment was secured prior to such termination in late November 1977, while another main part stems from differing perceptions and/or motivations with respect to seeking work of any nature following the group interviews of reinstatement applicants, all in the context of the 1977–78 winter job market in central Oregon as complicated further by imminence of the yearend holiday season.

In this general sense there are certain principles which apply. An employer may mitigate backpay liability by showing that a claimant "willfully incurred" loss by "clearly unjustifiable refusal to take desirable new employment." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941). This is an affirmative defense, with a burden on the employer to prove necessary facts. *NLRB v. Mooney Aircraft*, 366 F.2d 809, 813–814 (5th Cir. 1966). An employer does not meet that burden by presenting evidence of lack of employee success in obtaining interim employment, or that low interim earnings resulted. Rather, the employer must affirmatively demonstrate that the employee "neglected to make reasonable efforts to find interim work." *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 576 (5th Cir. 1966). Furthermore, while a discriminatee must make "reasonable exertions" to mitigate his loss of income, he is not held to "the highest standard of diligence." *NLRB v. Arduini Mfg. Corp.*, 394 F.2d 420 (1st Cir. 1968). Success is not the measure of sufficiency when discriminatees seek to achieve interim earnings; the law "only requires an honest good faith effort." *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955). In determining reasonableness of this effort, the employee's skills and qualifications, his age and labor conditions of the area are factors to be considered. *Mastro Plastics*, 136 NLRB 1342, 1359 (1962). In determining whether an individual claimant has made a reasonable search, the test must be whether the record as a whole establishes that the employee had efficaciously sought other employment during the entire backpay period. *Saginaw Aggregates*, 198 NLRB 598 (1972); *Nickey Chevrolet Sales*, 195 NLRB 395, 398–399 (1972). Finally, it is also well established that any uncertainty in the evidence is to be resolved against a respondent as wrongdoer. *Miami Coca-Cola Bottling*, supra; *Southern Household Products*, 203 NLRB 881 (1973).

Here some individuals found and maintained jobs in distant parts of the State, while others worked regularly

in the Prineville vicinity with various manufacturing, retailing, service, or miscellaneous employers of the area. The subject was illuminated by Arthur Bigelow, former office supervisor for the Oregon State Employment Service at Prineville from 1975 until mid-1978. Bigelow characterized employment opportunity in the lumber processing industry during the 1977–78 winter as one of the "better years," without the usual "down drop that we normally had" but instead remaining "fairly steady." He recalled the receipt of requisitions for job applicants from "various mills," including American Forest Products Company (formerly Bendix and Coin) and, surprisingly, even Consolidated Pine. Bigelow remembered the unemployment rate at the time as being around the "normal" 5 to 6 percent, and he contrasted that with a current 12 to 15 percent. Testimony on the job market profile was also offered by Ray Gould, an individual of many years' experience in the wood products industry and now employed by American Forest Products. His examination of hiring records for that firm showed that 71 persons were hired over the 3-month period of November 1977–January 1978 (18–18–35), inclusive. Gould testified that these hirings were into "plant jobs"; however, he had no specifics as to their wage rates and job categories, or as to which operational function needed such staffing.[16]

Art Fitzgerald, resident manager of American Forest Products in 1977 and currently, testified that the winter 1977–78 hirings were a reflection of different reasons, including "business conditions pick[ing] up."[17]

Lenny Lyle, vice president of administration for Les Schwab warehouse center in Prineville, testified that he has been with this retread tire production and distribution company for 12 years. In the span November 1977–January 1978 this firm hired seven nonoffice employees for entry level positions in either the retread plant or the distribution center.

Ellsworth Wright, general manager of Bend Millworks Company, testified that his firm is another direct competitor of the Respondent and utilizes practically identical equipment. In early 1978 Bend Millworks reached a total complement of over 600 employees, which represented the early operational phase of "a very good year." The plant is at the north end of Bend, an estimated 45-minute drive from Prineville. Wright estimated that, over a time span of November 1977 into part of February 1978, Bend Millworks was hiring at a rate of 30 to 60 employees per month. He tended to believe that this influx would include both skilled and unskilled persons. As Gould had done, Wright testified that these would be no impediment to a qualified person being hired for an active job opening simply because of being, or recently having been, on strike such as was the case at Clear Pine.

Against this background the Respondent contends generally that there has been a pervasive failure to mitigate damages by claimants, and that interim earnings were available to those not willfully idling themselves from employment. The Respondent attacks the implication of futility and needlessness as associating with testimony of some discriminatees,[18] by naming Colleen Maw, William R. Carter, Art Morton, Jordan, Debbie Miller, and Hayre as persons possessed of no anticipation that they would immediately return following the strike. The Respondent also points to the great number of individuals who simply registered for, and usually received, unemployment compensation benefits, but concededly engaged in no search for work or did so only with desultory effort.

C. *Credibility*

As a component of this litigation, the resolution of credibility arises only spottily in particular instances of whether the employment relationship survived some particular episode or sequence, plus the massive diversity of testimony respecting the eventful night of August 5, 1977, and the issue concerning any verbal threats of which Sittser is accused.

In general, I am satisfied that the Respondent's personnel records have a homespun integrity sufficient to give them ordinary weight. This, in turn, affects those issues as to which such records tend to corroborate to claimed experiences and actions of Stu Turner, Lockyear, and Frambes.

I cannot credit Kearon Kinsey, whose testimony was hesitant, vague, and unpersuasive. On this issue I credit Lockyear, whose demeanor and detail of recall respecting Kinsey was convincing. Further, I find Stu Turner creditable in this instance, particularly when tying in his recollection with the fact that Kinsey's husband was a valued employee at the plant.

I credit Hensley over Lockyear in terms of any disparity that exists between their respective versions of his poststrike interview concerning employment. Similarly I credit Carl Chancellor over Lockyear on the point of this claimant maintained an interest in returning to work, about which the Respondent did know or should have known. In these two instances the Respondent's documentary evidence to the contrary is rejected as erroneous recordation by Lockyear.

I credit Frambes in regard to his recollection that he extended a job offer to Churchill around January 1978, and that it was declined. There is another element to the backpay eligibility issue regarding Churchill, and it will be treated in the resolution below.

I credit the sincere-seeming Freese and Zimmerman with respect to their respective contacts about resuming work. In the scheme of things their recollections were

[16] The Respondent reserved the right to recall Gould at a point in the hearing when he would be better equipped with documents and clarification; however, this right was not later exercised.

[17] Gould had testified on July 15, 1982, while Fitzgerald testified during resumption of hearing on August 20, 1982. The Respondent did not announce that Fitzgerald was intended to enlarge on Gould's testimony, but to the extent this occurred the failure to recall Gould becomes all the more understandable and I draw no inference adverse to the Respondent because of this configuration. A composite of their testimony establishes that American Forest Products is a direct competitor of the Respondent, is located close by, and exhibits great operational similarity including equipment used and products manufactured.

[18] The General Counsel argues exactly to the contrary, asserting in his brief that involved employees "realistically thought" they would resume working soon after ending their strike, and that in any event a "discouraged" outlook was "understandable."

contradicted by implication; however, I am satisfied that they have each conscientiously set forth accurate facts.

As to the situation of Sittser's claimed misconduct, I credit Respondent witnesses Clark, Wright, and Webb on demeanor grounds. Sittser was himself evasive and unconvincing in his denials of what was attributed to him, and this frailty surfaced in yet other areas of his overall backpay claim. To the extent that Hayre supported Sittser's version, I reject that testimony also.

As to events around 1 a.m., Saturday, August 6, 1977, immediately following the night shift having completed its work, I give primacy credence to the testimony of Close, Payne, Sherrer, Jones, Hardt, former police officer Robert Anderson, Johnson, Webb, and Tucker. The critical fact emerging from this array of witnesses is that Andy Anderson carried an object like a wooden Indian club to the hectic confrontation, and used it to hammer on passing vehicles until knocked to the ground by Close's reversing manuever. I believe this interpretation harmonizes with all probabilities of the situation, particularly when intriguing testimony of Hayre is read in connection with that of Douglass. The former quite openly described key individuals associated with the picket line as apparently inebriated, while the latter all but conceded how "in effect" his large automobile had blocked off normal egress from the plant parking lot. This translates into an inference that Anderson, as part of these dynamics, went to the scene equipped and ready to engage in pugnacious behavior.

Findings of Fact and Resultant Conclusions of Law

On the individual eligibility issues I hold as follows:

1. Bruce Reed cannot be considered validly terminated prior to acquiring status as an unfair labor practice striker. That was his plain intention, and the intervening circumstance of an overtime assignment should not be available to this Employer in frustration of that objective.

2. The Respondent's documentary evidence concerning Tim Chandler is sufficient to demonstrate that he was routinely terminated after a spell of working with the strike in progress.

3. The Respondent's documentary evidence concerning Kristie Laudon is sufficient to demonstrate that she had similarly been routinely terminated after being hired with the strike in progress.

4. The Respondent's documentary evidence concerning Janice Grimm is sufficient to demonstrate that she displayed such equivocation toward employment with the Respondent in late 1977 that she either abandoned the strike, or failed to give notification of any interest in reinstatement which, in her particular case, was a prerequisite to backpay entitlement.

5. The Respondent's documentary evidence concerning Kearon Kinsey is sufficient to demonstrate that she abandoned the strike and was validly terminated with finality effective October 13, 1977.

6. Wanda Freese did not waive any entitlement to reinstatement, nor did she fail to accept an appropriate job offer at any time prior to the end of her backpay period.

7. The medical evidence respecting Jim Smith is somewhat inconclusive; however, the express entry by Dr. Carroll to the effect that Smith should not return to his regular work until well into January 1978 is sufficient to justify the Respondent's delaying reinstatement here. This serves to overcome Smith's opinion of self-capability and other subjective evidence that would show an earlier ability to work. However, the Respondent's overall delay into March 1978 was not adequately explained, and for this reason I hold that Smith is entitled to one half of the amount calculated for the first quarter of 1978, or the reasonable net backpay figure of $2,682.

8. The fundamental issue of how the mechanism of effectuating employee return to work following the strike is one on which I hold for the claimants. The Union's notification of strike termination and desire for reinstatement was resoundingly unconditional. The testimony of Regional Council No. 3 Vice President John Kocker shows convincingly that such was the intent and purpose of striking union members, and no authority reposed outside this crew for any variance. Stu Turner's responsive letter did not shift the burden of notifying employees to the Union, and attorney Newcomb's testimony does not yield this result, particularly when he concedes that no contrary agreement was reached in any binding sense. The Union's participation in sending up groups of employees for registration and company followup was a mere accommodation to the situation and its own desire to see members promptly working again. See *J. H. Rutter-Rex Mfg. Co.*, 158 NLRB 1414 (1966).

9. The Respondent failed to meet its duty of extending a valid offer of reinstatement to James Hensley.

10. The Respondent failed to meet its duty of extending a valid offer of reinstatement to Carl Chancellor.

11. The Respondent's documentary evidence concerning Connie and Jerry Miller is sufficient to demonstrate that they did not engage in the strike and each abandoned their employment immediately thereupon.

12. Dean Churchill was not shown by convincing proof to have attained striker status and, alternatively, declined a valid, timely offer of reemployment. Because of this he is removed from any backpay entitlement.

13. The Respondent failed to meet its duty of extending a valid offer of reinstatement to Richard Zimmerman.

14. Rodney Sittser made verbal threats of injury or adversity to several individuals; however, these were unaccompanied by action and did not recur over the several following months in which the strike continued. The Respondent has overreacted and is woefully without justification in contending that Sittser engaged in disqualifying misconduct. His backpay claim is confirmed, except for a reduction of $4,000, calculated as constructive intrafamily interim earnings of $500 per month for the 8 months of January-August 1981, inclusive. See *Midwest Solvents v. NLRB*, 696 F.2d 763 (10th Cir. 1982).

15. Andy Anderson engaged in picket line misconduct by tapping on exiting vehicles with an ominous, clublike object, and generally menaced nonstriking employees in the several moments of a single fractious confrontation. This is the "animal exuberance" which the Board ex-

cuses, and I again conclude that the Respondent has baselessly seized on limited happenings in a fruitless effort to escape major monetary liability. I confirm the backpay claim of Anderson. See *Coronet Casuals*, 207 NLRB 304 (1973).

16. As a matter of law the Respondent has not convincingly shown that any employee failed to mitigate damages by their conduct following the strike. The situation allowed a reasonable belief that reinstatement could occur any day, and the testimony of management officials from other wood products firms in the area, and from state functionary Bigelow, does not establish jobs readily available to these claimants. There is no correlation between the number of applicants and the hires actually processed, and the wide diversity between those who achieved interim earnings and those who hopefully waited is the exact illustration of human variances contemplated in the *Phelps Dodge* line of cases. I also expressly find that Don Pemberton's temporary presence in California during an early part of the backpay period was not a disqualifying removal from labor market prospects.

17. The only evidence with respect to financial loss stemming from the unilaterally substituted health care plan is testimony by Lauren Kelhoyoma to the effect that he has been "getting stuck" with annual deductibles of up to $200 under the new plan. The Respondent introduced a letter of Aetna Account Executive John Bayless dated June 23, 1981, stating that the substitute contract was a "duplicate plan of benefits." Kelhoyoma termed benefits of the old plan "more or less" paying off, and I cannot accept that the General Counsel has seriously pressed his branch of the litigation. Given the enormous complexity of industrial health care plans, the meager evidence on the point is insufficient as a basis for any finding of liability running to the Respondent.

RECOMMENDED ORDER[19]

The Respondent, its officers, agents, successors, and assigns, shall pay to each discriminatee the sum set opposite his or her name on the attached net backpay recapitulation marked "Appendix," together with interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[20] Individual amounts to persons for whom no valid offer of reinstatement has yet been made are subject to adjustment based on projections from and after August 31, 1981.

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[19] If no exceptions are filed as provided in 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.

[20] Dendy's sum is reduced by the conceded amount of $200, which Darlene Forsyth's is reduced by $187 for a medical expense item incurred outside her backpay period. Sums listed for Juanita Burr, David Fuller, Kenneth Heitz, Eunice Rice, and Larry Chancellor shall be transmitted to the Regional Director for Region 19, to be held in escrow of 1 year with disbursal or return as appropriate.