Golden Stevedoring Co., Inc. *and* International Longshoremen's Association, AFL–CIO, South Atlantic and Gulf Coast District. Cases 15–CA–13334, 15–CA–13394, 15–CA–13610, 15–CA–13870, 15–CA–13871, 15–CA–14186, 15–CA–14209, and 15–CA–14314

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On July 28, 1998, Administrative Law Judge Keltner W. Locke issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed cross-exceptions, a supporting brief, and an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified[2] and set forth in full below.

1. The General Counsel has excepted to the judge's dismissal of the complaint allegations that the Respondent violated Section 8(a)(3) and (5) of the Act by its postelection change in policy for allocating, unloading, and recouping work between unit and nonunit (temporary) employees, thereby reducing the hours of work for bargaining unit members. After carefully reviewing the record in light of the General Counsel's exceptions, we have decided to affirm the judge's finding that the General Counsel failed to show that a change in work assignments occurred.

In this connection, we observe that the judge either discredited the General Counsel's witness or found that their testimony lacked probative value. In contrast, the judge explicitly credited the testimony of the Respondent's witnesses that after the election there was no change in work assignment practices. The General Counsel has failed to show that the judge's credibility resolutions are inconsistent with documentary evidence or otherwise contrary to the clear preponderance of all the relevant evidence. In his exceptions, the General Counsel relies heavily on charts (based on payroll records) comparing the percentage of total hours that "regular" and "temporary" employees worked before and after the Union's certification. This evidence, however, is insufficient to overcome the force of the credited testimony chiefly because the General Counsel has included in his computations hours worked by employees who did not perform the specific unloading and recouping tasks in issue.

Accordingly, we find no merit in the General Counsel's exceptions, and we adopt the judge's dismissal of the relevant complaint allegations.

2. The Respondent has excepted to the judge's finding that the strike which employees engaged in between January and November 1996 was an unfair labor practice strike. The Respondent also excepts to the judge's finding that two letters sent to Union Organizer George Bru in February 1996 contained unlawful threats to have him arrested. As explained below, we do not agree with the judge's finding that the strike was an unfair labor practice strike, but we agree with his finding that the Respondent unlawfully threatened to have Bru arrested.

The Strike

a. Background

The Union won a Board-conducted election on July 12, 1995, and was certified as the employees' bargaining representative on July 21, 1995. Thereafter, the parties began negotiations for a collective-bargaining agreement. Bargaining continued with no success until January 23, 1996. That evening, the Union held a meeting with employees to discuss the status of bargaining.

According to Union Organizer George Bru, he opened the meeting by reading to the employees the Respondent's proposed contract. The employees unanimously voted to reject it. Following this vote, Bru explained the difference between an economic strike and an unfair labor practice strike. He cited as examples of unfair labor practices concerns he had heard employees express about what they believed to be the Respondent's harsher en-

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

Although the Respondent excepted to the judge's finding that it violated Sec. 8(a)(1) and (3) by suspending employees Autry, Burrell, and Scott on July 20, 1995, the Respondent failed to provide specific supporting argument in its brief.

[2] We shall modify the recommended Order to provide a remedy for the creation of impression of surveillance violation found by the judge, which he inadvertently failed to include. Additionally, we shall modify the recommended Order to conform with *Indian Hills Care Center*, 321 NLRB 144 (1996). Also we shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001). Finally, the judge inadvertently failed to provide the standard case citations for the computation of the make-whole remedies. We shall correct this oversight.

forcement of safety rules and the Respondent's use of temporary employees.[3] Bru also testified that he opened the floor for discussion and an employee mentioned another unfair labor practice charge pending before the Board at that time.[4] Bru further testified that a union attorney told the group that, in his opinion, the Board would find merit in the Union's charges and deem a strike to be an unfair labor practice strike. Finally, Bru testified that Union Representative Benny Holland told the employees as follows:

> We were at a stand still. We rejected the last proposal by the employer. [Holland] said now it's up to the body to decide what they want to do, whether or not we should continue as we are in negotiating, trying to negotiate, or continue to move in the pace we were going. And that's no where. We weren't moving anywhere. So [Holland] suggested that we vote to strike.

The employees then voted unanimously in favor of striking.

Employee Wyatt was the only employee who testified about the strike vote. He testified that the first topic of the strike meeting was the failure to make progress in contract negotiations. He recalled that, at the meeting, various employees had said that if they accepted the Respondent's proposal the treatment of employees would not change; that the Respondent might offer money, but would not change the way it treated employees; and that the employees would not get what they wanted in benefits and treatment if they did not strike. When asked for specifics about mistreatment, Wyatt replied, "Mainly being knocked out of hours, temporaries coming in and replacing you when you should be working. The harassment about seat belts and hard hats and all this type stuff." Then, according to Wyatt, the Union's attorney stated that a strike regarding money would be an economic strike, but that "the unfair labor [practice strike] was what we was after [so] that we couldn't be replaced."

b. The judge's conclusion

The General Counsel contended that the Respondent violated Section 8(a)(5) of the Act by unilaterally changing enforcement of safety rules and by using temporary employees to perform work previously performed by unit employees, and that these unfair labor practices were a motivating factor in the decision to begin the strike. The judge dismissed both complaint allegations. Nonetheless, he found the strike was an unfair labor practice strike based on his finding that the Respondent violated Section 8(a)(5) of the Act by unilaterally changing its disciplinary policy from a system of oral reprimands to written warnings. According to the judge, Bru's strike meeting discussion of employee concerns regarding changes in safety procedures was broad enough to encompass the change in the disciplinary policy. Thus, the change in the disciplinary system must have been one of the reasons the employees voted to strike. Therefore, the judge concluded that the strike was an unfair labor practice strike from its inception.

c. Discussion

It is well established that a work stoppage is considered an unfair labor practice strike if it is motivated, at least in part, by the employer's unfair labor practices, even if economic reasons for the strike were more important than the unfair labor practice activity. See *Burns Security Services*, 324 NLRB 485, 492 (1997), enf. denied on other grounds 146 F.3d 873 (D.C. Cir. 1998). It is not sufficient, however, merely to show that the unfair labor practices preceded the strike. Rather, there must be a causal connection between the two events. *See John Cuneo, Inc.,* 253 NLRB 1025, 1026 (1981). In sum, the unfair labor practices must have "contributed to the employees' decision to strike." *RGC (USA) Mineral Sands*, 332 NLRB 1633 (2001).

Here, the record fails to show that any unlawful conduct contributed to the employees' decision to strike. As stated above, the employees were upset about the enforcement of safety rules and the use of temporary employees, but the judge found, and we agree, that neither the safety rules enforcement nor the use of temporary employees constituted an unfair labor practice. The judge did find, and again we agree, that the Respondent violated Section 8(a)(5) by changing its disciplinary policy from a system of oral reprimands to written warnings. Contrary to the judge, however, we cannot find any evidence that the employees "were motivated by [this] unfair labor practice" when they decided to strike. Most significantly, no witness who was present at the strike meeting made any reference to this issue. Rather, the record indicates that in deciding to strike the employees were motivated solely by conduct that has not been shown to constitute an unfair labor practice, i.e., the enforcement of safety rules, the use of temporary employees, and the Respondent's contract proposal.

In essence, the judge inferred that because the employees had complained to Bru about being harassed on safety violations, "[t]hose complaints must certainly have embraced the unilateral change in discipline which the government has proven violative." The record, however, fairly considered as a whole, does not support the judge's

[3] These matters were the subjects of union unfair labor practice charges and complaint allegations, but, as discussed infra, the judge found that the Respondent's conduct did not violate the Act.

[4] The General Counsel did not issue complaint on the charge about which the employee spoke.

inference. In sum, it is simply not possible to conclude on the basis of the employees' general testimony about "harassment" that any concerns they may have had about "formalization" of the disciplinary procedure, by substituting written for oral warnings, contributed to their decision to strike.

Accordingly, we conclude that the strike which commenced on January 29, 1996, was an economic, rather than an unfair labor practice, strike, and we shall modify the recommended Order accordingly.[5]

Notwithstanding this modification, we adopt the judge's ultimate conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate Burrell on January 21, 1997, when he advised the Respondent of his availability, desire, and fitness for work. In this connection, it is well established that economic strikers must be reinstated upon application, absent a legitimate and substantial business justification, such as permanent replacement. See *Associated Grocers*, 253 NLRB 31, 32 (1980), enfd. 672 F.2d 897 (D.C. Cir. 1981); see also *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). Here, the Respondent does not defend against the refusal to reinstate allegation on the ground that Burrell had been permanently replaced, and the judge properly rejected the other business justifications the Respondent offered.

Our dissenting colleague argues that the Respondent's refusal to reinstate Burrell in January 1997 was lawful because it had previously offered him reinstatement in November 1996. For the following reasons, we reject the dissent's contention.

The relevant facts can be summarized as follows. In November 1996, following the Union's unconditional offer to return on behalf of the strikers, Burrell received a letter from the Union's attorney notifying him to report back to work. At that time, however, Burrell had a cast on his leg due to an injury sustained while working for a different employer during the strike. Burrell went to the Respondent's president, Edgard Gonzales, to explain that he wanted to return to work as soon as he obtained a medical release. Gonzales' own credited testimony establishes that he agreed to reinstate Burrell when a medical release was obtained.

On January 9, 1997, Burrell's doctor gave him a release to return to work on January 20, 1997. On January 21, 1997, Burrell reported to Gonzales' office with his doctor's release, ready to work. When told that Gonzales was busy, Burrell left his doctor's release and his phone number on Gonzales' desk. Burrell then advised Superintendent Johnson that Burrell was ready to report to work. Johnson told Burrell that he had to talk to Gonzales. Later that day, when Burrell returned to Gonzales' office, Burrell was told that Gonzales had left for the day. In short, the Respondent did not reinstate Burrell on January 21, 1997, and gave him no explanation for its failure to do so. Two months later, on March 26, 1997, the Respondent sent a letter to Burrell telling him to return to work by April 14, 1997.

On these facts, our dissenting colleague would find that the Respondent's reinstatement offer, conveyed to Burrell through the Union in November 1996, which Burrell was unable to accept because of his injury, relieved the Respondent of any obligation to reinstate Burrell in January 1997, when he was released for duty. We do not agree.

Under well-established Board law, an employee is afforded "a reasonable period of time to determine if he wishes to accept or reject the [reinstatement] offer and during which he can, if he accepts, take those steps necessary to return to work pursuant to the offer." *Fredeman's Calcasieu Locks Shipyard*, 208 NLRB 839 (1974), enfd. mem. 493 F.2d 663 (5th Cir. 1974). There is no per se rule establishing what constitutes a "reasonable period of time." Rather, "[w]hat constitutes the 'reasonable time' will depend essentially on the situation in which an employee finds himself." Id. Accord: *Esterline Electronics Corp*., 290 NLRB 834 (1988). See, e.g., *Creutz Plating Corp*., 172 NLRB 1 (1968) (respondent required to keep offer of reinstatement open longer than 6 months in order to allow ill employee sufficient time to recover).

We find the above principles applicable to Burrell's situation. In November 1996 when the Respondent offered him reinstatement, Burrell was unable to work due to his injury, and he so informed Gonzales. Gonzales promised Burrell that he could return to work when he obtained his doctor's release. On January 21, 1997, Burrell reported to the Respondent with his doctor's release, ready to return to work. He was not reinstated.

Under these circumstances, we cannot agree with our colleague that the Respondent's reinstatement obligation expired in November 1996, when Burrell was unable to return to work. Rather, in accord with Board precedent, we find that the reinstatement offer continued for a rea-

[5] Specifically, we shall amend par. 3 of the judge's Conclusion of Law and modify par. 1(d) of his recommended cease-and-desist order to reflect our finding that employee Donald Burrell was an economic, not an unfair labor practice, striker.

Our reversal of the judge's unfair labor practice strike finding does not affect any other aspect of the judge's remedy.

sonable period of time.[6] Further, we find that, given Burrell's inability to work because of his injury and the Respondent's express promise to reinstate him when a medical release was obtained, a reasonable period of time continued until January 21, 1997, when Burrell notified the Respondent that he was able to work. See also *NLRB v. Mooney Aircraft*, 61 LRRM 2164, 2165–2166 (5th Cir. 1966), contempt proceeding on order in 138 NLRB 1331, 1333 (1962), enfd. 328 F.2d 426 (5th Cir. 1964) (finding it unreasonable for an employer to refuse to extend an offer of employment considering the wrongfully discharged employee became ill within the fixed reporting time). Thus, on January 21, 1997, the Respondent unlawfully failed and refused to reinstate Burrell in violation of Section 8(a)(3) and (1) of the Act.[7]

Threat of Arrest

For the reasons set forth below, we adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act by threatening to cause the arrest of Union Official Bru if he engaged in protected activities on the Alabama State Docks.

The Respondent and other stevedoring companies lease property from the Alabama State Docks Department. The entire State facility is fenced and policed by a security force. A State road cuts through the facility.

As stated above, the Union is the employees' certified bargaining representative. When the Respondent's employees began their economic strike on January 29, 1996, the State Docks Department designated a gate through which the Respondent's employees were to pass, and another gate (the main gate) for all other employees. The Union picketed at the gate designated for the Respondent's employees. Shortly after the strike began, Union Agent Bru learned that some of the Respondent's nonstriking employees were using the main gate. He complained to the chief of the State Docks police force, who told him that he needed to provide proof that the main gate had been "tainted" before the Union could lawfully picket the main gate.

Accordingly, Bru stationed a striker at the main gate to observe who entered. On February 1, 1996, the observer called to inform Bru that he had seen some of the Respondent's employees passing through the main gate. Bru immediately drove on the State road passing through State Docks property to the Respondent's maintenance garage. Bru remained in his car, which he parked on the side of the State road, to photograph license plates of cars parked near the Respondent's maintenance garage. Bru did not enter the Respondent's leased premises.

On February 2, 1996, one of the Respondent's secretaries[8] delivered to Bru a letter signed by the Respondent's president, which stated:

> On Thursday, February 1, 1996, you were observed in the parking lot adjacent to the Golden Stevedoring Co., Inc., new maintenance shop at approximately 7:50 a.m. You appeared to be taking down the license tag numbers of employees of Golden Stevedoring, Co., Inc.
>
> You have no legitimate business on the leased property of Golden Stevedoring, Co., Inc.
>
> THIS IS A WARNING! You will be trespassing in violation of the laws of the State of Alabama if you enter the leased property of Golden Stevedoring Co., Inc., without my written permission.

On February 20, 1996, Bru again entered the State facility to investigate whether any of the Respondent's nonstriking employees had used the main gate. This visit prompted a second letter, dated February 21, 1996, and signed by the Respondent's president, which stated in part as follows: "THIS IS A SECOND WARNING! . . . Further trespassing . . . will result in a warrant being issued for your arrest."

"It is beyond question that an employer's exclusion of union representatives from public property violates Section 8(a)(1), so long as the union representatives are engaged in activity protected by Section 7 of the Act." *Bristol Farms*, 311 NLRB 437 (1993). On February 1, 1996, Bru drove on a State road nearby the Respondent's maintenance garage to investigate reports that the main gate had been tainted. The record shows that on that day Bru remained on public property and did not enter the Respondent's leased premises. Clearly, then, the Respondent's February 2, 1996 threat to have Bru arrested

[6] We reject the dissent's attempt to distinguish the above-cited cases on the ground that they involve "discriminatee[s]" while Burrell "was simply a striker who could not accept the reinstatement offer when it was made." Like a discriminatee, Burrell was entitled to an offer of reinstatement. Indeed, the dissent concedes this point. Further, it is well established that the reinstatement rights of economic strikers, like the reinstatement rights of discriminatees, are based on the statute. See *Brooks Research & Mfg.*, 202 NLRB 634, 636 (1973). In sum, there is no legal basis for the distinction the dissent draws between discriminatees and strikers or for its position that Burrell should not be afforded a reasonable period of time to accept the Respondent's reinstatement offer.

[7] Accordingly, we shall provide for our usual reinstatement remedy. The effect the Respondent's March 26, 1997 letter may have on the remedy is an issue best left for resolution at the compliance stage of this proceeding.

[8] There is no evidence that the secretary was aware of the contents of this letter.

violated Section 8(a)(1),[9] if Bru was engaged in protected activity at the time of the February 1, 1996 incident.

The Act protects a union's right to picket an employer with whom the union has a labor dispute. As the Supreme Court stated in *Steelworkers (Carrier Corp.) v. NLRB*, 376 U.S. 492, 499 (1964), "The primary strike, which is protected by the proviso [to Sec. 8(b)(4)(B)], is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only preserved the right to strike; it also saved 'primary picketing' from the secondary [ban]. Picketing has traditionally been a major weapon to implement the goals of a strike."

Other employers sharing a common situs with the primary employer may be insulated from the disruption of the labor dispute by establishing "neutral" gates, i.e., gates reserved for the employees of the employer not involved in the labor dispute. So long as the employees of other employers enter through neutral gates, the union may not picket the neutral gates. Neutral employers are insulated from the picketing, however, only so long as the reserve gate system is faithfully observed. If employees of the struck employer enter through a neutral gate rather than a gate designated for them, the neutral gate is considered "tainted" and a union may lawfully engage in picketing at that gate. See *J. F. Hoff Electric Co. v. NLRB*, 642 F.2d 1266, 1269–1271 (D.C. Cir. 1980), cert. denied 451 U.S. 918 (1981). However, isolated or de minimis use of a neutral gate by a primary employer's employees will not render lawful the union's picketing at that gate. See *Plumbers Local 274*, 267 NLRB 1111, 1115 (1983).

Based on these principles, we make the following findings in this case. The Union, which otherwise could only picket at the gate the State Docks Department had designated for the Respondent's employees, could picket at the main gate if the Respondent's nonstriking employees were entering through it. When Bru drove on a State road near to the Respondent's maintenance garage on February 1, 1996, he was investigating reports that the Respondent's nonstriking employees were using the main gate, rather than the gate designated for them. In doing so, he was seeking to gather information relevant to whether the Union's picketing could be lawfully extended to the main gate. Bru's investigation, clearly undertaken in his capacity as an agent of the employees' bargaining representative, was protected activity.[10] Thus, the Respondent's attempt to exclude him from public property and its threat to have him arrested for engaging in protected activity violated Section 8(a)(1).

Our dissenting colleague would not find that the threat to have Bru arrested violated the Act. He reasons that because none of the Respondent's employees knew of the threat, the threat could not have chilled the Section 7 rights of the Respondent's employees. He concludes, citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), that Section 7 rights are those of employees, not unions.

The Board rejected our colleague's sweeping interpretation of *Lechmere* in *BE & K Construction Co.*, 329 NLRB 717, 724 (1999), enfd. 246 F.3d 619 (6th Cir. 2001). In that case, the Board squarely held, with court approval, that *Lechmere* did not negate the principle that acts of unions and their agents can be protected under the Act. Id. at 724.[11] As the Board observed, it would be "curious and myopic" to hold otherwise, for a contrary interpretation would mean that "conduct that is protected when engaged in by . . . employees . . . would lose its protection if engaged in by the employees' union on their behalf." Id. The instant case illustrates how a similarly anomalous result would occur were we to agree with our colleague.

As stated above, the Respondent's employees were engaged in picketing that was restricted to a specified gate because the Alabama State Docks Department established a reserve gate system. However, if the Respondent's nonstriking employees were using the main gate reserved for neutrals, then the striking employees could lawfully extend the picketing to that gate. Bru, an agent of the certified bargaining representative, while on public property,[12] was seeking to gather information relevant to whether the reserve gate system was tainted. The Respondent threatened to have Bru arrested if he did not cease his activity.

In other words, Bru's investigation, undertaken on behalf of the employees he represented, was linked to the employees' Section 7 right to strike, which included the

[9] The February 2, 1996 letter accused Bru of trespassing and warned him that the Respondent would take action against him if he continued such activity without the Respondent's permission. It is clear from the second letter of February 21, 1996, that the action the Respondent threatened was to have Bru arrested.

Although we rely on the February 21, 1996 letter as lending context and meaning to the warning the Respondent issued to Bru on February 2, 1996, it is unnecessary to pass on whether the second letter independently violated the Act. A finding of such an additional violation would be cumulative and would not affect the remedy.

[10] Bru's action was also prudent. A suspicion that a reserve gate system has been tainted does not entitle a union to expand picketing to neutral gates. The union must be able to show proof of taint. *See Oil Workers Local 3-689 (Martin Marietta)*, 307 NLRB 1031, 1032 (1992).

[11] Accord: *Petrochem Insulation,* 330 NLRB 47, 49 (1999), enfd. 240 F.3d 26 (D.C. Cir. 2001).

[12] The dissent's reliance on *Food & Commercial Workers Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996), cert. denied 519 U.S. 809 (1996), is misplaced because the issue in that case was whether nonemployees had a right of access to private property.

right to extend picketing to another location if the reserve gate system was tainted. The Respondent, by threatening to have him arrested, sought to prevent Bru's gathering of information vital to determining whether the reserve gate system was tainted. Interfering with Bru's gathering of information directly relevant to the course of the employees' protected activity would necessarily interfere with the employees' Section 7 rights.

To find that the threat to have Bru arrested did not violate the Act, as our colleague proposes, would create the following anomaly: The Respondent's employees had a right protected by Section 7 to extend their picketing to the main gate if the reserve gate system was tainted, but the Respondent could, through threats, lawfully attempt to prevent the employees' bargaining agent from gathering information vital to ascertaining whether the employees' may exercise that Section 7 right. We decline to join our colleague in reading the Act in such an incongruous way.

3. The Respondent has excepted to the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally changing its disciplinary system from one based on oral reprimands to one using written warnings. Contrary to our dissenting colleague, we agree with the judge's analysis and conclusion.

On July 13, 1995, a day after the Union won the election, the Respondent's superintendent, Kenneth Johnson, began issuing written warnings, placing them in an employee's personnel file, and giving a copy of the warning to the disciplined employee. Prior to the election, the Respondent gave warnings orally. The Respondent admitted that this change was based on its attorney's advice "to document everything that happened, because there would probably be an unfair labor practice filed."[13]

As the judge recognized, the Board has held that "in order for a statutory bargaining obligation to arise with respect to a particular change unilaterally implemented by an employer, such change must be a 'material, substantial, and a significant' one affecting the terms and conditions of employment of bargaining unit employees." *Millard Processing Services*, 310 NLRB 421, 425 (1993) (citation omitted). In finding that the Respondent's formalization of its disciplinary procedure constituted such a change, the judge relied on *Garney Morris, Inc.,* 313 NLRB 101, 119–120 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995). In that case, the Board found that a respondent violated Section 8(a)(5) when it unilaterally implemented a new, more detailed disciplinary warning form. The judge reasoned that if a ~~change from a simple warning~~ form to a more a simple warning form to a more complicated one constituted a "material, substantial, and significant" change in working conditions, then, a fortiori, such a change occurred when the Respondent switched from oral to written warnings. Further, the judge stated that written warnings have a "greater permanence than evanescent speech."

Support for the judge's analysis can be found in the strikingly similar case of *Amoco Chemicals Corp*., 211 NLRB 618 (1974), enfd. in relevant part 529 F.2d 427 (5th Cir. 1976). In *Amoco*, the respondent, shortly after a representation election, unilaterally changed from an oral warning system to a written warning system. The Board, in finding that the change significantly affected working conditions, explained, "Written warnings are more formal and tend to become a permanent part of an employee's personnel file." Id. at 618 fn. 2.[14] The court of appeals agreed with the Board, stating that under the new system of written warnings "the employer's complaints tended to become a permanent part of an employee's personnel file which could affect his future job security." 529 F.2d at 431. See *also Migali Industries*, 285 NLRB 820, 821 (1987) (finding that the respondent violated Sec. 8(a)(5) by unilaterally changing from oral to written warnings for absenteeism and tardiness, even though no discipline issued pursuant to changed procedure).

Here, as in *Amoco*, the Respondent unilaterally changed from an oral warning system to a more formal written warning system. Here, too, as in *Amoco*, under the new system, the written warning is retained in the employee's personnel file and could affect his job security. Further, it is immaterial, as it was in *Amoco* and *Migali*, that, as part of the change from an oral to a written system, the Respondent did not impose discipline more harshly. Therefore, we conclude, in agreement with the judge, that under established Board precedent the Respondent violated Section 8(a)(5) by its unilateral formalization of its disciplinary procedure.

The cases relied on by the dissent are distinguishable on their facts. In *Allied Mechanical Services*, 320 NLRB 32 (1995), enfd. 113 F.3d 623 (6th Cir. 1997), the Board found that the respondent had merely clarified, not changed, its existing policy on overtime pay. Here, by contrast, it is clear that a change in policy occurred; the issue presented is whether the change was "material, substantial, and significant," a question not addressed in *Allied Mechanical*.

Champion Parts Rebuilders v. NLRB, 717 F.2d 845, 853–855 (3d Cir. 1983), merely involved a change in

[13] The judge found that except for placing the disciplinary message in written form the Respondent did not impose greater punishment for a particular infraction after the election than it had imposed before.

[14] There was no finding by the Board that the respondent imposed discipline more harshly.

company procedures for photocopying doctors' excuses. There was no evidence that the change adversely affected the employees' ability to make the copies and collect the wages they were due. Therefore, the court concluded that the change had only a minimal effect on the employees' terms and conditions of employment. Here, however, the Respondent's change from oral to written warnings could adversely affect employee job security because the warning notices were to be placed in an employee's personnel file.

Finally, in *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976), the company substituted timeclocks for manual notations to record worktime, and in *Litton Systems*, 300 NLRB 324, 331–332 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), the company installed a central clock and buzzer system to signify the beginning and ending of breaks. In these cases, the changes did not have any meaningful effect on the employees' terms and conditions of employment because employers simply chose more efficient and dependable methods of enforcing existing workplace rules.[15] By contrast, as discussed above, the Respondent's change did have a significant impact on employees' working conditions because discipline was now more formal and permanent with a likely affect on job security.

Accordingly, for all these reasons, we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its disciplinary system from one involving oral reprimands to one using written warnings.

4. The Respondent has excepted to the judge's finding that the Respondent violated Section 8(a)(1) by creating the impression of surveillance. Contrary to our dissenting colleague, we adopt the judge's finding.

In July 1995, Superintendent Johnson and employee Carey Wyatt were discussing the Union. Wyatt's credited, uncontradicted testimony was that Johnson "told me to watch my back, to watch it close, that they will be out to get me." The judge found that Johnson's statement would reasonably create the impression that employees' union activities were under surveillance.

Our dissenting colleague asserts that Johnson's statement cannot be treated as creating the impression of surveillance. He relies on *Rock-Tenn Co.*, 315 NLRB 670, 683 (1994), enfd. 69 F.3d 803 (7th Cir. 1995). In *Rock-Tenn*, the Board found a respondent's statement that it was "tired of [a union officer] misleading the people and that she had to stop it or further action would be taken" was a threat of future action, but did not create the impression of surveillance.

We do not agree that the Board's reasoning in *Rock-Tenn* compels dismissing the creation of surveillance allegation in this case. In *Rock-Tenn*, the respondent stated to the local union president that it would take future action if conduct that occurred in the past were repeated. The respondent's employees knew that the respondent's knowledge of the past conduct was not acquired through surveillance. Thus, employees could not reasonably believe the respondent had surreptitiously observed past activity, and the reference to the future obviously referred to unspecified discipline for similar conduct rather than implying surveillance. Given the context, there was no implication in the statement that employees' protected activity would be monitored.

In the instant case, Johnson ended a conversation about the Union by telling Wyatt to "watch [your] back." Given the context in which the statement was made, we find that a clear implication of Johnson's remark was that the Respondent would be monitoring Wyatt to see whether his union activity continued. If so, "they" would "get" him. In *Rock-Tenn*, as explained above, the record as a whole clearly disarmed what might otherwise have been a statement creating the impression of surveillance. In contrast, the record here supplies no basis for finding that Wyatt could not reasonably believe that Johnson's statement implied future monitoring of union activity.

Our colleague suggests that a statement cannot create an impression of surveillance when the statement refers only to future employer conduct. We can discern no logical reason why only statements implying that surveillance has already occurred can be found to create the impression of surveillance. Further, such a position is contrary to Board law. See *Florida Coca-Cola Bottling Co*., 321 NLRB 21, 22–23 (1996), in which the Board found that a statement expressing an intention to monitor union activity created the impression of surveillance.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3.

"3. The Respondent violated the Act by the following conduct: By creating the impression that employees' union activities were under surveillance, as alleged in paragraph 7(a) of the complaint; by threatening employees with closure of the facility, as alleged in paragraph 8(c) of the complaint; by threatening to cause the arrest of a union official if he engaged in union or protected concerted activities on the Alabama State Docks, as alleged in paragraph 8(d) of the complaint; by suspending employees Leon Autry, Donald Burrell, and Larry Scott

[15] Similarly, in *Goren Printing Co.*, 280 NLRB 1120 (1986), cited by the dissent, the employer simply replaced its existing rule, requiring employees orally to inform a supervisor if they were leaving work early, with a policy that employees provide a supervisor with a written note. Such a change had an "inconsequential impact" on the employees. Id. at 1120.

on July 20, 1995, insofar as the suspension extended beyond that date, and by issuing to them "final warning" letters as alleged in paragraph 9 of the complaint; by refusing to reinstate economic striker Donald Burrell in the absence of a legitimate and substantial business justification; and by unilaterally changing its disciplinary system from one predominantly involving oral reprimands to one using written warnings, without notifying the Union of the change and affording it the opportunity to bargain, as alleged in paragraph 23 of the complaint."

ORDER

The National Labor Relations Board orders that the Respondent, Golden Stevedoring Co., Inc., Mobile, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant closure if they select the Union to represent them or engage in other protected concerted activities.

(b) Threatening to cause the arrest of union officials because they engage in union or other protected concerted activities on the Alabama State Docks.

(c) Warning and suspending its employees because they engaged in union or other protected concerted activities.

(d) Failing and refusing to reinstate economic strikers in the absence of a legitimate and substantial business justification.

(e) Creating an unlawful impression of surveillance of employees engaging in union or other protected concerted activities.

(f) Unilaterally changing its disciplinary system from one based on oral reprimands to one using written warnings, or unilaterally changing any other term or condition of employment affecting bargaining unit employees and involving a mandatory subject of collective bargaining, without first giving notice to the Union of the proposed change and affording the Union the opportunity to bargain about it.

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

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

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary warnings it issued to Leon Autry, Donald Burrell, and Larry Scott on July 20, 1995, and, within 3 days thereafter, notify the employees in writing that this has been done and that the warnings will not be used against them in any way.

(b) Make Leon Autry, Donald Burrell, and Larry Scott whole, with interest, for any loss of earnings or other benefits suffered as a result of their unlawful suspensions from work on July 21, 1995, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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

(d) Within 14 days from the date of this Order, offer Donald Burrell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make Donald Burrell whole for any loss of earnings and other benefits suffered as a result of the unlawful refusal to reinstate him on January 21, 1997. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra.

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

(g) Within 14 days from the date of this Order, rescind the written warning disciplinary procedure it implemented after employees selected the Union on July 12, 1995, and reinstate the oral reprimand procedure previously in effect.

(h) Within 14 days from the date of this Order, or such additional time as the Regional Director may allow for good cause shown, remove from its files all written warnings it issued using the disciplinary procedure it instituted after July 12, 1995, and, within 3 days thereafter, notify employees in writing that this has been done and that the warnings will not be used against them in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order**.**

(j) Within 14 days after service by the Region, post at its facility in Mobile, Alabama, copies of the attached

notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 12, 1995.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN HURTGEN, dissenting in part.

I disagree with my colleagues in four respects.

1. I disagree with my colleagues that the Respondent violated Section 8(a)(5) by unilaterally changing its disciplinary policy from a system of oral reprimands to a system of written warnings. Contrary to the complaint's allegations, the judge found that the Respondent did not tighten or significantly change, the enforcement of the rules. Indeed, the judge found that the Respondent did not issue any discipline for infractions that it previously would have ignored or handled without discipline. My colleagues do not disturb these factual findings.

The Board has long held that a unilateral change in a mandatory subject of bargaining is unlawful only if it is "material, substantial, and significant." *Alamo Cement Co.,* 281 NLRB 737, 738 (1986). Consistent with this approach, the Board, in *Goren Printing Co.,* 280 NLRB 1120 (1986), found lawful an employer's unilaterally imposed requirement that employees provide a note, rather than an oral report, if the employee needed to leave work early. The Board reasoned that the employer did not change its rules but rather instituted a more "dependable" method of enforcing its rules. Likewise, in *Rust Craft Broadcasting of New York,* 225 NLRB 327 (1976), the employer installed timeclocks to replace printed cards that employees manually printed to record their time at work. The Board found that the employer did not violate the Act by "unilaterally initiating a more dependable method of enforcing its longstanding rule that employees record their time 'in and out.'" Id. at 327.

Similarly, the Respondent did not in any way change its policy concerning what conduct would be subject to discipline or what level of discipline would be applicable. Rather, the Respondent simply implemented a more dependable method of memorializing its disciplinary practices by writing down the discipline. Such a change does not rise to the level of a material, substantial, and significant change. See also *Champion Parts Rebuilders v. NLRB*, 717 F.2d 845 (3d Cir. 1983) (company's change in practice for employees' copying doctors excuses by no longer routing them through union steward not unlawful); *Allied Mechanical Services*, 320 NLRB 32 (1995), enfd. 113 F.3d 623 (6th Cir. 1997) (clarification of existing overtime pay policy consistent with policy in employee handbook); and *Litton Systems,* 300 NLRB 324, 331–332 (1990), enfd. 949 F.2d 249 (8th Cir. 1991) (installation of a central clock and buzzer system to signify the beginning and ending of breaks).

My colleagues speculate that the Respondent's change from oral to written warnings "could adversely affect employee job security" because such warnings were to be placed in the personnel files, and the "more formal" discipline is "likely" to affect job security. However, this speculation is contrary to the judge's finding that the Respondent did not increase the disciplinary penalties or expand the range of conduct subject to discipline. Moreover, *Garney Morris, Inc.,*[1] relied on by my colleagues, is distinguishable because there, the employer added to the range of conduct for which discipline could be imposed by adding "much more" detail to its disciplinary form and changing its disciplinary procedure.

2. I also disagree with my colleagues' adoption of the judge's finding that the Respondent violated Section 8(a)(1) by creating the impression of surveillance, and therefore, I also disagree with their modification of the judge's recommended Order based on this finding. The complaint alleges that in July 1995 Kenneth Wayne Johnson, the Respondent's superintendent, "created an impression among its employees that their union activities were under surveillance." The judge credited employee Carey Wyatt's testimony that, in a discussion about the Union, Johnson told him to "watch my back, to watch it close, that they will be out to get me." The judge found that this comment constituted an unlawful impression of surveillance. I find, however, that this

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

[1] 313 NLRB 101, 119–120 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995).

comment did not reasonably convey the impression that the Respondent had engaged in surveillance.

In my view, the statement was at most, a threat that, in the future, someone would "get" Wyatt because of his union activity. It was not a statement that, in the past, Respondent had surreptitiously spied on his union activity.

Accordingly, I would dismiss this allegation. Had the complaint alleged that the statement constituted an unlawful threat, I might well find it a violation of Section 8(a)(1). See *Rock-Tenn Co.,* 315 NLRB 670, 683 (1994), enfd. 69 F.3d 803 (7th Cir. 1995) (statement constituted threat but was alleged as impression of surveillance and therefore could not be found). Contrary to my colleagues' assertion, I note that Johnson's statement does not constitute a threat of future surveillance. At most, it constitutes a threat of future retaliation. Further, even if it were a threat of future surveillance, that is not the same as the creation of an impression of surveillance. In this latter regard, and contrary to my colleagues, the conduct in *Florida Coca-Cola Bottling Co*., 321 NLRB 21, 22–23 (1996), was *not* found to create an impression of surveillance. It was found to constitute a threat of surveillance. See Conclusion of Law 3(b), above.

3. I also find that the Respondent did not unlawfully threaten to arrest Union Organizer George Bru. The evidence reflects that, on February 1, 1996, Bru entered the State docks where the Respondent and other companies perform work, and he watched outside a gate to determine whether the Respondent's employees were using it to enter the worksite. The next day, the Respondent sent Bru a letter warning that he had no legitimate business on the leased property and warning that his entry without the Respondent's written permission constituted trespass. Bru entered the worksite again a few weeks later and the Respondent sent him a letter stating that further trespass would result in his arrest. Bru is a union agent, not an employee. There is no evidence that any of the Respondent's employees knew about the threat.

I disagree with the finding of a violation. The question is whether the Respondent's threat to arrest Bru chilled the Section 7 rights of the Respondent's employees. It is clear that the threat was not made to an employee, and that no employee learned of the threat. Accordingly, I find that the Respondent's employees' Section 7 rights were not chilled by the threat. See *Pacific Dry Dock Co.,* 303 NLRB 569, 571 (1991) (employee rights not chilled because employee did not know about threat to arrest former employee who entered property to act as a union observer in election).

Contrary to the judge's conclusion, the Board's law on this issue has not changed, and his reliance on *Mr. Z's Food Mart,* 325 NLRB 871 fn. 2, 882–884 (1998), and *Indio Grocer Outlet*, 323 NLRB 1138 (1997), is misplaced. Unlike those cases, there is a specific fact-finding here that the Respondent's communication (set forth in a letter to a union representative) was not brought to the attention of any employee.

My colleagues rely on *BE & K Construction,*[2] a case in which I did not participate. Contrary to my colleagues, I do not find it "curious and myopic" that the Board should accept the Supreme Court's clear holding in *Lechmere*[3] that "[b]y its plain terms . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers." Accord: *Food & Commercial Workers Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996) (nothing in *Lechmere* suggests that the rights of nonemployees are enhanced when access to private property is sought by nonemployees to communicate with the employer's customers).

Further, *BE & K* is distinguishable. In that case, the employer sued the union in retaliation for the exercise of a Section 7 right. The lawsuit, by its nature, was an open and public act. Therefore, employees would be aware of it and would be chilled thereby. By contrast, the threat here was conveyed in a private letter to the union agent. The employees were not aware of it.

4. Finally, I disagree with my colleagues that the Respondent violated Section 8(a)(3) by refusing to reinstate Donald Burrell. The complaint alleges that the Respondent has refused to reinstate him since on or about January 20, 1997. The facts show that Burrell participated in a strike ending in November 1996. The Board majority finds, and I agree, that the strike was an economic rather than unfair labor practice strike. At the end of the strike, Burrell received a copy of a letter sent to strikers by the Union's attorney, notifying them to report back to work. Burrell informed Gonzales, the Respondent's president, that he was physically unable to return to work at that time because of an injury, but that he would like to return when physically able. Gonzales replied, "Okay." On January 9, 1997, Burrell's doctor gave him a release to work on January 20 and Burrell informed Gonzales' secretary and Superintendent Johnson on January 21 that he was ready to report to work. The Respondent did not offer to reinstate him at that time. On March 26, 1997, the Respondent mailed Burrell a letter directing him to report to work, which letter he did not receive.

An economic striker has the right to be placed on a preferential hiring list upon making an unconditional offer to return to work. *Laidlaw Corp.,* 171 NLRB 1366, 1369–1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969),

[2] 329 NLRB 717 (1999), enfd. 246 F.3d 619 (6th Cir. 2001).
[3] *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992).

cert. denied 397 U.S. 920 (1970). See also *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (economic striker who offers unconditionally to return to work is entitled to immediate reinstatement unless his employer can show a legitimate and substantial business justification for refusing to reinstate him). While on strike, a striker remains an "employee" because he is an "individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938) (quoting Sec. 2(3) of the Act).

Based on the above, Burrell had a right to reinstatement as of November 1996, when the strike ended. The Respondent offered him reinstatement. However, through no fault of the Respondent, Burrell could not accept the offer. At that point, Burrell was neither a reinstated striker nor a striker (for the strike was over). He therefore had no striker rights; he had only the right of any employee or applicant, i.e., the right not to be discriminated against. There is no showing that the Respondent discriminatorily refused to take him back. Indeed, the Respondent offered him reinstatement on March 26. At most, there was a breach of promise when the Respondent failed to honor Gonzales' "okay" by failing to reinstate Burrell on January 27. However, a breach of promise is not an unfair labor practice.

My colleagues say that an employee has a reasonable period of time to accept a reinstatement offer. However, the cases that they cite stand only for the proposition that *a discriminatee* has a reasonable period of time to accept a reinstatement offer. That principle is based on the remedial principles of the Act. However, the instant case does not involve a discriminatee. Burrell was simply a striker who could not accept the reinstatement offer when it was made. The case does not involve a remedy for a discrimination.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

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

WE WILL NOT threaten employees with plant closure if they select International Longshoremen's Association, AFL–CIO, South Atlantic and Gulf Coast District, or any other labor organization, to represent them or engage in other protected concerted activities.

WE WILL NOT threaten to cause the arrest of union officials because they engaged in union or other protected concerted activities on the Alabama State Docks.

WE WILL NOT issue warnings to or suspend our employees because they engage in union activities or other protected concerted activities.

WE WILL NOT fail or refuse to reinstate economic strikers in the absence of a legitimate and substantial business justification.

WE WILL NOT create an unlawful impression of surveillance of employees engaging in union or other protected concerted activities.

WE WILL NOT unilaterally change our disciplinary system from one based on oral reprimands to one using written warnings, or unilaterally change any other term or condition of employment affecting our employees represented by the Union and involving a mandatory subject of collective bargaining, without first notifying the Union and giving it the opportunity to bargain regarding this proposed change as required by the National Labor Relations Act.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings we issued to our employees, Leon Autry, Donald Burrell, and Larry Scott, on July 20, 1995, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the warnings will not be used against them in any way.

WE WILL make Leon Autry, Donald Burrell, and Larry Scott whole, with interest, for any loss of earning or other benefits they suffered because we suspended them from employment on July 21, 1995.

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

WE WILL, within 14 days from the date of the Board's Order, offer Donald Burrell full reinstatement to his former position or, if that job no longer exists, to a substan-

tially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Donald Burrell whole for any loss of earnings and other benefits he suffered because we refused to reinstate him on January 21, 1997, and thereafter, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to reinstate Donald Burrell, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the refusal to reinstate him will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, rescind the written warning disciplinary procedure we implemented after our employees selected the Union on July 12, 1995, and reinstate the oral reprimand procedure previously in effect.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all written warnings which we issued using the disciplinary procedure we instituted after our employees selected the Union on July 12, 1995, and WE WILL, within 3 days thereafter, notify employees in writing that this has been done and that the warnings will not be used against them in any way.

GOLDEN STEVEDORING, INC.

Charles R. Rogers Esq., for the General Counsel.
Willis C. Darby Jr., Esq. and *Elizabeth D. Rehm, Esq.,* of Mobile, Alabama, for the Respondent.
Mary Olsen, Esq., of Mobile, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. In this case, the General Counsel (the General Counsel or government) of the National Labor Relations Board (the Board) alleges that Golden Stevedoring Co., Inc. (the Respondent or Employer) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). I find that the General Counsel has established that Respondent violated Section 8(a)(1) of the Act by making certain statements to employees, violated Section 8(a)(1) and (3) by suspending three employees and issuing them warning letters, and by refusing to reinstate an unfair labor practice striker, and violated Section 8(a)(1), (3), and (5) of the Act by unilaterally changing from a policy of issuing oral reprimands to issuing written disciplinary warnings without notifying the Union and according it an opportunity to bargain about the change. In other respects, I find that the Respondent did not violate the Act, as alleged.

Procedural History

The record establishes, and I find, that the International Longshoremen's Association, AFL–CIO, South Atlantic and Gulf Coast District (the Charging Party or the Union) filed charges against the Employer on July 25, 1995 (Case 15–CA–13334), August 28, 1995 (Case 15–CA–13394), December 14, 1995 (Case 15–CA–13610), and May 14, 1996 (Cases 15–CA–13870 and 15–CA–13871).[1] On November 30, 1995, the Regional Director of Region 15 of the Board issued the original order consolidating cases, consolidated complaint and notice of hearing in this manner, and amended it four times before hearing.[2] The fifth order consolidating cases, fifth consolidated complaint and notice of hearing, dated July 11, 1997, will be referred to as the "complaint" in this decision.

I heard this case in Mobile, Alabama, on July 28 through August 1, September 22–26, and October 1–3, 1997.[3] The parties filed posthearing briefs, which I have considered.

FINDINGS OF FACT

I. STATUS OF THE PARTIES

The complaint alleges, Respondent has admitted, and I find the following to be true. At all material times, Respondent, a corporation with an office and place of business at Mobile, Alabama, has been engaged in the loading, unloading, and storage of cargo from ships and barges; during the 12-month period ending October 31, 1995, it purchased and received at this facility goods valued in excess of $50,000 directly from points outside the State of Alabama. I conclude that at all times material to this case, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Although Respondent does not admit that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act, I find that the evidence establishes this fact. Respondent has admitted the appropriateness of the unit described in the complaint, and also has admitted the allegations in complaint paragraph 21, namely, that the Board conducted an election among Respondent's employees on July 12, 1995, that the Charging Party won this election, and that on July 21, 1995, the Board certified the Union as the exclusive representative of the Respondent's employees in the unit described in the complaint. In these circumstances, there can be no doubt that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.[4]

[1] The Charging Party amended certain of these charges before the hearing. The formal documents do not include the charges filed in Cases 15–CA–14186, 15–CA–14209, and 15–CA–14314. However, the complaint alleges and the Respondent admits the filing and service of these charges.

[2] At hearing, the General Counsel orally amended par. 1(e) of the complaint to correct a typographical error in the date. As amended, the complaint alleges that the amended charge in Case 15–CA–13610 was filed on February 22, 1996 (rather than 1995), and served on February 23, 1996. (Tr. 41.) The General Counsel also amended par. 17 of the complaint orally, at the hearing, to allege that James Lambert was refused reinstatement on December 10, 1996, rather than December 10, 1997. (Tr. 42.)

[3] I order the transcript of the hearing corrected in accordance with "Appendix B" to this decision. Additionally, numerous references in the transcript to "Gonzalez" should be corrected to "Gonzales." References to "HEARING OFFICER" signify the administrative law judge.

[4] Additionally I find that at all times material to this case since July 12, 1995, based on Sec. 9(a) of the Act, the Union has been the collective-bargaining representative of the Respondent's employees in the unit described in the complaint.

The complaint alleges and Respondent has admitted that Edgard H. Gonzales,[5] Kenneth Wayne Johnson, Vandon Scott Johnson, and Ken Wear are its supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act. I so find.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The events in this case concern a union organizing campaign culminating in a Board-conducted election on July 12, 1995, which the Union won, and a strike from January 29 to November 11, 1996. I will discuss the unfair labor practice allegations in chronological order.

A. June 15, 1995–Alleged 8(a)(1) Statement

Complaint paragraph 8(a) alleges that about June 15, 1995, at Respondent's facility, Respondent's president, Edgard H. Gonzales, "by telling employees that Respondent did not have any money, would not give employees a raise, would never sign a contract and, if employees wanted to make more money, they should go work for a different employer, informed its employees that it would be futile for them to select the Union as their bargaining representative." (GC Exh. 1(bbb).) Respondent's Answer moved to strike this allegation on the basis that the statement in question was protected by Section 8(c) of the Act.[6] I have enied the motion to strike.

At hearing, Carey Wyatt testified that on June 15, 1995, he met with Gonzales in a conference room at the Respondent's facility, and that no one else was present. At that time, Wyatt was an employee of the Respondent. On direct examination by the General Counsel, Wyatt testified as follows:

> Q. What was said at this meeting?
>
> A. He set about telling me there was no way that a Union was going to come in, that he had no money and he had a yellow legal pad that he was writing on, writing numbers down, showing the cause and effect of what a Union causing him to give more money and more benefits and stuff, he was writing all this down and showing me that, you know, there's just no way that this can be done. He says, I do not have the money, I will shut my doors before I pay this. [Tr. 535–536.]

It is necessary to consider everything which Gonzales reportedly said to determine whether the message was, as alleged in the complaint, "that it would be futile for them to select the Union as their bargaining representative." Wyatt's testimony on cross-examination provides a more complete account:

> Q. Tell me what Mr. Gonzales said about the bankruptcy.
>
> A. He said that if we persisted in pushing him to do the things that the labor would want him to do, as far as money and insurance and vacation and all that stuff, that it would drive him to bankruptcy. He would have to shut his doors.
>
> I asked him at that time if other companies could do it, why can't he.
>
> Q. And what was his response?
>
> A. He said that he had to lower his prices to be able to maintain the clientele that he does. Therefore, he could not afford to pay us what we was asking. [Tr. 572.]

Later in the cross-examination, Wyatt described how Gonzales added up the expenses he believed his company would incur if it agreed to the Union's bargaining demands:

> We talked about, like I said, *he drawn on a yellow legal pad, you know, what he felt it would cost him to, you know, provide better insurance, what it would cost for vacation for every one of his employees, what it would cost, you know, to get better life insurance and holiday pay and so forth and so on like this, and come up with a huge figure down at the bottom and circled the figure* and basically told me that this is what it's going to cost me and I just do not have it, you know, I'm going to go bankrupt if I'm forced to pay this, so therefore, I'm never going to pay it, you know. [Tr. 572–573; emphasis added.]

Gonzales testified that Wyatt requested this meeting. Although Gonzales stated that the meeting took place in the conference room at Respondent's facility, his testimony contradicted Wyatt's in most other respects:

> A. Well, it was a relative short conversation. I didn't know what he wanted, and I just asked him about his kids, family, you know, general questions or conversation. And at some point, he started talking to me about the union. He say that really not him or the rest of the guys working in the company wanted to bring the union in.
>
> Then I said, But you all are doing it. Then he say, Yes, but we can solve this, you know. We don't need to get to extremes. If you'll get me a raise, I can stop this.
>
> Q. What was your response?
>
> A. I told him it was illegal for me to even discuss with him that.
>
> Q. Anything else?
>
> A. That's pretty much the end of the conversation.
>
> Q. During the conversation, did you fill out a note pad and show it to him?
>
> A. I don't think I did. [Tr. 2459–2460.]

Based in part on my observations of the witnesses, I credit Gonzales rather than Wyatt.[7] Having determined that Gonzales

[5] The correct spelling of "Gonzales" ends in an "s," as shown in the complaint, rather than a "z." (Tr. 48.) However, certain documents, including some letters sent by Gonzales, spell his name "Gonzalez." (See, e.g., GC Exhs. 9 and 10.)

[6] Sec. 8(c) of the Act states: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

[7] In addition to my observations of the demeanor of the witnesses, there is another reason I am reluctant to credit Wyatt. The complaint alleges that Wyatt's meeting with Gonzales took place on June 15, 1995, which is almost 1 month before the election. It does not allege that Gonzales had a similar meeting with any other employee on or around that time. Why would Gonzales single out Wyatt?

did not make the statements attributed to him, I recommend that the allegation in paragraph 8(a) be dismissed.

B. July 11, 1995—Alleged 8(a)(1) Statement

Complaint paragraph 8(b) alleges that the Respondent, through its president, Edgard Gonzales, "by telling employees that he did not like the union; if it was within his power, the employees would not get a union; and that he would not sign a contract with the Union; informed its employees that it would be futile for them to select the Union as their bargaining representative." (GC Exh. 1(bbb).) Respondent's answer moved to strike this allegation on the basis that the alleged statement was protected by Section 8(c) of the Act. I denied that motion.

The day before the Board-conducted election, according to Donald Burrell, who was then employed by Respondent, he was leaving a vessel and saw "Mr. Gonzales and his wife were sitting in his car at the bottom of the gang ramp." Burrell testified that Gonzales motioned for him to come over:

> A. I went to his car, and he said he wanted to talk to me about my vote tomorrow. And if I'm not mistaken, he said, How was you going to vote tomorrow? And I told him right now I was undecided. I didn't know how I was going to vote. And—
>
> Q. What was said then?
>
> A. Say that again now?
>
> Q. What was said after that?
>
> A. All right. After that was said, he told me that, if you decide to go with the Union, that he would never sign a contract with the Union as long as he's been there. He's been there 16 years and they have tried it before. They didn't get it, and he would not sign a contract with them now.
>
> Q. Okay. What was said after that?
>
> A. All right. After that was said, he asked me have I ever had any dealings with the Union before. And I told him, no I never had any dealings with the Union before. I said, My daddy was in a union once before, and that union got busted up.
>
> And he told me, he said, You see. That's what the Union gets you. It loses your jobs. It takes your jobs away from you.
>
> Q. Okay. What was said after that?
>
> A. Okay. After that, he told me that—there was a guy on the dock at the time. I don't know who he was. He called him over to the car and told him, he said, I'm through telling Mr. Burrell here what the Union will do for you. He said, What the Union going to do for you is take your job.
>
> You're not going to work as much as you can—will now. That when you decide to vote Union, you're not going to have a job.
>
> Q. And who was it that was saying that?
>
> A. Some guy that Mr. Gonzales knew. I didn't know him. [Tr. 965–966.]

Although Burrell testified that Gonzales' wife was in the car at the time of this conversation, she did not corroborate Burrell's testimony. However, her testimony does not constitute an absolute denial that such a meeting took place, because she was responding to a question, "Do you recall any occasion when Mr. Gonzales had a conversation with Mr. Burrell *at night* when you were on the wharf?" (Tr. 2398, Emphasis added.) Thus, her testimony does not exclude the possibility that Gonzales had such a conversation with Burrell during the day.

It appears that Respondent's counsel believed that Burrell testified that his conversation at Gonzales' car took place at night. Thus, to refute Burrell, he introduced a timesheet showing that Burrell got off work at noon on July 11, 1995. (R. Exh. 91.)

However, Burrell did not testify that the conversation took place at night. He testified, "It was about 11:00" but did not specify whether before noon or midnight. (Tr. 965.)

Nonetheless, and even though Gonzales and his wife did not squarely deny the allegation, I do not credit Burrell. He prefaced his testimony with "if I'm not mistaken . . . . That, in itself, does not inspire confidence in the testimony. Moreover, based on the demeanor of the witnesses, I do not find Burrell to be particularly reliable.

I find that the government has failed to establish this allegation, and recommend that it be dismissed.

C. July 13, 1995—Alleged Unilateral Change in Disciplinary Policy

Paragraph 23 of the complaint alleges that about July 13, 1995, Respondent instituted a new disciplinary policy for safety violations, tardiness and work violations, which included issuance of written warnings, suspensions, and terminations for violations of this policy. Paragraph 25 of the complaint, admitted by Respondent, alleges that these matters are mandatory subjects of bargaining. Complaint paragraph 26 alleges that Respondent made the alleged changes without giving the Union prior notice and an opportunity to bargain about them, and paragraph 29 alleges that these actions violated Section 8(a)(1) and (5) of the Act. Respondent's answer denied the allegations in all these complaint paragraphs except paragraph 25.

The allegations concerning unilateral changes in rule enforcement become easier to evaluate if divided into the following categories: (1) change from a system of oral reprimands to written warnings; (2) change in enforcement of safety rules; and (3) change in enforcement of attendance rules.

1. Change from oral to written discipline

Respondent's superintendent, Kenneth Johnson, admitted that after the election, he began issuing written warnings, which he had not done before. He made this change because the Re-

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If Gonzales had known that Wyatt supported the Union, such knowledge might explain the meeting and the comments attributed to him by Wyatt. Stated another way, Gonzales might have chosen to express his opinion about the Union to someone he knew supported it. However, the record does not establish that Gonzales had knowledge of any employee's union activities, let alone Wyatt's, on June 15, 1995. To the contrary, Wyatt stated in his pretrial affidavit, "To my knowledge, prior to about 3 days before the election, Edgard [Gonzales] had no concrete knowledge about who was a union supporter." (R. Exh. 19.)

spondent's attorney told him to do so.[8] Johnson credibly testified that the company lawyer told him "to document everything that happened, because there would probably be an unfair labor practice filed." (Tr. 2006.)

Respondent's president, Gonzales, also acknowledged this change, which he called a "formalization." He testified that before the election Respondent had a "custom" that most of the warnings were given orally, but that after the election, "We put more attention of putting everything in writing when the need for that was there." At the same time, he denied that the administering of discipline had intensified. (Tr. 53–54.)

There is a greater conflict in the evidence regarding whether the Respondent actually got tougher in imposing discipline, or issued warnings where no discipline would have been given before. I find that a preponderance of the evidence does not establish that Respondent issued discipline for infractions it previously would have ignored or handled without discipline.

2. Safety rules

The record clearly fails to establish that the Respondent tightened its enforcement of safety rules in response to the Union's organizing effort. To the contrary, the motivating factor appears to be periodic inspections by the Occupational Safety and Health Administration, and a 1994 inspection in particular. Thus, to the extent that Respondent made a change in how strictly it enforced safety rules, that change took place well before the union organizing drive.

In reaching this conclusion, I particularly rely on the testimony of John Todd, which I credit.[9] Todd began work with Respondent in about 1992. Although at the time of the hearing, Todd held the position of mechanic, he began work for Respondent as a laborer. On direct examination, Todd testified that after a 1994 inspection by the Occupational Safety and Health Administration, the Respondent toughened its enforcement of safety standards:

> Q. BY MR. DARBY: What happened with respect to safety after the OSHA inspection in 1994?
>
> A. It became very strict, very rigid.
>
> Q. All right. And who participated in making it strict?
>
> A. Edgard Gonzales.
>
> Q. Who else?
>
> A. Kenny Johnson. They enforced it; all the supervisors enforced it. [Tr. 1944.]

On cross-examination by the General Counsel, Todd described how the Respondent conducted periodic safety meetings for its employees, and encouraged safe practices with both a "carrot" and a "stick."

> Q. Did those meetings start after that OSHA inspection in 1994?
>
> A. We had—we used to have drawings, and he would have safety meetings. We would have safety—we would have—after every ten ships if there was no accident, we would have a drawing, and it was—you know, we'd have those safety meetings.
>
> . . . .
>
> Q. What kind of drawing are you talking about? A raffle or a door prize sort of thing?
>
> A. No. It was just pick a name out of the hat, you know, people
>
> . . . .
>
> Q. Okay. Well, just let me clarify for the record, because I didn't understand what you meant by drawings. He picked—Mr. Gonzales would pick a name out of the hat, and that name, the person, would win money?
>
> A. Yes, sir.
>
> Q. Okay. Now, that was—I believe you said that was before the OSHA inspection. Is that right?
>
> A. Yes. We've had them ever since I've been there. Yes, sir.
>
> Q. So it's continued.
>
> A. It was continued.
>
> Q. But you said that something about the enforcement of the safety rules became stricter after the OSHA meeting?
>
> A. After the meeting, they was very strict. He made everybody—we had to wear hardhats, safety glasses, mandatory wear steel-toed shoes. If not, you don't go on the job. You get sent home. If not, they would make ways to help you get them, get the things that you needed. [Tr. 1958–1959.]

Other witnesses corroborated Todd's testimony. For example, a general picture emerged from the record that Superintendent Kenneth Johnson had a longstanding practice of stepping on employees' shoes to determine whether the toes had a protective steel liner for safety. This practice originated well before the union campaign and, apparently, was a custom among other employers operating on the docks, as well.[10] One of Respondent's employees, Ray Sanders, testified as follows:

[8] As a witness, Kenneth Johnson was somewhat laconic, but very believable, called by the General Counsel, he testified as follows:

Q. Before the Union election in 1995, July of 1995, isn't it true that it was rarely any written warnings given out?

A. I never did see a need to do that.

Q. But it's true?

A. I always—Yes, it's true. I never did give any out. I always used verbal.

Q. Okay. So you never gave any?

A. No.

Q. Now after the election, that changed didn't it?

A. Yes.

Q. Who made the decision to change that?

A. Mr. Darby told me that, to write down everything that happened.

Q. Is that what you did?

A. That's what I did. [Tr. 122–123.]

[9] I observed Todd's demeanor as he testified. He impressed me as being a reliable witness. It may be noted that the week before Todd testified, the Respondent had suspended him for an unauthorized absence from work. (Tr. 2023.) Therefore, it does not appear that Todd was in any special position of favor with the Company or the recipient of preferred treatment.

[10] Kenneth Johnson testified that in the most recent OSHA inspection the inspector found one employee who was not wearing steel–toed

Q. Does Kenny Johnson ever check to see if you've got safety shoes?
A. Yes.
Q. How does he check?
A. Step on them.
Q. Has Kenny Johnson ever stepped on your feet?
A. Yes.
Q. Before the election?
A. Yes.
Q. Does he step on your toes any more since the election than he did before?
A. Yes. Ain't nothing changed. [Tr. 1539–1540.]

Even some of the employees most identified with the Union gave testimony establishing that the Respondent's enforcement of safety rules antedated the union campaign.[11] For example, Donald Burrell worked for Respondent both before and after the election in which employees selected the Union. His testimony, as clarified on cross-examination, indicates no significant shift in application of the safety boot policy after the election.

On direct examination, Burrell stated that after the election, management "made it a point that where if you wasn't going to wear your hard hat, your safety glasses and boots, they was going to send you home." (Tr. 1013.)

According to Burrell's testimony on direct examination, before the election, management made temporary workers go home if they did not have steel-toed boots. However, on cross-examination, Burrell clarified that even before the election, Superintendent Kenneth Johnson would send regular employees home if they did not have their safety boots:

Q. BY MR. DARBY: All right. Was it was common knowledge that people got sent home before the union election if they came to work without safety-toed shoes?
A. Not a regular employee.
Q. Who would get sent home?
A. A laborer—a temporary.
Q. Anyone else?
A. No, sir. One of the regular employees—he would probably make them—Kenny would make them go get steel-toed boots, *because he knew they had them*, and come on back to work.
Q. Okay. He didn't say he had to go stay home all day, but he would get—Kenny would—if you didn't have your steel-toed boots, he would send you home and you'd come back. Is that right?
A. Yes, sir.
Q. And that's before the Union came in.
A. Yes, sir. [Tr. 1094; Emphasis added.]

Burrell did express the view that after the election management checked more frequently to be sure that employees were using their safety devices. Just before giving this testimony, however, Burrell described an accident involving one of the heavy chains used to hoist cargo. (Tr. 1011–1012.) The record reflects that loading and unloading ships and railroad cars does expose the longshoremen to significant hazards.

The testimony of another union supporter, Carey Wyatt, indicates that management did become more vocal about safety after the election. However, it does not establish that supervisors imposed any more discipline for safety violations than they had before the election. Wyatt gave the following testimony on redirect examination:

Q. BY MR. ROGERS: You testified on cross examination regarding the safety rules and whether you had to follow them or not. After the election, did the administration of the safety rules change?
A. I don't know that they changed. I know they was being enforced. I do not know whether, like he had mentioned whether, you know, it had been a rule all along and we just didn't know it, but it was not being enforced beforehand versus now, it is being enforced.
Q. When you say "versus now," what do you mean?
A. After the election.
Q. What do you base that statement on?
A. Mainly Scott Johnson running around yelling at everybody, telling them they better buckle up or he was going to write them up, you know, they better wear their hard hat, you know, or they're going to get wrote up.
Q. When did he start doing that?
A. Probably a week or so after the election. It wasn't the next day, you know, but it was real soon after the election.
Q. What was it again that you saw him do?
A. I never seen him write up anybody but I seen him fuss at quite a few of them, telling them, you know, if you don't do it, you're going to get wrote up. [Tr. 619–620; Emphasis added.][12]

Based on the credited testimony, I do not find any substantial change in safety rule enforcement after the election. It is possible that there was some fluctuation in the enforcement of the safety rules from time to time, arising not by design but from the human tendency to let attention to the rules "slide" while focusing upon the demands of work, followed by the opposite reflex after the authoritative reminder produced by an OSHA inspection. Similarly, supervisors might have focused more on

shoes. (He "had got by us," Johnson testified.) The Respondent sent him home to put them on. (Tr. 2043.)

[11] One former employee, Larry Scott, did describe a stark change in rule enforcement after the election: "Before we voted Union, guys were wearing tennis shoes on the boat. They'd get off in a hole. Tank top shirts. Some of them had on baseball caps. They'd pull their hard hats off and put their baseball caps on. No safety glasses. After we voted the Union in, everything got strict. You'd have to have your steel toed shoes, safety glasses, hard hat and no tank top shirts." (Tr. 738–739.) This testimony is not consistent with the picture painted by other witnesses, and I do not credit it.

[12] Another employee supporting the Union, Leon Autry, also gave testimony indicating that management became more vocal after the election about employees obeying the safety rules. Wyatt described how Supervisor Scott Johnson told a forklift driver who failed to wear his seat belt that he would be written up the next time it happened. Autry also testified he heard Johnson remind forklift drivers to wear their safety glasses at all times. (Tr. 1164–1166.)

safety requirements after an accident like the one described by Burrell.

However, a preponderance of the evidence does not establish that Respondent instructed its supervisors to tighten their enforcement of the safety rules or otherwise implemented a more rigorous enforcement of them after the election. I conclude that the General Counsel has not proven any material, substantial and significant change took place in the Respondent's safety rules or in their application.

3. Attendance rules

Similarly, the record does not reflect any significant change in the enforcement of Respondent's rules regarding attendance. For example, Wyatt testified that there was never a time before the election when Superintendent Kenneth Johnson threatened his job or threatened him with further discipline for being late. (Tr. 550.) Instead, Johnson would give him a tongue-lashing using vulgar expletives. (Tr. 549.)

It could be argued that a threat of further disciplinary action for tardiness is a more serious form of discipline than upbraiding the late employee with a barrage of dirty names. However, the opposite also could be argued. Based on the record in this proceeding, I do not reach the conclusion that an employee received any harsher reprimand for an attendance infraction after the election than he did before.

To summarize, the evidence does not establish that the Respondent created or imposed any new rules after the election that had not been in existence before. The record also does not establish that Respondent applied the existing rules to actions it would have ignored before. Similarly, except for placing the disciplinary message in written form, Respondent did not impose greater punishment for a particular infraction after the election than it had imposed before.

In sum, I find that Respondent did not tighten the application of its disciplinary rules or expand their scope. However, I find that after the election, Respondent's managers began delivering disciplinary messages to employees in written form, rather than orally, as they had previously done. Therefore, I must decide whether this action constituted a unilateral change in any term or condition of employment which was a mandatory subject of collective bargaining.

4. Analysis

Generally, an employer has a duty to bargain with the exclusive representative of a unit of its employees before making a change in wages, hours, or other working conditions, but that duty arises only if the change is a "'material, substantial, and a significant' one affecting the terms and conditions of employment of bargaining unit employees." *Millard Processing Services,* 310 NLRB 421, 425 (1993), citing *Angelica Healthcare Services*, 284 NLRB 844, 853 (1987).

In *Garney Morris, Inc.*, 313 NLRB 101 (1993), the Board found that an employer had made an unlawful unilateral change by adopting a new discipline form without bargaining with the exclusive representative of its unit employees. The employer already had been using a written form for 10 years but, the judge found, "The new form was much more detailed. It provided space for a narrative description of the reason for the warning, another place for a reply by the employee, and a place for the ultimate determination by the supervisor." Id. at 120. The Board affirmed the judge's conclusion that unilateral implementation of the form violated Section 8(a)(5).

If a change from a simple warning form to a more complicated one constitutes a "material, substantial and significant" change in working conditions, the same logic would mandate finding a material, substantial and significant change when the Respondent switched to written warnings when previously it had used no forms at all. In all likelihood, the psychological effect of this abrupt change from spoken to written reprimands probably was greater than that produced simply by changing the form.

It should be stressed that Respondent did more than make a private notation that an oral warning had been given, for reference if further disciplinary action were needed in the future. Rather, the change involved providing the employee with a piece of paper memorializing the disciplinary action.

Notwithstanding the common phrase "reduce to writing," the psychological impact of placing words on paper is to magnify their effect, not to reduce it. Written words acquire a heightened credibility and aura of permanence, acknowledged by such expressions as "get it in writing" and "see it in black and white."

In some areas, the law also accords greater respect to the written word than to the spoken. For example, in many jurisdictions, the law distinguishes between spoken defamation, slander, and written defamation, libel. The Act itself includes, within the definition of collective bargaining, "the execution of a *written* contract incorporating any agreement reached if requested by either party." 29 U.S.C. § 158(d) (emphasis added).

I conclude that the change, delivering disciplinary warnings to employees in written form, did increase the psychological severity of the warning given for an infraction. Reprimands are not CandyGrams, and it would be unlikely for an employee to prefer receiving them on paper, with its greater permanence than evanescent speech.

Therefore, I find that Respondent's "formalization" of its disciplinary procedure, replacing oral warnings with written, does constitute a significant change in a condition of employment which is a mandatory subject of collective-bargaining. The record also establishes that Respondent made this change without notifying the Union, and without giving the Union the opportunity to bargain about this change or its effects. Such action violated Section 8(a)(5) and (1) of the Act.

D. July 20, 1995—Suspension of Autry, Burrell, and Scott

Paragraph 9 of the complaint alleges that about July 20, 1995, Respondent suspended Leon Autry, Donald Burrell, and Larry Scott. Respondent admitted this allegation. However, Respondent denied the allegation in paragraph 19 that it took this action because the employees had formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in such activities.

On July 20, 1995, Autry, Burrell, and Scott were unloading coils of metal from railroad cars. The day did not get off to a good start. The employee assigned to bring drinking water to the jobsite did not arrive as soon as expected. According to Burrell, he told their supervisor, Scott Johnson, that the men

would unload only two cars, but would unload no more until the water arrived. Burrell testified as follows on direct examination:

> A. The morning of the—that you're talking about, we had—if I'm not mistaken, we had about 25 rails cars that he wanted to do that day. And we told him—said, Yes. We probably could get those, you know. And what happened was, they was late with the water.
>
> And normally we could do two rail cars 20 minutes. So I told the guy, I said, Well, we need to get some water around here. Because it was hot. And I said, We going to get started on doing these rail cars. I said, We'll do two rail cars. After that, we need some water.
>
> Q. Now, did you—is this what you told to Scott Johnson?
>
> A. Yes. Scott Johnson. Okay. Then he said, Fine. We'll get you some water around. And he told me that Willy Brown was sick that morning, but they would get some water. Okay. Then after that happened, we did the two rail cars. The water came. We got water. (Tr. 97; Emphasis added.)[13]

The record makes clear that the men never actually stopped work. As Burrell testified, the water arrived before the time the walkout would have begun.

However, a dispute then arose as to whether the men were unloading the rail cars as expeditiously as they could. Under certain circumstances, a crane can lift two large rolls of metal at one time, but when the coils are the wrong distance apart the longshoremen can put the necessary cable only through one coil.

The General Counsel's witnesses testified, in effect, that supervision was demanding that they hook the cable around two coils at time, when the spacing of the coils made the demand impractical, impossible, or unsafe. Burrell's testimony is representative:

> We started back on the next two rail cars. And all of a sudden, Scott Johnson said, I want you all to get two cars at a time. And I told him at the time, I said, Scott, we can—we'll get two when we can. Right now, they're too close together. We can only get one at a time.
>
> I said, If we can get two, we'll get two. He said fine. So he left. We proceeded to go ahead on and do the work, getting the one at a time like we could. And, say, oh, 15 or 20 minutes later, Jay Johnson come back, which he was already down there with us, but he was on the ground.
>
> And he come to us and he said, Well, I want you all to get two. And I told him, I said, Well, we'll get two if we can. But right now, seeing that they're close together, we can't get but one at a time. So we proceeded on to getting the one at a time. [Tr. 972–973.]

According to Burrell, one foreman, J. H. Johnson ("Jay" Johnson), said he could hook up two coils to the crane at one time, but spent about 15–20 minutes trying to do so without success. (Tr. 974–975.) Although Johnson testified as a witness for the General Counsel, his testimony does not corroborate Burrell's. I do not credit Johnson.[14]

The parties developed a mass of conflicting evidence about whether or not the men could have and should have been attaching two coils to the crane cable at a time, but clearly, they were only attaching one at a time.[15]

Superintendent Kenneth Johnson recommended to Gonzales that Autry, Burrell, and Scott be laid off. Respondent did lay off these three, and called in temporary workers to finish their shifts. Johnson explained the reasoning for his recommendation in this testimony:

> Q. Why did you tell him that?
>
> A. Because they was dragging the job out. They were goofing off. They weren't working.
>
> Q. How were they goofing off?
>
> A. They were unloading one coil at a time.
>
> Q. Were they always unloading one coil at a time that day?
>
> A. According to Scott Johnson, whenever I was present whenever he called me there, they would unload two coils. Whenever I left, they would unload one. At one particular time, I think I was there, I drove up on them and they had one coil hooked up and I asked them what was the matter, couldn't you unload two. And they could have. [Tr. 129.][16]

---

[13] Leon Autry corroborated Burrell's account: "Mr. Burrell stated—I think it was to Jay Johnson—that if we don't get—if I don't get no water by the time I finish these two cars or something, I'm not going to work any more." (Tr. 1207.)

[14] Frequently, Johnson answered questions "I don't know" even when the questions did not appear particularly difficult. Additionally, based on the demeanor of the witnesses, I am not convinced that Johnson's testimony was reliable.

Moreover, Johnson testified that Superintendent Kenneth Johnson instructed him to hook up just one coil to the crane at a time. It is not clear when Superintendent Johnson gave him this instruction, but it may have been long before July 20, 1995. However, another witness, Larry Scott, contradicted Johnson on this point.

[15] For example, John B. Todd Jr., a mechanic for Respondent, suggested that pulling two coils at a time was the normal practice rather than the exception. Todd testified that on this particular date, "like I say, they were pulling one at a time. They were told to pull two at a time where available, which most of the time, you can pull two at a time. The only time you only pull one is if you have an odd number or if you want to break—if you've got three in a row, and you break one out. And they consistently pulled one at a time." (Tr. 1935.)

By comparison, Leon Autry's testimony paints a picture of Superintendent Kenneth Johnson making highly unreasonable demands on the men:

Q. Did any—you started—you said you started at seven o'clock. After seven o'clock do you recall any supervisor coming up to the rail car where you were?

A. Kenny Johnson came around about 7:15, which is my supervisor, and told us *he wanted us to do twice as many rail cars by twelve o'clock as we done all day the day before.* We'd already did like 13 cars that whole day. So that mean he want us to do 26 cars by twelve o'clock. (Tr. 1150; emphasis added.)

[16] Johnson also testified that on this date, the employees in question were "doing everything they could to drag the job out" such as standing around standing around drinking water and talking when they should

From the record, it is clear that the discipline imposed on Autry, Burrell, and Scott involved two separate decisions. The first was a decision to send them home on July 20, 1995, and call in temporary workers to do the work. Clearly, Kenneth Johnson made the decision authorizing the first-line supervisor to send the three men home.

Johnson testified that he told the supervisor that if the men kept pulling only one coil off the rail car at a time, "to knock them off[17] and call the temporary agent and get some men there that would work." (Tr. 2032.) This decision, made in the field, was distinct from the later decision, approved by the Respondent's president, to issue disciplinary letters informing Autry, Burrell, and Scott that they would remain suspended through July 21.

Gonzales, rather than Superintendent Johnson, issued these disciplinary letters, but Johnson testified that he recommended that the three employees be disciplined for "goofing off" rather than doing their work. Johnson also testified there was no other reason why he recommended that they be laid off. However, the warning letters which Respondent provided to Autry, Burrell, and Scott gave a number of reasons:

> You were called to come to work today at 07:00 hrs. at North C to help unload rail cars loaded with 10 tons steel coils.
>
> You caused delays on the job on purpose, you refused to carry on with instructions that you [sic] supervisors gave you. You were told to hook the cargo to unloaded [sic] 2 pcs. at the time and your [sic] only rigged one. After the superintendent Mr. Kenneth Johnson moved away temporarily from the working area you continued stretching the job as you could manipulate it.
>
> You used abusive and foul language toward supervisors on the job.
>
> Take this as a second warning.
>
> Yesterday you were reprimanded for your behavior and actions verbally by Mr. Kenneth Johnson, [General]. Superintendent, by Mr. Ken Wear, Supervisor, and Mr. Jay Johnson, acting Foreman.
>
> Because of your behavior you were knocked off at 3:00 PM yesterday afternoon even when we had nine more railcars to unload that we have now to pay demurrage on.
>
> You were knocked off today at 8:30 AM due to your refusal to follow instructions.
>
> As a disciplinary action you are to be out of a job the rest of the day today and tomorrow.
>
> . . . .
>
> Be hereby notified. This will be your last warning.
>
> Next time you fail to follow instructions and refuse to work, disrespect your superiors, disappear from the job or slow the job down on purpose you will be terminated from your employment with Golden Stevedoring Co., Inc. [GC Exhs. 2, 3, and 4.]

These letters characterize the discipline as a "second warning," and state that the previous day, July 19, 1995, the employees had been "knocked off" at 3 p.m. "even when we had nine more railcars to unload that we have now to pay demurrage on." However, the record establishes, and I find, that work had stopped the previous afternoon because of an electrical storm which made working around the crane dangerous.[18]

To determine whether these layoffs and disciplinary letters violate Section 8(a)(3) of the Act, I apply the criteria established by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must first make a prima facie showing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" to take the action which allegedly violated Section 8(a)(3).

Once the General Counsel has made such a showing, the burden then shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083, 1089. If the General Counsel does not present evidence establishing such a prima facie case, the respondent does not have to demonstrate that it would have taken the adverse employment action anyway.

The General Counsel may establish the prima facie case by proving the following four elements: (1) The alleged discriminatee engaged in union or protected concerted activities. (2) The respondent knew about such activities. (3) The respondent took an adverse employment action against the alleged discriminatee. (4) There is a link, or nexus, between the protected activities and the adverse employment action.

At the first step, the government must prove that the alleged discriminatees engaged in union or protected concerted activities. At the time of the July 20, 1995 discipline, the Union's organizing campaign had just ended in an election victory for the Union.

Moreover, for the reasons stated below, I conclude that management considered that Autry, Burrell, and Scott had been engaging in concerted activities on July 20. Although that may not have been the case, management acted on such a belief in deciding to lay them off.

It should be stated that, based on Burrell's testimony on cross–examination, I do not find that he had conferred with other workers about the water issue before he told the supervisor that they would stop work if the water failed to arrive:

> Q. Did you and the other men, or some of the other men that you were working with, decide among yourselves that you weren't going to unload any more coils from any more rail cars until you got water?
>
> A. No, sir.
>
> Q. You didn't do that.

have been working. (Tr. 2028.) "In other words," Johnson testified, with apparent conviction, "they done got lazy." (Tr. 2029.)

[17] In the slang used on the Alabama docks, "knock off" has a less sinister meaning than in detective novels. As an intransitive verb, to "knock off" simply signifies quitting work for the day, and, used transitively, it means telling employees it was the time to do so.

[18] Superintendent Johnson testified that he sent everyone working that job home after the lightning began. (Tr. 2361.)

A. No, sir. [Tr. 1041–1042.][19]

However, I also conclude that Burrell's statement, threatening to cease work if the water had not arrived by a certain time, constituted concerted activity protected by the Act. The Board has held that individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are the logical outgrowth of the concerns expressed by the group. See *Mike Yurosek & Sons, Inc.*, 306 NLRB 1037, 1038 (1992).

Here, the record amply reflects that other employees besides Burrell were concerned about having drinking water at the jobsite. I find that the government has established the first *Wright Line* element.

At the second step, the General Counsel must prove that Respondent knew about the protected activities. The evidence abundantly establishes this element.

Undoubtedly, the Respondent was particularly sensitive to the issue of concerted activity because of the recent organizing campaign which had culminated in the Union's victory in the July 12, 1995 election. In fact, management was so sensitized to this subject that it perceived that Autry and Scott, as well as Burrell, had threatened to cease work if the water did not arrive. Thus, in explaining why he took the disciplinary action alleged in paragraph 9 of the complaint, and admitted by Respondent, Gonzales testified in part as follows:

> A. They were unloading steel coil for breakout. And they were told to do lifting of two coils at a time. And they were lifting only one. And they were coming off the car. At one point, *they refused to work because they said that they weren't going back to work because there was no ice water there.* And they just kept talking and talking to other people on the job. So I have to call them back. [Tr. 59; emphasis added.][20]

Gonzales, who received his information from Superintendent Kenneth Johnson, was wrong. The employees hadn't refused to work. Burrell had merely made the threat. However, based on Gonzales' testimony, I find that when he made the decision to discipline Burrell, Autry, and Scott, he believed that they engaged in a concerted refusal to work because they did not have ice water. In sum, the government has proven the second element of the *Wright Line* test.

The General Counsel also must demonstrate that the discriminatees suffered an adverse employment action. The warning letters they received stated that as "a disciplinary action you are to be out of a job the rest of the day today and tomorrow." (GC Exhs. 2, 3, and 4.) Clearly, this layoff constituted an employment action and it certainly was adverse. The government has proven the third of the *Wright Line* criteria.

Finally, the General Counsel must show that there is a nexus or link between the employees' protected activities and the adverse employment action. The testimony of Gonzales' president establishes this necessary link. Asked the reason for the discipline, Gonzales answered, in part, "they refused to work because they said that they weren't going back to work because there was no ice water there." (Tr. 59.)

In addition to this admission, connecting the disciplinary action with the perceived concerted activity, the record contains ample evidence from which to infer a link between the recent union activity and the discipline. The timing alone, 8 days after the election, raises suspicion.

Even more significant, I believe, is the fact that the disciplinary letters claimed that the three employees had been sent home for misconduct the previous day, July 19. However, the record establishes that they stopped work early that day because of a storm. Almost certainly, the Respondent would have been aware of this fact, which leads to the conclusion that the statement about prior discipline was knowingly false.[21]

When evidence indicates that a stated motive is a pretext, the Board may infer that the real motive is unlawful. For this reason, as well as the statements of Gonzales and the timing of the discipline, I find that the General Counsel has established the necessary nexus between the protected activities and the adverse employment actions.

Therefore, the government has proven a prima facie case, and the burden shifts to the Respondent to establish that it would have taken the same action against the discriminatees regardless of their protected activities. Respondent asserts that Autry, Burrell, and Scott were deliberately slowing down the work by removing only one coil of metal at a time when they could have removed two.

A deliberate work slowdown on the job may involve concerted activity by a number of employees, but it is not protected by the Act. Unlike a strike, in which employees refuse to work but also don't get paid, in an on-the-job work slowdown the employees still draw a paycheck while failing to perform the work expected in return. Therefore, Respondent presented evidence to show that Autry, Burrell, and Scott were deliberately slowing down the work by removing only one coil from a rail car when they could have been attaching the cable to two.

Under *Wright Line*, the Respondent must show that it would have taken the same disciplinary action even if the alleged discriminatees had engaged in no protected activity. That means the Respondent does not have to prove that the misconduct actually took place, but only that it held a reasonable belief that it did, and acted on that belief in good faith.[22]

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[19] Autry's testimony also suggests that when Burrell made this demand for water he had not conferred in advance with other employees. (Tr. 1207.)

[20] Gonzales also gave as an additional reason for laying off the men, that they were using foul language. Considering that these employees were seasoned longshoremen working at a port, this stated reason was not instantly convincing. Respondent tried to draw a distinction between profane banter among employees and profanity directed at a supervisor in a spirit of name calling. I still find the "foul language" reason to be a makeweight which drains some of the credibility away from the other reasons Respondent gave for the layoffs.

[21] It is not clear that Respondent's president, Gonzales, either prepared or signed the disciplinary letters. Although they bear a rather illegible signature, which purports to be that of Gonzales, the name below the signature is spelled "Gonzalez" with a "z" rather than an "s." (GC Exhs. 3, 4, and 5.) However, Respondent is bound by the disciplinary letters it issued to the discriminatees, regardless of who prepared them.

[22] However, if the asserted misconduct arose out of the alleged discriminatees' protected activities, for example, if the Respondent

The parties developed a substantial body of testimony, conflicting in various details, concerning whether or not the men should have been attaching one or two coils of metal to the crane cable on that particular day. Considering the amount of time that elapsed between the event and the hearing, none of the testimony can be considered 100 percent reliable. However, I believe that the most accurate account may be found in the testimony of Larry Scott, one of the three alleged discriminatees.

Respondent's attorney subjected him to an exhausting cross-examination, which afforded a greater opportunity to take note of Scott's demeanor and composure "under fire." Based on those observations, I credit his testimony about what happened while he was unloading the rail cars on July 10, 1995. Although it was not in his apparent interest, Scott testified that it was not unusual for longshoremen to attach two coils to the crane cable at one time:

> Q. Would you ever lift one coil when you could lift two?
>
> A. No, sir.
>
> Q. Two is the way to do it?
>
> A. Yes, sir. [Tr. 766.][23]

However, on July 20, 1995, Scott's testimony made clear, it was not possible to get the cable through both spools of metal. As Scott testified, Foreman Jay Johnson tried to do so without success.

Nonetheless, Superintendent Kenneth Johnson appeared intent on doing the task in that manner. His attitude is quite understandable, considering that Respondent had undertaken to unload 95 rail cars full of the heavy coils, and a storm the previous day had forced the men to cease work early. Moreover, it cost Respondent demurrage penalties if the unloading took too long.[24]

Johnson clearly was trying to make up for lost time, and was not about to take "can't do" for an answer. Scott testified, in part, as follows:

> Q. What did Kenny Johnson say when he came up to the rail car?
>
> A. He told us to pull two and we told him we couldn't, you know. On some of them, we could get two. On some of them, we couldn't.
>
> Q. Who told him that?
>
> A. Donald Burrell. You know, all of us. I told him, see, it's spaced out. If I had dropped the chain back up in the rail car, I showed him, I went through the hole and I pulled the chain back and the chain only come back so far. I said, we can't get the two. *He said, well, if you all can't get the two, I can get somebody that can, you know.* So we went ahead and got the one. He left. Then Scott Johnson called him back again on the radio.
>
> Q. How do you know that?
>
> A. He was standing right there in front of us.
>
> Q. Scott Johnson was?
>
> A. Yes, sir. He called him back and he told him, hey, they are still pulling the one. Kenny came back again. He said, I'll tell you what, just get your ass off the rail car. He said, I'll get somebody to get them. So, we got off. We went on to sit down under the little shack.
>
> Q. Okay. Hold on. Before you got off the rail car, did you hear anyone use any foul language on the rail car?
>
> A. No, sir.
>
> Q. Not at all?
>
> A. No, sir. [Tr. 725–726; emphasis added.]

I conclude that Kenneth Johnson also was testifying truthfully when he expressed his opinion that the men were "goofing off." When he was present at the unloading site that day, the men would appear to be hooking two coils to one cable. Yet he heard from Foreman Scott Johnson that whenever he, Kenneth Johnson, left the jobsite, the men would go back to unloading just one coil.

Superintendent Johnson's own observations seemed to confirm the foreman's report. "At one particular time," he testified, "I think I was there, I drove up on them and they had one coil hooked up and I asked them what was the matter, couldn't you unload two. And they could have." (Tr. 129.)[25]

From his testimony and my observations of him as a witness, Kenneth Johnson did not appear to have particularly strong feelings about the Union. In all likelihood, few things in life disturbed his equilibrium. But undoubtedly, one of those few was an employee who was not serious about his work. Such an attitude would trigger in Johnson the unique feeling of exasperation usually observed in the parent of a teenager.

A suspicion that his men were playing games with him, going through the motions without being serious about accomplishing the assigned job, could push this sense of frustration into the red zone. And that is what seemed to be happening on July 20, 1995, when the crew only appeared to be following Johnson's instructions when he was there to watch.

From the perspective of the crew, however, the facts were quite different. They believed it impossible to do the job the way Johnson wanted them to do it or, if not absolutely impossible, so time consuming it would be counterproductive. After all, one foreman, Jay Johnson, had wasted about 20 minutes in an unsuccessful attempt to hook two coils onto one cable. Yet Kenneth Johnson would appear at the site and demand that they do the work that way.

Clearly, Johnson's frustration at the rate of progress propelled him to call in temporary workers to replace Autry,

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claimed that they engaged in picket-line misconduct, the Board uses the decisional framework of *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), rather than *Wright Line*. See *E. W. Grobbel Sons,* 322 NLRB 304 (1996). In this case, the alleged misconduct, a slowdown at work, does not arise out of the discriminatees' protected activities. *Philips Industries,* 295 NLRB 717, 732 (1989).

[23] The witnesses, including Scott, were sequestered during the hearing. Scott's testimony presumably is uninfluenced by any knowledge of how other witnesses answered.

[24] The disciplinary letters to Autry, Burrell, and Scott referred to these demurrage penalties. (GC Exhs. 3, 4, and 5.)

[25] Johnson also testified that as he was walking off after talking to the men, someone said "f— you." (Tr. 2033, 2362.) I credit this testimony. However, I find that when Johnson sent the regular employees home on July 20, 1995, and called in temporary workers to finish the job, his only motive was to get the tasks done on time.

Burrell, and Scott on July 20, 1995. The evidence does not support a finding that when he took this step Johnson was motivated by animus towards the Union.[26]

Similarly, the record does not establish that he laid them off because Burrell said they would stop work if the water did not arrive. Indeed, Johnson credibly testified that he did not learn about the "water flap deal" (as he called it) until after he suspended the three. (Tr. 2033, 2363.)[27]

With respect to the layoff on July 20, 1995, I find that Respondent has proven that it would have taken the same action against Autry, Burrell, and Scott regardless of their union and protected concerted activity. Superintendent Johnson would have laid off any employee whom he had perceived to be working slowly when there was so much urgent work to be done.

However, the disciplinary actions went further than merely laying off the three employees on this one day when temporary workers were summoned to do the job. The July 20, 1995 letters to Autry, Burrell, and Scott specifically stated, "As a disciplinary action you are to be out of a job the rest of the day today and tomorrow." (GC Exhs. 2, 3, and 4.) Each letter ended with a notice that it was a "last warning" and concluded

> Next time you fail to follow instructions and refuse to work, disrespect your superiors, disappear from the job or slow the job down on purpose you will be terminated from your employment with Golden Stevedoring Co., Inc. [GC Exhs. 2, 3, and 4.]

The letters do not mention Burrell's threat of concerted activity, but Gonzales mentioned it when testifying about the reasons for the discipline. (Tr. 59.) Moreover, the disciplinary letters threatened to terminate the employees the next time they refused to work or disrespected superiors. They made no exception for activities protected by the Act.

The burden of proof clearly rests on Respondent to establish that it would have imposed the same discipline even in the absence of protected activities. Based on the testimony of Gonzales and the language of the disciplinary letters, I am not convinced that Respondent would have taken the same action against Autry, Burrell, and Scott regardless of the recent union campaign and Burrell's statement that the employees would stop work unless water arrived. Perhaps that is so, but I do not believe Respondent has proven it by a preponderance of the evidence.

Therefore, with respect to the disciplinary letters themselves, which placed the employees on a "final warning" status, and the period of suspension after July 20, 1995, I find that Respondent discriminated against Autry, Burrell, and Scott in violation of Section 8(a)(3) and (1) of the Act.

E. July 1995—Creation of Impression of Surveillance and July 24, 1995—Written Warning to Employee Carey Wyatt

Paragraph 7(a) of the complaint alleges that "About July 1995, on a date not more precisely known, Respondent, by Kenneth Wayne Johnson, created an impression among its employees that their union activities were under surveillance." This alleged 8(a)(1) violation will be considered with the alleged violation of Section 8(a)(1) and (3) raised by paragraphs 10, 19, and 28 of the complaint.

Paragraph 10 of the complaint alleges that about July 24, 1995, Respondent issued a written warning to Carey Wyatt. In its answer, Respondent admitted that it "furnished Carey Wyatt with a copy of a 'disciplinary notice' on July 27, 1995," but otherwise denied the allegations.[28] It denied the allegations in paragraph 19, that it had given Wyatt this warning to discourage union activities, and it also denied the conclusion alleged in paragraph 28, that this action violated Section 8(a)(1) and (3) of the Act.

Wyatt testified that "about a week or so" before receiving the written warning on July 27, 1995, he and Superintendent Johnson were discussing "the Union and all" and Johnson "told me to watch my back, to watch it close, that they will be out to get me." (Tr. 540.)[29]

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[26] Some of the witnesses identified with the Union indicated that after Autry, Burrell, and Scott were laid off on July 20, 1995, the temporary workers showed up very quickly to replace them. Such a rapid response could be consistent with a prearranged plan to remove the alleged discriminatees from the job quickly while minimizing the impact on production. However, Scott estimated the intervening time to be longer, between 30 minutes and an hour. (Tr. 768.) I credit this testimony.

[27] Significantly, on direct examination by the General Counsel, Johnson testified that he laid off Autry, Burrell, and Scott because they were "dragging their feet on the job" but did not mention Burrell's statement that they would stop working if they did not get drinking water. (Tr. 129.) Johnson's concern clearly focused on getting the 95 rail cars unloaded, not on retaliating against employees for concerted activity.

[28] The choice of words used by Respondent in answering the complaint may have some significance. Instead of admitting that it "issued" such a warning to Wyatt, it admitted it "furnished" him with a copy of it. Perhaps Respondent wished to emphasize its position that its disciplinary policy had not changed, but instead, it was merely writing down the warnings which previously had been given orally. Nonetheless, I have concluded that this "formalization" (as Respondent called it) resulted in harsher discipline being issued because a written warning has greater impact than an oral one.

In deciding the issues raised by par. 10, I will rely on my conclusion that there is no significant difference between furnishing an employee with a copy of the memo which memorialized discipline and issuing the disciplinary memo directly to him.

[29] Wyatt's testimony generally accords with his pretrial affidavit except to the date of Johnson's alleged statement. The affidavit, given on August 16, 1995, places the date of the statement as a week before the *election*, which was July 12, 1995, rather than a week before the July 27, 1995 disciplinary notice. In his affidavit, Wyatt stated in part as follows:

> About a week before the election, I was in my office, which I share with the other checkers and Kenny Johnson. At this time Kenny said to me "As a friend, I'm warning you to watch your step. They're going to be out to get you." He used some examples like your wife coming up here 5 or 10 minutes before lunch, letting the guys go to lunch 5–10 minutes early, and taking them to get their cars while they are on the clock. I told him that I was going to watch my back and he didn't have to worry about that. This is all I remember about this conversation. We were the only 2 people in the office at the time. [R. Exh. 19, at 3.]

Johnson did not deny such a statement. Although the trier-of-fact may reject uncontradicted testimony, I believe that before doing so, the record should establish some persuasive reasons to find the testimony unreliable. There are no reasons, extrinsic to the testimony, for rejecting it, and I credit Wyatt.

I find that Johnson offered this information to Wyatt in a friendly spirit, not to instill in Wyatt a feeling that he was under surveillance or otherwise intimidate him in the exercise of Section 7 rights. However, intent generally is not an element of an 8(a)(1) violation. Rather, the Board applies an objective standard to determine the effect that a statement reasonably would have on employees.[30]

Here, the statement reasonably would create the impression that employees' union activities were under surveillance, and that they could suffer retaliation for engaging in such activities. Therefore, I conclude that the statement interferes with, restrains, and coerces employees in the exercise of Section 7 rights. I find that it violates Section 8(a)(1) of the Act, as alleged in paragraph 7(a) of the complaint.

Turning to paragraph 10 of the complaint, the Respondent does not dispute that on about July 27, 1995, it gave Wyatt a memo from Superintendent Kenneth Johnson to President Gonzales. This memo stated:

> I told Mr. Wyatt to be at work today at 07:00 and Mr. Wyatt showed up for work at 07:35 with no phone calls to inform him would be late. He said he forgot to set his alarm clock.
>
> Mr. Wyatt has been informed that this is the second time in eight days period that he has failed to show up to work on time. [GC Exh. 15.]

Wyatt did not remember whether or not he had been 35 minutes late on that day, as stated in the memo. He testified, "I do not recall. I knew I had been late one morning but I do not remember the amount of time." (Tr. 544.)

In determining whether this warning violated Section 8(a)(1) of the Act, I will apply the *Wright Line* analytical framework described above. At the first step, I must examine whether Wyatt had engaged in union activity or concerted activity protected by the Act.

Wyatt testified that he made the initial contact with the Union and got 18 to 19 people to attend a meeting with Union Organizer George Bru. (Tr. 530.) He also testified that he wore a hat with a union emblem to work every day, and handed out 50 union hats and more than 100 union pins. (Tr. 532–534.)

I am skeptical about parts of Wyatt's testimony. Wyatt stated in an August 16, 1995 affidavit that "To my knowledge, prior to about 3 days before the election, Edgard [Gonzales] had no concrete knowledge about who was a union supporter." (R. Exh. 19.)

If Wyatt had worn the union hat to work every day as he claimed at trial, the Respondent clearly would have been aware that he supported the Union. Moreover, if even a fraction of the employees who received hats and pins wore these items, their support for the Union could not have escaped Respondent's notice.

Another witness, J. H. ("Jay") Johnson, testified that he had seen Wyatt wearing a union hat while working at Golden. (Tr. 702–703.) In a pretrial affidavit, however, Johnson had stated "I have never worn any union buttons, badges, or other paraphernalia [sic]. *I don't remember any employee wearing anything, eithe.*" (R. Exh. 21; emphasis added.)

Because of these contradictions, I greatly discount Wyatt's testimony about the extent and notoriety of his protected activities. However, the record does not contradict his testimony that he made the initial contact with the Union and set up the first meeting of employees with the union organizer. Therefore, I conclude that the General Counsel has proven the first element of the *Wright Line* test.

The second element the government must establish is that the Respondent knew about Wyatt's protected activities. Notwithstanding that I believe Wyatt exaggerated while testifying about his union activities, I conclude that Respondent did know that he supported the Union. Superintendent Johnson's advice to Wyatt, to "watch his back" and "watch it close" lends support to this conclusion. I find that the General Counsel has established the second *Wright Line* element.

At the third step, the General Counsel must prove that Wyatt suffered an adverse employment action. A disciplinary warning certainly constitutes such an action. The government has established the third *Wright Line* element.

However, I conclude that the General Counsel has not proven the final requirement, a link or nexus between the protected activity and the discipline. Wyatt did not deny being 35 minutes late on the day in question, but testified that he could not remember. I find that he was late, as described in the disciplinary memo.

Moreover, Superintendent Johnson attaches great importance to punctuality. I observed the quiet pride he displayed when testifying that he had not been late to work since 1962. (Tr. 1994.) I find that Johnson did not treat Wyatt any differently than he would have treated any other employee who arrived for work 35 minutes late. In sum, I find that the government has failed to establish the required link between Wyatt's protected activities and the discipline taken against him.[31]

Therefore, I find that Respondent did not violate Section 8(3) by issuing the warning to Wyatt, and recommend that this allegation be dismissed. However, I note that issuance of this written warning results from the unlawful unilateral change in dis-

[30] See, e.g., *Waco, Inc.*, 273 NLRB 746, 748 (1984). There are exceptions. See, e.g., *Tualatin Electric, Inc.*, 319 NLRB 1237 (1995) (an employer's "no moonlighting" policy violated Sec. 8(a)(1) where the evidence established that the respondent intended to use it to exclude job applicants sent by the union during a "salting" campaign).

[31] My finding that Johnson did not treat Wyatt disparately would also lead to the conclusion that Respondent could meet its burden of rebutting a prima facie case, by demonstrating that it would have taken the action against Wyatt regardless of protected activities. However, I believe the evidence falls short of making such a prima facie case, and therefore, no burden fell on Respondent to rebut it.

ciplinary procedures which violates Section 8(a)(5) and (1) of the Act.[32]

F. July 25 and 26, 1995—Written Warnings Issued to Donald Burrell

Paragraph 11 of the complaint alleges that about July 25 and 26, 1995, Respondent issued written warnings to Donald Burrell. Paragraph 19 alleges that Respondent was unlawfully motivated in issuing these warnings, and paragraph 28 alleges that the warnings violated Section 8(a)(3) and (1) of the Act.

Respondent admitted that on July 25, 1995, it "furnished Donald Burrell with a memorandum from Kenneth Johnson to Edgard H. Gonzales relating to Donald Burrell" and that on July 26, 1995, it "furnished Donald Burrell with a copy of a 'Disciplinary Notice'" but otherwise denied paragraph 11. It also denied that it violated Section 8(a)(3) and (1) of the Act.

At the outset of this discussion, I will note that these written warnings, like the one issued to Wyatt on July 24, 1995, were the result of a unilateral change the Respondent made without notifying and bargaining with the Union, in violation of Section 8(a)(5) and (1) of the Act. (See below.) Therefore, the written warnings must be rescinded to remedy the 8(a)(5) violation.

Here, I will consider whether they also constitute discrimination in violation of Section 8(a)(3). Since the conclusions I reach do not affect the remedy, this discussion will be brief.

The first of the warnings concerned Burrell being late to work; the second concerned forklift safety. I will discuss them in sequence.

On July 25, 1995, Burrell received a copy of a memorandum from Superintendent Johnson to President Gonzales. It stated:

> This is to inform you that yesterday July 24, 1995, Mr. Donald Burrell was told to come to work July 25, 1995 at 07:00 a.m., and he showed up at 07:45 a.m. When I asked him for a reason of his delay his answer was that he over slept. I had to send him back home since somebody else had taken his place already.
>
> Should this happen again I would have to terminate Mr. Burrell's employment with this company.
>
> Please note this is one more warning that Mr. Burrell is receiving concerning his job performance. [GC Exh. 5.]

At the hearing, Burrell admitted that he had been late on the day in question. However, he testified that he was 5 or 10 minutes late, not the 35 minutes stated in the warning memorandum. Burrell further testified, in part, as follows:

> Q. Okay. And when you came in to work, who did you talk to?
>
> A. When I got to work, I talked to [Supervisor] Ken Wear, and—
>
> Q. What did you tell him?
>
> A. I told him that my—that I was—I said I overslept, if I'm not mistaken —that I overslept, and I'm here now. He said, Well—if I'm not mistaken, he told me, he said, Well, Kenny Johnson has already filled your spot. I got to talk to him. So—
>
> Q. Then what happened?
>
> A. And he called him on the radio. It was about 15 or 20 minutes later, Kenny Johnson did come. And everybody—wasn't nobody around at the time but me and Kenny. And the first thing he asked me was why was I influencing these other guys to go Union, you know—to be dealing with the Union.
>
> And I said, Boss, what you mean by influencing these guys? These guys are grown men. I can't influence them. And at that particular time, somebody else walked up. And he didn't want nobody to hear that conversation but me and him. So the conversation stopped.
>
> And he told me that he had filled my spot, to go home and come back in the morning. [Tr. 986–987; Emphasis added.]

Two procedural matters must be discussed in connection with the testimony excerpted above. The first concerns the question which Burrell attributes to Superintendent Johnson, asking why Burrell was "influencing these other guys to go Union." The complaint does not allege this statement to be unlawful interrogation, or, in fact, to be any violation of the Act. The complaint does not refer to the quoted question at all.

The quoted question would appear to be unlawful interrogation of a employee about his union activities. However, based in part on my observations of the witnesses. I do not credit Burrell's testimony and therefore do not find that Johnson asked the question Burrell attributes to him.

The second procedural matter concerns the Respondent's motion at hearing to strike the testimony quoted above, on the basis that there is no allegation in the complaint that, by sending Burrell home on this date, it suspending him in violation of the Act. The General Counsel agreed with Respondent that the complaint did not allege that Respondent had sent Burrell home unlawfully on this date, and the testimony merely completed the story about what happened to Burrell at that time. (Tr. 988.) Denying the motion to strike, I accepted the testimony for that purpose.

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[32] As stated above, placing this warning in written form does constitute a departure from Respondent's preelection practice, and is evidence that the Respondent made the unlawful unilateral change alleged in pars. 23, 25, 26, and 29 of the complaint. Under certain circumstances, where an employer has committed widespread unfair labor practices, a unilateral change in disciplinary procedure can violate Sec. 8(a)(3) as well as Sec. 8(a)(5). For example, in *Garney Morris, Inc.*, above, the Board adopted the judge's finding that "each and every time" the Respondent issued discipline using a more onerous form it unilaterally adopted, that action violated Sec. 8(a)(3) as well as Sec. 8(a)(5). *Garney Morris, Inc.*, 313 NLRB at 120.

However, in *Outboard Marine Corp.*, 307 NLRB 1333, 1337 (1992), the Board reversed a somewhat similar finding by the judge. The Board stated that "conduct indicative of a statutory failure to bargain in good faith does not establish discriminatory conduct, in violation of Sec. 8(a)(3). Unlike the judge, we are not persuaded that the Respondent's overall animus and conduct prove a preconceived plan to rid the Calhoun plant of the Union and that, therefore, the unlawful impasse was necessarily discriminatory."

Based on the present record, the evidence of animus is insufficient to provide a basis for concluding that merely issuing the warning in written form violated Sec. 8(a)(3) as well as Sec. 8(a)(5).

Even if the complaint had alleged it to be violative, I would not find that the Respondent violated the Act by failing to offer Burrell work on this date. Burrell admittedly was late to work and, his own testimony indicates, the Respondent already had filled his position with another person. Clearly, Respondent had a legitimate business interest in having someone report to work at the appointed time, whether it was Burrell or someone else.

As to Burrell receiving a warning for being late, I note again that Superintendent Johnson, who hadn't been late to work once in 35 years, was a stickler for punctuality. For the same reasons discussed above in connection with the July 24, 1995 warning issued to Wyatt, I conclude that the General Counsel has not established a prima facie case of discrimination.

Under the practice in effect before the election, Johnson would have "chewed out" Burrell orally, rather than given him a written memorandum. The evidence establishes that such an oral reprimand would not have violated the Act, and that the only violation arises because of the unilateral change in the way warnings were issued. Therefore, I recommend that the allegation that this warning violated Section 8(a)(3) be dismissed.

On July 26, 1995, Burrell received another warning. This one concerned Burrell driving a forklift even though not licensed to do so, and took the form of a memo from Foreman Jay Johnson to Superintendent Kenneth Johnson. It stated as follows:

> Mr. Burrell was working on the M/V "ARATI" today. He is a labor[er] and while he was in the hole [sic] of the ship he was spotted by his job foreman driving a forklift in the hole [sic]. He was immediately told to get off of the lift, that was not his job, not to get back on it.
>
> At approximately 21:45 Mr. Burrell was then seen again on the forklift that is not his job and he is not a forklift operator. I felt he was being insubordinate and ignored the foreman's instructions. [GC Exh. 6.]

The parties developed a hefty body of evidence concerning this issue, including testimony from a number of witnesses about the events in question and the driving of forklifts in general. However, as noted above, the resolution of this 8(a)(3) issue will not affect the remedy in this case, because the issuance of the written warning constituted an unlawful unilateral change under Section 8(a)(5) of the Act.

Therefore, I will address this allegation very briefly. In fact, the key testimony in resolving it comes from Burrell himself. From that testimony it is clear, and I find, that Burrell knew that he wasn't supposed to drive a forklift but thought he could do it without getting caught. He got caught.

On July 26, 1995, Burrell and the other members of his crew had a long day. They started work at 7 a.m. that day and were still on the job at 9:45 p.m. The crew wanted to finish but the forklift driver had to use the restroom. As Burrell stated in a pretrial affidavit and admitted during the hearing, he "knew that if he left he wouldn't be coming back because it takes 15 minutes to climb up out of the hol[d]" to get to the restroom on the dock. Eager to finish the day's work, Burrell got on the forklift. (R. Exh. 37.)

Burrell testified, and other witnesses confirmed, that President Gonzales had a policy that only licensed forklift drivers operate that equipment. From the record, I infer that Gonzales felt just as emphatically about this policy as Kenneth Johnson felt about punctuality.

In his testimony, Burrell admitted that he was aware of Gonzales' forklift policy. When asked on direct examination if he were aware of the forklift policy, Burrell replied, "The only policy that we had on the job was not to let Edgard Gonzales see you drive it." (Tr. 992–993.)[33]

Although Burrell had been told not to drive a forklift when Gonzales was "on the boat," he chose to do so on a night when Gonzales indeed was on the boat. In fact, Burrell admitted having seen Gonzales that evening on the vessel. Yet even at hearing, Burrell did not believe Gonzales had seen him commit the infraction:

> Q. You don't think he saw you.
>
> A. He did not see me.
>
> Q. How do you know he didn't see you?
>
> A. Because, like I said, I sat there and I watched him leave. And it was dark at the time. So, you know, when it's dark and you're on that ship, you barely can see exactly who's up top. [Tr. 1091.]

Clearly, Burrell guessed wrong. I do not find it to violate the Act for the Respondent to discipline an employee who knew that an action was against the rules but did it anyway, thinking he could get away with it in the dark. Applying the *Wright Line* analysis here in the same manner as described above, I find that the General Counsel has not established a prima facie case.

The only violation here arises from the unilateral change of issuing disciplinary warnings in writing, and not from the discipline itself. Therefore, I recommend that the Section 8(a)(3) allegation be dismissed.

G. August 2, 1995—Alleged Unilateral Reduction in Hours Worked

Paragraph 12 of the complaint alleges that "since about August 2, 1995, Respondent has reduced the work hours of its employees by utilizing temporary employees to perform work previously performed by bargaining unit members." Paragraph 28 alleges that this reduction discriminated against employees in violation of Section 8(a)(3), and interfered with, restrained, and coerced them in violation of Section 8(a)(1) of the Act.

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[33] Burrell's testimony on cross–examination was even more definite:

> Q. You knew not to drive that forklift while Edgard was there, didn't you?
>
> A. Yes, sir.
>
> Q. Why did you know not to drive that forklift in front of Edgard Gonzales?
>
> A. I had been told by Jay Johnson, Scott Johnson, Kenny Johnson, Ken Ware not to drive the forklift if Edgard is on the boat—that not let him see you drive it.
>
> Q. All right. And over what period of time did all of your supervisors tell you not to drive that forklift if Mr. Gonzales was on the boat?
>
> A. Since I've been there. [Tr. 1090–1091.]

Paragraph 24 of the complaint alleges that "about August 2, 1995, Respondent "changed its policy for assignment of work at its facility thereby reducing the hours of employment for bargaining unit members." Paragraphs 25, 26, and 29 allege that Respondent took this action without notifying the Union or affording it the chance to bargain about the changes, that the changes were mandatory subjects of collective bargaining and that accordingly, the alleged unilateral change violated Section 8(a)(5) and (1) of the Act.

1. Sufficiency of pleadings and proof

A procedural matter should be discussed first. Before, during, and after the hearing, the Respondent has contended vigorously that the General Counsel failed to place it on notice of the specific conduct the government considered unlawful. As I understand the thrust of the Respondent's argument, it asserts that the General Counsel never identified the work which the Respondent supposedly took away from employees in the bargaining unit and assigned to temporary workers from a labor service.

However, the General Counsel contends that the government does not have to point to any specific task that the Respondent took away from Employee "X" and assigned to Temporary Worker "Y." According to the General Counsel, the government can meet its burden of proof with statistical evidence showing a reduction in the number of hours worked by regular employees as compared to the number of hours worked by temporary employees during a given period.

Thus, in opposing the Respondent's motion to dismiss these allegations, the General Counsel stated on the record "it's the General Counsel's position that we're not required to specify the different duties that the temporary employees did in the place of the bargaining unit employees." (Tr. 1893.)

Notwithstanding this argument, I believe that proving what duties the temporary workers performed constitutes an essential element of the General Counsel's case. Unless the government proves that the temporaries performed work which previously had been assigned to bargaining unit employees, it cannot establish that there has been a unilateral change in the terms and conditions of employment in the bargaining unit.

Stated another way, the General Counsel bears the burden of proving the unilateral change in terms and conditions of employment alleged in the complaint. The only way the government can prove that any change occurred is by establishing what the terms and conditions of employment were before the alleged change, also establishing what the terms and conditions of employment became after the change, and then comparing the two.

Additionally, not every unilateral change in a term or condition of employment produces a duty to notify the Union and bargain with it. Only a change in a *mandatory* subject of bargaining creates this obligation. The General Counsel bears the burden of proving that an alleged change did involve a mandatory subject of bargaining. It is difficult to imagine how the General Counsel could carry this burden without proving the specific condition of employment which had changed.

However, a clear distinction must be drawn between the specificity required for an adequate pleading and the specificity needed to carry the burden of proof in the courtroom. I conclude that the complaint placed the Respondent on sufficient notice to satisfy due process requirements because it alleged the general elements the government had to prove. For example, it alleged that the Respondent unilaterally had changed mandatory terms and conditions of employment.

Under the "notice pleading" standards which are now widely accepted, the complaint need not contain a wealth of detail about the facts which the government intends to prove at trial.[34] In sum, I find that the complaint does not deny the Respondent its due process rights.

At trial, however, the government still must present evidence to prove each element of its case, including that a unilateral change occurred and that it involved a mandatory subject of bargaining.

To satisfy the government's burden of proof, the General Counsel necessarily must identify which terms and conditions of employment have changed, and how. At the hearing, however, the General Counsel had some difficulty describing exactly what had changed:

> MR. ROGERS: Our allegation goes to the idea that the —after the election, the Respondent began to reduce the number of hours worked by its bargaining unit employees and any—but they still had the same amount of work to do, and increased the number of hours worked by temporary employees as a way to punish the employees for voting the Union in, basically.
>
> JUDGE LOCKE: Now, is this with respect to any particular work, like the recoupment, or—
>
> MR. ROGERS: The only time the temporary —
>
> JUDGE LOCKE—any particular job classification?
>
> MR. ROGERS: Well, the only time the temporary employees are used on any sort of large basis is when they—this is based on my reading of the record, based on my reading of the documents. And I think that Respondent even mentioned the same thing earlier. The only time the temporary employees are used on anything other than a one, two or three basis is when they have ships come in.
>
> And you can tell from the payroll records. There will be—the payroll records will be one page, one page, one page, and then there will be three pages. And you can tell when the temporary—when the amount of work increases.
>
> So as a matter—as a practical matter, the times when it—when this activity happened were when ships were, I think, either being loaded or unloaded. At any rate, the records show—will show when a lot of the temporary employees were hired day by day. [Tr. 1905–1906.]

However, even assuming that the payroll records relied on by the General Counsel did show an increase in the hours worked by temporary employees, these documents do not describe what the temporary employees were doing. The records

[34] Thus, the General Counsel argued, "it's just not necessary that we, in the pleadings, identify the duties that the temporary employees did in place of the bargaining unit employees." (Tr. 1894.) Literally, that is true. There is no requirement that these job duties be identified *in the complaint*. But having no obligation to describe evidence in a pleading does not eliminate the duty to present such evidence at trial.

indicate that the temporaries did something, that Respondent kept track of how much time they spent doing it, and, presumably, that Respondent was preparing to pay them for it. However, the time records do not establish whether the temporaries were performing bargaining unit work.[35]

Thus, proving an increase in hours worked by temporary employees does not, by itself, establish a prima facie case that either Section 8(a)(3) or (5) has been violated.

With respect to the 8(a)(3) allegation, the complaint alleges that Respondent reduced the hours of its employees unlawfully as a means of discriminating against them. Although the complaint asserts that Respondent used temporary employees to perform the work the regular employees would have done, that averment concerns the means allegedly used to accomplish the discrimination, and not the discrimination itself. The 8(a)(3) prima facie case still must be established by proving the *Wright Line* elements discussed above.

With respect to the 8(a)(5) allegation, the General Counsel bears the burden of proving that the temporary employees were performing bargaining unit work in a way, or to an extent, that they did not before the election. As discussed above, the General Counsel cannot satisfy this burden simply with records showing that on some days, temporaries worked more hours than they used to work. Evidence must show what kind of work they were doing, that the performance of this work by temporaries rather than bargaining unit employees changed a term or condition of employment that was previously in effect, that the changed term or condition of employment was a mandatory subject of collective bargaining, and that the Respondent made the change without notifying the Union and affording it the opportunity to bargain about the change and its effects.

2. The evidence

As stated above, the General Counsel relies largely on the Respondent's payroll records to establish the violations alleged in complaint paragraphs 12 and 24. Therefore, it is appropriate to begin with an examination of those records. (GC Exh. 16.)

The payroll records do not establish what the General Counsel's brief claims. A table in the General Counsel's brief ostensibly "summarizes the information contained in the records in G.C. Exh. 16." The table is highly abstracted. It does not break down the hours worked into the total for regular employees and the total for temporary workers. Instead, it provides only a percentage derived by the General Counsel's calculations. This table states, in part example, that in January 1995 temporary employees worked 18.57 percent of 3506.75 hours, that in July 1995 temporary employees worked 33.50 percent of 7090.50 hours, and that in August 1995 temporaries worked 26.19 percent of 2072.00 hours worked by the regular and temporary employees. (GC Br. 19–20.):

However, going back to the source documents in General Counsel's Exhibit 16 and adding up the hours produces an apparent discrepancy when those actual figures are compared to those summarized in the table. For example, the payroll records for January 1995 show that during that month, regular employees worked a total of 7089.75 hours, and temporaries worked a total of 914.50. Thus, regular employees alone worked more than twice the number of hours shown in the table for the hours of regular employees and temporary employees combined.

The payroll records for July 1995 show that regular employees worked a total of 7876.50 hours during that month, and temporaries worked 3024.50. Thus, the total number of hours worked by regular employees that month, as established by the source documents, exceeds the number of hours shown in the table for regular employees and temporary employees combined.[36]

What caused the discrepancy between the figures given in the General Counsel's brief and the totals from the source data? In making his computations, the General Counsel did not include all the hours shown in the payroll records, but rather made an assumption which excluded a substantial number of those hours. The General Counsel's brief explains the calculation this way:

> Since temporary employees were only called in when the Respondent was loading or unloading a ship, the only time that a permanent employee could be replaced by a temporary employee was when a ship was being worked. Comparisons should be made, therefore, only by using days when ships were being worked. *It is a fair estimate that the Respondent was working a ship when its total number of hours worked was 400 or more per day*. . . . By adding the total number of hours in a month worked on days when the Respondent's employees worked a total of 400 or more per day and comparing the percentage of the total hours worked by temporary employees each month, an accurate picture of the Respondent's hiring practices can be adduced. (GC Br. at 19, emphasis added.)

The General Counsel is quite explicit about this methodology, but I do not share the General Counsel's confidence in it. The methodology assumes facts that are not in evidence. For example, the record does not establish a satisfactory basis for concluding that "temporary employees were only called in when the Respondent was loading or unloading a ship."

Perhaps the General Counsel simply made this assumption because it sounded reasonable, and not because evidence established it. Even if the assumption turned out to be true, however, it would not justify ignoring hours listed on the official payroll records and excluding them from the computation. If any bargaining unit work has been shifted from unit employees to temporaries, an accurate determination of the amount must begin with accurate figures showing how much work was done. The further the figures depart from the actual amounts, the further the computation veers from the truth.

The government's methodology rests on another questionable assumption as well. The General Counsel attaches special significance to the days on which ships were in port. However,

[35] In addition to the payroll records, the General Counsel also relies on testimony to establish that there was a unilateral change involving a mandatory subject of bargaining. This evidence will be discussed below.

[36] However, the percentage of total hours worked by temporaries in July 1995 is about 28 percent, which is not too far from the 33.5 percent figure given in the table.

it does not appear that the General Counsel identifies such dates with records listing the ship names with dates of arrival and departure. Instead, the government makes an assumption that "the Respondent was working a ship when its total number of hours worked was 400 or more per day."

The General Counsel's brief calls that figure a "fair estimate," but does not cite any evidence as a basis. Indeed, the General Counsel does not even provide much argument to support this assumption, let alone evidence. Considering the entire record, I find the assumption unproven.

At a more basic level, the government's methodology is objectionable intuitively. Excluding hours worked on the basis of an arbitrary formula has some of the flavor of pulling cards out of a deck before the game begins. Someone seeking only to build a house of cards will not suffer if all the tens or queens are missing, but a fair game requires playing with a full deck. So does an accurate computation.

However, there are other flaws besides the exclusion of data. The government's methodology does not appear to treat the data in ways likely to yield a mathematically sound result.

The problem becomes apparent when the General Counsel's brief argues that the "average monthly average percentage of total hours worked by temporary employees from January 1995 through July 1995, inclusive, is 26.13. The monthly average percentage of total hours worked by temporary employees from August 1995 through January 1996, inclusive, is 41.91." (GC's Bri. at 20.)

Although the words "average monthly average percentage" sound awkward or redundant, they accurately reflect the route taken by the General Counsel to his conclusion. In arguing that the proportion of work performed by temporaries increased after the election, the General Counsel relies on what is essentially an average of averages. However, averaging averages is more likely to lead to confusion than to clarity.[37] This technique cannot be used accurately to make the comparisons sought.

The General Counsel bears the burden of proving that the Respondent has reduced the amount of work assigned to employees in the bargaining unit. However, I find that the government has not demonstrated, through the payroll records, that such a reduction took place.

The testimony also does not support such a conclusion, although it consumed much of the 13 days of hearing. Much of this testimony concerned a task called "recouping."[38] Carey Wyatt, called by the General Counsel, described the task in this manner:

> Q. [W]ell, the standard procedure and the way we had always done it before was we'd work an aluminum boat, and in the course of unloading this boat, bundles of aluminum would get damaged. They'd bust open and all this. We would just slide the stuff aside and whenever the boat was finished, then our regular laborers would come in and re-bundle this and we'd go on and put it in stock to be shipped out. [Tr. 554.]

The evidence clearly establishes that temporary workers did at least some of the recouping before the election. However, the General Counsel presented evidence that the temporaries did more of it afterwards, and this increase constituted part of the alleged unilateral change. Wyatt testified that there were occasions after the election when temporaries would be called in to recoup. However, the vagueness and inconsistency of his testimony limits its value. For example, on cross-examination, Wyatt testified in part as follows:

> Q. Your testimony is that on five or ten occasions after the boat sailed, temporary people were called in to help recoup?
>
> A. I exaggerated a little on the ten. I know there was not ten boats. It was more probably in the line of anywhere from three to five, maybe six boats. Yes, they were called in. [Tr. 600.]

Although Wyatt testified about an occasion when, he said, temporary employees worked on recouping aluminum in a warehouse called "Cotton Five," he admitted on cross-examination that he had not seen them do it. (Tr. 585–586.) Thus, his testimony does not establish that temporaries were doing work previously done by bargaining unit employees, or that they were doing more of it than they did before the election.

Additionally, Wyatt did not remember how many temporary workers were in his own crew or what kind of work he and the other crew members were doing at the time the temporaries were recouping. (Tr. 586–587.) The lack of specific information renders much of his testimony tantamount to expressions of opinion or repetition of hearsay. Therefore, I do not credit it.

Another of the General Counsel's witnesses, J. H. Johnson, testified on direct examination that the recouping practice changed after the election. Before the election, according to Johnson, "They would wait until the ship was over and let the regular laborers do it." (Tr. 658.) However, Johnson stated on direct examination, that policy changed:

> Q. And then after the election, when did they do the recoup?

[37] The inaccuracy introduced by taking an average of averages appears in even a simple hypothetical calculation. Assume that in January regular employees worked 10 hours and temporaries worked 5 hours; that in February regular employees worked 12 hours and temporaries worked 8, and that in March regular employees worked 240 hours and temporaries worked 30 hours. During this calendar quarter, regular employees worked 262 hours and temporaries worked 43 for a total of 305 hours. For this 3-month period, temporaries worked about 14 percent of the total hours.

However, if percentages are calculated for each month rather than by quarter, the temporary employees worked 33 percent of the total hours in January, 40 percent of the total hours in February, and 11 percent of the total in March. The average of these percentages is .28, or double the actual percentage of hours worked by temporaries over the 3-month period. For the same reasons that this calculation produced an inaccurate result, the General Counsel cannot obtain a mathematically meaningful result by comparing an average of the percentages of hours worked in each of seven separate months before the election with an average of the percentages of hours worked in each of five separate months after the election.

[38] The work allegedly done by temporaries also included the typical duties of a longshoreman unloading cargo.

A. During the ship.
Q. And who did it?
A. Laborers, multi-temp's. [Tr. 657–658.]

Apart from the lack of specific information, two problems cast doubt on Johnson's testimony. First, Johnson's testimony clearly establishes that the Respondent had a long practice of assigning temporary workers to perform work similar to that done by the regular employees,[39] so the asserted change essentially is quantitative, not qualitative, in nature. Johnson's testimony, however, does not establish to what extent the use of temporary workers increased.

Second, an inconsistency between Johnson's testimony on direct and cross-examination undermines his credibility. As quoted above, Johnson testified on direct examination that after the election, Respondent began using temporary workers to do the recouping while the regular employees were still unloading cargo from the hold of the ship. However, on cross-examination, Johnson gave the following answers to questions regarding when the temporary workers (multitemps) began recouping while the vessel was still in port:

Q. How often and when did that first start happening?
A. After the election.
Q. When these multi-temp laborers were recouping and our men were sitting at home with no work, was there a boat being loaded or discharged?
A. I don't know.
Q. It's important that you try to remember whether a boat was being loaded or discharged when this activity that you have described occurred.
A. Which activity are you talking about?
Q. When temporary employees were recouping and our men were sitting at home with no work.
A. It had to be after a vessel.
Q. It would have to be after a vessel had left port?
A. Yes. [Tr. 699–700.]

In addition to this inconsistency between direct and cross–examination, there are other reasons to doubt the reliability of Johnson's testimony. Johnson, who had been a foreman or acting foreman, admitted that he had never supervised employees doing recouping while a vessel was still in port. (Tr. 701.) Additionally, Johnson never supervised a crew while that crew was recouping. (Tr. 702.)

Moreover, Johnson's job duties involved working on a vessel, but the recouping by temporary employees allegedly took place in a warehouse. For all of these reasons, I have doubts about the reliability of Johnson's testimony on this matter, and do not credit it.

Another witness, Larry Scott, also testified that unlike before the election, when they performed recouping after the departure of the vessel, "After the election, they were recouping while we was on the boat bringing the stuff up. They had guys up in the warehouse, cotton five, recouping then." (Tr. 805–806.) However, Scott did not work in the warehouse and only went there occasionally to use the restroom.

Additionally, Scott's testimony suffered from internal inconsistencies. On direct examination, he testified that after the election, the Respondent "was bringing in more temporaries, guys. It used to only be just the workers, the ones that worked for the company, because it was just enough work for us. After we voted for the Union, they was bringing in something like 25, 30 temporaries to hurry up and finish." (Tr. 737.)

At one point during cross-examination, Scott stated that "the recouping was only for us, the employee that worked for Golden." However, in the next sentence, he qualified that absolute position by stating "*Most* of the time it'd just be for us." (Tr. 855; emphasis added.) Later in his cross–examination, Scott contradicted his earlier statement that it "used to only be just the workers, the ones that worked for the company" (Tr. 737) who did the recouping.

Q. Before the election some of the time temporary employees help recoup is that correct?
A. Sometimes. [Tr. 855.]

Scott also maintained that on two occasions after the election, the Respondent would use temporary employees to perform recouping at a warehouse called "Cotton Five" while the regular employees remained on a vessel unloading the cargo. However, he could not be any more specific as to date. (Tr. 807–808.)

As stated above, Scott was in this warehouse only briefly, to use the restroom, and the record does not establish that he had any personal contact with the individuals he believed were doing the recouping. Although I have concluded that Scott was an honest witness, the accuracy of his testimony is still limited both by his opportunity to observe an event and by his ability to recall when the event took place. Here, he had little opportunity to observe, and inconsistencies in his testimony suggest that his recollection is less than perfect.

For example, Scott testified on direct examination that he observed temporary workers doing recouping after the election only two or three times. (Tr. 738.) However, on cross–examination he changed that testimony to "4 or 5 times," leading me to conclude that Scott really wasn't certain. This inconsistency, although not major, does affect the weight I give Scott's testimony. Considering his admission that before the election temporary employees performed recouping "sometimes" (Tr. 855), Scott's testimony fails to establish that the Respondent made any significant change in how it assigned regular employees and temporary workers to this task.

Donald Burrell testified in conclusory terms that after the election, a change occurred in the use of temporary employees. However, his testimony is so general that it lacks probative value in establishing that Respondent increased the use of temporary workers after the election. (See, e.g., Tr. 1013–1018.)

Leon Autry, called by the General Counsel, gave testimony regarding the use of temporary workers before and after the election, but in general, I found it rather confusing.[40] More-

[39] For example, Johnson testified that, before the election, if the work got slow, temporary workers went home first. (Tr. 656.)

[40] An example of Autry's testimony on this matter is quoted below.

Q. What did those temporary employees do before the election when there was no ship in port?

over, although Autry's initial testimony indicated he had seen temporary workers doing recouping in a warehouse, cross-examination revealed that actually, he had not observed them doing any work.

> Q. Okay. The only thing you saw is what you testified before. You saw them eating lunch. Is that right?
>
> A. Well, I seen them—half of them was laying up on the aluminum stuff asleep. Most of them were asleep probably—or going to sleep or something.
>
> Q. Okay. Well—
>
> A. It wasn't that they was even talking about—some of them was eating and some of them was laying up on the aluminum asleep. That's as far as I know. [Tr. 1303.]

In addition to these uncertainties in his testimony, certain aspects of the cross–examination raised doubts about Autry's candor.[41] For all of these reasons, I do not credit his testimony.

Some other witnesses testified that there had been no change in recouping practices. James David Shiver Jr., a forklift driver, testified that he saw no difference. (Tr. 1786.) The Respondent's superintendent, Kenneth Johnson, testified, in part, as follows:

> Q. Let's say you don't have enough work for everybody, for all of your regular employees. How do you choose who is going to do the work?
>
> A. The man that's been there the longest.
>
> Q. And how long has that been your policy?
>
> A. Ever since I can remember.
>
> Q. Is that your policy?
>
> A. Yes, sir.
>
> Q. Have you ever been criticized for that policy?
>
> A. Yes, sir.
>
> Q. Who's criticized you?
>
> A. Edgard.
>
> Q. And what did Edgard criticize you about? What did he want you to do?
>
> A. Rotate it and swap it around.
>
> Q. And did you? Do you?
>
> A. No.
>
> Q. You don't. You do it your way?
>
> A. That's the way I do it. I work the oldest man.
>
> Q. Was that true before the election?
>
> A. Yes, sir.
>
> Q. Is it true now?
>
> A. Yes, sir.
>
> Q. Has it ever been any different?
>
> A. No, sir. [Tr. 2002–2003.]

Although Johnson's words appear in print to be terse, if not gruff, his demeanor at the hearing conveyed no sense of hostility or antagonism. The brevity of his responses seemed to arise from a sense of economy that regarded frill with some degree of suspicion. It was an attitude fully at home in a person who had not been late to work in 35 years, and who appeared to view life from an island of order somehow unperturbed by the natural amount of chaos in the world. I believe Johnson's testimony shares this reliability, and I credit it.

Based on his testimony, as well as the absence of credible testimony to the contrary, I find that Respondent did not change the way it assigned temporary workers to recouping or other tasks performed by employees in the bargaining unit.[42] Similarly, I find that the government has not proven that Respondent has reduced the hours of employment for bargaining unit members.

In sum, the record does not establish that Respondent violated Section 8(a)(5), (3), or (1) in the manner alleged in paragraphs 12 and 24 of the complaint. I recommend that these allegations be dismissed.

H. August 1995—Threat of Plant Closure

Paragraph 8(c) of the complaint alleges that about August 1995, a more precise date being unknown to the General Counsel, Respondent, by Edgard H. Gonzales, "at the Adams Mark Hotel, threatened its employees with plant closure if the Union was selected as their bargaining representative." The Respondent denied this allegation.

The wording of this allegation suggests that in August 1995 employees were considering whether to select the Union to represent them. However, they had already chosen the Union, which the Board certified on July 21, 1995.

The General Counsel elicited testimony from Larry Scott that Gonzales made such a threat of plant closure during a negotiating session with the Union:

> Q. What did he say?
>
> A. He said before the Union would come in, he'd close the doors. He said he don't like the Union, he don't want the Union. He said he went Union one time and they bankrupted him or something. [Tr. 721.]

Another witness for the General Counsel, Mason Barnes, gave similar testimony:

> Q. Well, what did he say at this negotiation meeting?
>
> A. At this negotiation—just about every one we had—that he would close his doors before he went union, that he was not going to be union, period; he wasn't for a union, he wasn't for anything to benefit the employees, unfair labor practices or anything, he wasn't for it, he was totally against it. [Tr. 1625–1626.]

A. They came in to help us if we needed help. But before that time, they only came if we—you know, if we had cars to unload, we unload the cars and then we did the recoup. But then after then, then it was like you do the cars and you do the recoup. It was like we did the cars and they did the recoup. But before then it was not like that. That's when—you ask me a question. I'm going to tell you the answer. [Tr. 1295.]

[41] For example, Autry's pretrial affidavit stated at one point that he had taken photographs to show that some employees, favored by management, drove forklifts without being disciplined for a safety violation. (Tr. 1283.) However, when asked about this matter on cross–examination, his responses suggested to me some degree of equivocation, rather than difficulty with memory. (Tr. 1282.)

[42] Although much of the testimony at hearing focused on the recouping work, the General Counsel also contends that the Respondent increased the extent to which it used temporary workers to do other work performed by bargaining unit employees. I find that the evidence does not establish this allegation.

Gonzales gave a different version of what he told the employees on the Union's negotiating committee. He testified that he told them he would not sign the Union's contract proposal, and gave them reasons why he would not. To sign that proposal, Gonzales said, "would have meant for us, for Golden, to increase of operation in over 300 percent." (Tr. 2639.)

According to Gonzales, he further told the union negotiators "that for Golden to accept that contract, we had to have the ability to pass the extra costs on to the customer, and by our doing that, we were not going to be competitive; the customers were going to abandon us; and likely they were going to go and land in the hands of the nonunion shops in the port." (Tr. 2639.)

For two reasons, I credit the testimony of Scott and Barnes. First, Gonzales did not squarely deny making the "close the doors" threat they attributed to him.

Second, Gonzales' wife, Norma Gonzales, testified that she attended all bargaining sessions between Respondent and the Union. (Tr. 2398.) However, her testimony does not rule out the possibility that Gonzales made the alleged plant closure threat.

On the other hand, it is somewhat risky to infer too much from Norma Gonzales' failure to deny, absolutely and unequivocally, that her husband made such a statement, because no attorney asked her specifically if he threatened to close the plant. Respondent's attorney did ask her if her husband ever said "outright, I won't sign a contract" but that question is different from asking whether or not Gonzales said that he would close the plant.[43] The issue raised by the complaint allegation concerns a threat of plant closure, not a refusal to bargain.

Additionally, neither the General Counsel nor the Union's attorney asked Norma Gonzales specifically whether her husband made such a threat of plant closure. However, on cross-examination, the General Counsel did elicit the following testimony:

> Q. Okay. Did Mr. Gonzales say what would happen if he ended up—if he was not competitive?
>
> A. Well, if he was not competitive with the other nonunion shops, probably down the road he would have to close.
>
> Q. Did he say that at the meetings?
>
> A. Not in the meetings. I don't remember ***if*** he said it in the meetings. [Tr. 2403; Emphasis added.]

Norma Gonzales' testimony that she did not remember ***if*** her husband made such a statement leaves open that possibility.

It concerns me that the General Counsel did not adduce testimony from more witnesses on this point, considering that, according to Norma Gonzales, between 10 and 15 individuals attended each negotiating session on behalf of the Union. (Tr. 2399.) However, I have concluded that, in general, Scott is a reliable witness. Another witness, Barnes, has corroborated his testimony, which has not been absolutely denied by Gonzales or his wife.[44] Therefore, I will credit Scott.

I find that at a negotiating session in August 1995 Gonzales told union negotiators, including employees Scott and Mason, that before the Union would come in, or before he "went union" he would close his doors. The timing of this statement, after the employees already had voted for the Union seems unusual, but, for the reasons stated above. I find that Gonzales made it. Applying an objective standard, I find that these words reasonably would be understood to constitute a threat of plant closure if employees persisted in supporting the Union or seeking the Union to represent them.

My crediting of Scott's testimony does not signify that I discredit Gonzales, because Gonzales did not squarely contradict Scott. Crediting the testimony of Gonzales and his wife, I find that he did explain his refusal to agree to the union proposal on economic grounds. However, Gonzales' comments about the acceptability of the Union's bargaining proposal are not at issue. The closure threat alleged in the complaint, and established by the testimony of Scott and Barnes, does not concern any economic consequences of the Union's porposal. Rather, it relates closure to the fact that the employees "went union." That is a clear threat of retaliation.

Therefore, I find that the statement violates Section 8(a)(1) of the Act, as alleged in paragraph 8(c) of the complaint.

I. November 10, 1995—Alleged Discriminatory Recall

Complaint paragraph 13 alleges that about November 10, 1995, "Respondent recalled its employees Mason Barnes and Donald Burrell to work while they were working for another company, thereby adversely affecting their hours of work and their earnings." Paragraph 19 alleges that Respondent took this action because employees formed, joined, or assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities. Paragraph 28 alleges that this action violated Section 8(a)(3) and (1) of the Act.

Respondent admitted that on November 10, 1995, it "called Mason Barnes and Donald Burrell" to work for it, but stated that it otherwise did not have information sufficient to form a belief about the allegations of paragraph 13. It denied the allegations of complaint paragraphs 19 and 28.

Mason Barnes testified that on one occasion, Superintendent Kenneth Johnson had announced that the Company only needed five employees to work the next day. So Barnes, along with Donald Burrell and about five others, went to another stevedoring company, Southern Cargo, and talked with a foreman, who said to report at 6 a.m. the next day. He did. (Tr. 1627–1629.)

Another of Respondent's employees, Donald Burrell, also went to work that day at Southern Cargo. Although Barnes

[43] In response, she testified, "The only thing that I heard was that he said that he was willing to sign a contract, if we could be competitive in the market with the non-shop stevedores. Otherwise, if it was not competitive, there was no way that he was going to sign something that would hurt the company." (Tr. 2400.)

[44] In general, I did not find Barnes to be a reliable witness. On cross–examination, he answered so many questions with the expression "possible" that it raised a question as to whether he was making the effort to answer fully. However, I note that Barnes' testimony is consistent with the statement in his May 19, 1997 affidavit, that "Gonzlez [sic] stated that he was not going to go union and before he went union he would close his doors." (R .Exh. 55 at 2.) Moreover, Barnes' testimony corroborates, and is corroborated by, that of Scott.

could not recall the date specifically, I find, based on the entire record that it was around November 10, 1995.

Barnes testified that around lunchtime he and Burrell left the ship where they were working in a hold. As they came down the gangway, one of Respondent's supervisors, Ken Wear, met them and said they were supposed to report to work for Golden Stevedoring at 1 p.m. that day. According to Barnes, Wear told him to get a forklift and meet him at the "Cotton Five" warehouse. (Tr. 1629.)

Barnes and Burrell told their supervisor at Southern Cargo that they were returning to work at Golden Stevedoring, and went to the "Cotton Five" warehouse, where they waited. When Kenneth Johnson arrived, he instructed them to stack aluminum ingots and band them together, which they did. At about 4 p.m., a supervisor sent them home for the day. (Tr. 999–1000; 1630.)

The men wanted to work longer that day, and returned to their supervisor at Southern Cargo, a man Burrell identified as "Wayne." He had already found replacements for them that day, but told them to return the next. Although rain prevented them from working the following morning, Burrell and Barnes did work for Southern Cargo that afternoon. (Tr. 1000–1001.)

Later, Barnes received a letter from Gonzales. That letter stated as follows:

> We have had as one of the company policies and for a long time the "no loan" of personnel or equipment to competitor's companies operating at the same ports that this company does business.
>
> We are sure that even when this policy has not been given in writing to you it has been communicated verbally and enforced any time any of our employees has challenged this disposition of the company and has been discharged from his duties with the company.
>
> We have the confirmation that you, in open violation to [sic] this rule, have been soliciting and accepting work with some of our competitors at this port.
>
> Should you continue to do so, we will have no other alternative than to permanently separate you from this organization. [R. Exh. 41.]

The complaint does not allege that anything in this letter violates the Act. As the exhibit number indicates, the Respondent, not the General Counsel, introduced it into evidence at the hearing. Rather, the complaint alleges that their "recall," while they were working for the other employer, violated Section 8(a)(3).

To violate Section 8(a)(3), an employer must engage in some act of discrimination in regard to hire or tenure of employment or any term or condition of employment. See 29 U.S.C. § 158(a)(3). Therefore, the government's theory of violation appears to be that the Respondent discriminated against Barnes and Burrell by putting them to work. In his opening statement, the General Counsel explained the government's theory as follows:

> [T]he allegation is that . . . these two employees, Mason Barnes and Donald Burrell, were discriminated against because of their support for the Union in this retaliatory manner, yanking them from one good job to another job with Respondent when the evidence shows that there was no work for them to do.

The General Counsel's brief states that the "Respondent's animus motivated it to force two of its union–supporting employees to leave a more lucrative job even though it really did not have enough work to keep them busy. Therefore, the recall of Barnes and Burrell from their job at Southern Cargo on November 10 violated Section 8(a)(1) and (3) of the Act." (GC Br. at 22.) However, the General Counsel does not cite any legal authority to support this theory of violation.

As I understand it, the government's theory necessarily rests on the premise that Barnes and Burrell had a right to work elsewhere whenever their employer could not put them to work. Presumably, unless the employees had such a right to be working somewhere else, the Respondent would not act unlawfully by denying them the opportunity.

However, the concept that an employee of one company has a right to be working for another company on his day off requires some examination. If such a right exists, what is its source? The General Counsel has not claimed that the Act confers such a right, and otherwise has not described its origin. Whatever its source, the General Counsel must bear the burden of proving that such a right exists if the government contends that it was unlawful to take the right away.

In the absence of any argument or evidence that such a right has been created by law, I will assume that if it exists, it springs from the relationship between employer and employee. At the time of this alleged 8(a)(3) violation,[45] the Union and Respondent were engaged in negotiations for their first collective-bargaining agreement. In this circumstance, absent lawful impasse, the Respondent could not implement a new rule prohibiting "moonlighting" unilaterally. At least, it could not do so lawfully, and, as noted, the government doesn't allege that Respondent implemented such a rule unlawfully.

Therefore, whatever preexisting policy the Respondent had on such outside work remained in effect. If the preexisting policy allowed an employee to work elsewhere on his day off, then denying an employee that right would reduce his privileges as an employee. If motivated by antiunion animus, such a denial would discriminate against him in violation of Section 8(a)(3).[46]

As noted above, a predicate to proving the denial of this right is proving its existence. Barnes testified that it was common for Respondent's employees to work for other companies:

> Q. BY MR. ROGERS: My question was from the time you started working there, when did you first see—or

[45] The complaint does not allege that Respondent violated Sec. 8(a)(5) by unilaterally implementing a new rule to prohibit its employees from working for other stevedoring companies in their spare time.

[46] Cf. *Tualatin Electric, Inc.*, 319 NLRB 1237 (1995), in which the Board found that an employer's policy against "moonlighting" violated Sec. 8(a)(1) because, in that case, there was "abundant evidence in the record indicating that the moonlighting policy was adopted primarily as a result of the Respondent's antiunion animus." In the instant case, there is no evidence that Respondent adopted the "no moonlighting" policy to interfere with employees' union activities or their exercise of other protected rights.

when did you first notice that Golden employees or people who worked for Golden worked for competitors?

A. Probably about the second month after I was working there that people would work for other companies. When they didn't have no work here, they would work for other ones, and then after we voted a union, they got to where they worked more because in case they get a strike, the hours got cut back. Where we used to get 40 hours a week, we wasn't getting that no more.

Q. How often would you see someone who works for Golden working for a competitor after that second month?

A. Every time they got a chance.

Q. Well, how often would that be?

A. Every week. [Tr. 1637.]

Barnes acknowledged that, more than once, he had heard a rumor that the Respondent did not allow its employees to work for competitors on their days off, but he provided no more specific information.

Initially, Donald Burrell, like Barnes, testified that he had been unaware Respondent had a rule against employees working for competitors on their days off. However, on cross-examination, Burrell admitted that when he was first hired by the Respondent, an individual nicknamed "Santa Claus" had given him this information:

THE WITNESS: Santa Claus told me this when I first got hired at Golden. When I first—about a month or two after I got hired at Golden. And I went and worked for Coastal Cargo, which worked—I worked it with Santa Claus. And he remembered me from over there at Golden.

And he said, You know Edgard going to fire you if he finds out you're working for somebody else. [Tr. 1137.]

Because of this contradiction between Burrell's initial testimony and his testimony later in cross-examination, I do not credit him. Moreover, other testimony, which I do find credible, establishes that the Respondent had a longstanding rule prohibiting its employees from working for the competition during their days off. For example, James Shiver Jr. described how he learned about the rule long before the Union's campaign:

Q. And about when was that, if you recall?

A. That was about—it was about—it was long before any of the union stuff ever even came about. There was about three or four of us who went to work with another company over there and went to work at night, which was Premier Stevedore. And there was three or four of us—they had made a place for us to work at night, which paid good money, but no steady work, you know, but just one of those things that the work—there wasn't much to it, but, you know, you grabbed it when it was there. And then, when it was gone, it was gone.

So Mr. Gonzales called at all different times—there was approximately three or four of us—into the office and reminded us—you know, he told us that Premier was a company that was—I don't know what you call it—competition, and Golden had the rule which—I knew it before I even did it—before I even worked with them, I knew about it because Mr. Gonzales told us that long before he ever even caught up with us working, but we was hoping to get by with it for a little while.

And he called us into the office one at a time and told us that we had a choice, that the company had a rule that—work with Golden or work with—wherever you wanted to work. And so he asked me was—which one was my choice. I told him—I said, "Naturally, I'm going to work with Golden because there is—I'm going to continue to work with Golden because there's not enough work with Premier," which there wasn't. And all I said was, I enjoy my job with Golden. [Tr. 1786–1787.]

Moreover, Respondent's superintendent, Kenneth Johnson, testified that for the past 7 or 8 years before the hearing, Respondent had a policy that did not allow its employees to work for other stevedoring companies. (Tr. 2037.) As discussed above, I found Johnson to be a reliable witness, and I credit this testimony.

The record does not establish any instance in which the Respondent knew about one of its employees doing work for a competitor and either ignored or condoned it. Although Barnes testified that Respondent's employees did perform work for competitors, he provided no specific instances, and the record contains none. Therefore, I do not credit his testimony.

Because, at all times material to this issue, Respondent had a rule against employees working for competitors, and because the evidence does not establish that Respondent enforced the rule disparately, I conclude that its employees did not have the right to work for competitors during their time off. Since they did not have that right, requiring them to report to work for Golden did not constitute an "adverse employment action" necessary to satisfy the third step of the *Wright Line* analysis.[47]

In sum, I do not find that Respondent violated Section 8(a)(1) and (3) of the Act in the manner alleged in paragraph 13 of the complaint. I recommend that these allegations be dismissed.

J. January 29—November 11, 1996—the Strike Against Respondent

Paragraph 14 of the complaint alleges that from about January 29 until November 11, 1996, certain employees of Respondent, represented by the Union and employed at its facility, ceased work concertedly and engaged in a strike. Paragraph 15 alleges that the strike was caused by Respondent's unfair labor practices described in complaint paragraphs 7–13, 19, 23, 24, and 26. Although Respondent admits that the Union went on strike, it denies that the strike was caused by unfair labor practices.

At the hearing, the General Counsel adduced testimony from Union Organizer George Bru concerning the decision to go on strike. Bru described a union meeting on January 23, 1996, at which he told employees about the difference between an eco-

[47] However, I would find that the General Counsel proved the first two requirements, protected activities and employer knowledge, with respect to both Barnes and Burrell. The record does not establish the required link or nexus necessary to satisfy the fourth element of the *Wright Line* test.

nomic strike and an unfair labor practice strike. Bru gave them, as an example of an unfair labor practice, that "Carey Wyatt had had his keys taken away from him . . . for no apparent reason other than he suspected that Mr. Gonzales didn't trust him because he was involved with the Union." (Tr. 197.)

The complaint does not include such an allegation, although the General Counsel stated that it was the subject of a charge. I presume that the allegation either was withdrawn or dismissed before the hearing. However, the General Counsel still contends that it may provide the basis for a finding that unfair labor practices caused the strike.

Thus, the General Counsel stated, "as I understand it there's also the theory that even if the issue of ULP strikes can also hinge on ULPs that the union thinks at the time are valid whether they're found later on to be—whether it's found later on that the allegations are not supported is a separate issue." (Tr. 198.)[48] However, the General Counsel cited no authority for this theory and may have backed away from it somewhat in the posthearing brief, which states that to "be classified as an unfair labor practice strike, unfair labor practices must be, at least, a motivating factor in the decision to begin the strike." (GC Br. at 24.)

I conclude that to satisfy its burden of proving that the strike was an unfair labor practice strike, the government must present evidence establishing that the employer committed unfair labor practices, rather than merely the employees' belief that the employer had committed unfair labor practices.[49] Additionally, the General Counsel must present evidence showing how the unfair labor practices influenced the employees in their decision to strike.

Bru also testified that at this meeting, he told the employees:

> I know that you guys have been complaining to me of unfair treatment by your employer. I know that you've been saying that you've been singled out and harassed. And I said, in particular, on safety violations. The company had changed its policy. I said I know the company has changed its policy because I continue to hear statements from you guys. [Tr. 202.]

Bru clearly was referring to the allegation that the Respondent was enforcing its safety rules more stringently. Thus, he told the employees, "they are getting tighter on you wearing a hat. I said I know that. You have to wear your seat belt all the time. These are things that, in the past, they may say something to you every now and then." (Tr. 202.)

Additionally, Bru testified that during this meeting, a union attorney, Christopher Krafchak, announced that "the NLRB had agreed to hear the charges that had been filed by the union. And he said at that point we'd have a good chance of winning these—he thought we'd have a good chance of winning these charges which number probably 15 by then. . . . And it was his opinion that this was, in fact, an unfair labor practice charge or strike, if we chose to go on strike, it would be designated as an unfair labor practice strike." (Tr. 209–210.)

The employees attending this meeting voted to strike, but delayed actually going on strike until a tactically opportune time. Bru testified that during the entire strike, the pickets carried signs stating "Golden Stevedoring Company on strike, protest unfair labor practice." (Tr. 211.)

Based on Bru's testimony, which I credit, I find that the union members had under consideration the unfair labor practice allegations at the time they voted to strike. Additionally, I find that they were motivated by an actual unfair labor practice which the Respondent committed, the unilateral change in disciplinary procedure when Respondent began putting warnings in writing.

It is true that, according to Bru's testimony, he spoke about the alleged unilateral change in safety rules, and I have found that Respondent did not make such an unlawful change. However, I find that Bru's discussion also fairly encompassed the change to written warnings rather than oral reprimands. Thus, Bru testified he told the voters, "I know that you've been saying that you've been singled out and harassed. And I said, *in particular*, on safety violations." (Tr. 201–202; emphasis added.)

Thus, Bru treated the alleged change in safety rules merely as an example of the complaints he had received from employees about being "harassed." Those complaints must certainly have embraced the unilateral change in discipline which the government has proven violative.

I find that the strike against Respondent was, at all times from its inception, an unfair labor practice strike.

K. February 2 and 21, 1996—Alleged Threats and Attempt to Cause the Arrest of Union Organizer Bru

Paragraph 8(d) of the complaint alleges that by letters dated February 2 and 21, 1996, Respondent, by Edgard H. Gonzales, "threatened Union officials with arrest if they engaged in union or concerted activities on the Alabama State Docks." The Respondent, in its answer, admitted "that by letters dated February 2, and 21, 1996," it "threatened George B. Bru with arrest if Bru continued to trespass on property in the possession of Golden Stevedoring Co., Inc., while engaging in activity in violation of section 8(b)(1)(b) of the Act."

Paragraph 8(e) of the complaint alleges that on about February 21, 1996, Respondent, by Edgard H. Gonzales, "attempted to cause the arrest of a union official because he was engaged in union and concerted activities on the Alabama State Docks." The Respondent denied this allegation by stating that it was without knowledge of it.

The State of Alabama has a large facility with docks for ships arriving from the Gulf of Mexico. Longshoremen working for the various stevedoring companies load and unload

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[48] The General Counsel also disclaimed any interest in proving that Respondent took away Wyatt's keys. "The fact that there was a charge filed about it and it was brought up at this meeting is what's important." (Tr. 199.)

[49] Clearly, the Union is not required to file an unfair labor practice charge as a predicate to asserting that the strike was an unfair labor practice strike. See *Burns Security Services,* 324 NLRB 485 (1997). ("The employees may legitimately choose to protest an unfair labor practice by calling a lawful strike rather than filing an unfair labor practice charge, and the Board will not draw any adverse inference from the employees' exercise of this legitimate form of protest.") However, that principle is different from stating that an unfair labor practice strike can be proven without proof of unfair labor practices.

cargo from these vessels and their employers, the stevedoring companies, have facilities which they lease from the State of Alabama. Although the Alabama State Docks occupy a large area, it is fenced, and a security force polices the area. I credit the testimony of Union Organizer George Bru concerning the events on the occasions when he encountered these police officers.

When the strike began, the State Docks established a gate system which reserved one entrance for use by those associated with Golden Stevedoring, and another entrance for others. The Union lawfully could picket only at the entrance reserved for the Respondent, unless the main gate, used by all others, became "tainted." In labor law terminology, a gate becomes "tainted" when it is used by persons associated with the employer the Union is striking, and at that point, the Union may picket at that entrance as well.

Bru credibly testified that the Union had received reports that Respondent's nonstriking personnel had been using the main gate. He wanted to document that the gate was being "tainted" in this fashion by taking photographs of cars as they entered and left. If such photographs established "taint" by personnel associated with Golden Stevedoring, he would take this evidence to the chief of the officers policing the State Docks to justify the Union picketing at the main entrance.

On February 1, 1996, Bru, with camera ready, sat at the front gate trying to spot someone from Golden Stevedoring trying to enter. Instead, someone from Golden Stevedoring spotted him, or so he later surmised. Bru then rode around the docks to talk with various people [50] and then returned to the entrance.

Several days later, one of Respondent's secretaries hand delivered a letter to Bru. This letter, dated February 2, 1996, and signed by Gonzales, stated:

> On Thursday, February 1, 1996, you were observed in the parking lot adjacent to the Golden Stevedoring Co., Inc., new maintenance shop at approximately 7:50 a.m. You appeared to be taking down the license tag numbers of employees of Golden Stevedoring Co., Inc.
>
> You have no legitimate business on the leased property of Golden Stevedoring Co., Inc.
>
> THIS IS A WARNING! You will be trespassing in violation of the laws of the State of Alabama if you enter the leased property of Golden Stevedoring Co., Inc., without my written permission. [GC Exh. 10.]

Bru was not then employed by the Respondent, had never been, and had never applied to be. Although an employee of Respondent delivered the letter to Bru, the record does not establish that she read it or knew its contents.

On February 20, 1996, Bru was driving his Isuzu Trooper on a road within the property operated by the State of Alabama as the Alabama State Docks. He was near a location where vessels dock and cargo is loaded or unloaded by longshoremen.

One of Respondent's employees, Carey Wyatt, was with Bru in the car. They went to a spot which, Bru testified, was about 130 yards from a ship being unloaded[51] by Respondent's employees. Bru testified they parked in a spot unlikely to cause interference with the unloading, and watched for about 10 minutes, trying to recognize any of Respondent's employees who had entered by the main gate rather than the gate reserved for Golden Stevedoring. (Tr. 179.)

Bru testified that the chief of the State Docks police force and another officer, Sergeant Hale, came into the area and motioned Bru and Wyatt to come over to the north side of the pier, where they had a discussion. At some point, Respondent's president, Edgard Gonzales, joined this group. (Tr. 180–182.)

According to Bru, he told the officers

> that we had accusations that—from the [striker the Union had posted to observe the main gate] that someone had entered the gate that was known to work for Golden and . . . there were two other people in the car with this person and they were going to the ship, so he thought, to go to work. . . . I told the Chief I took Carey Wyatt with me [to the pier] to identify the car. So the Chief said, "Well I don't have any problem with you being here, Mr. Bru, but I have a problem with Carey Wyatt being here because he's not supposed to enter through the front gate." [Tr. 180–182.]

According to Bru, Gonzales spoke with the police chief, but Bru did not hear what Gonzales said. (Tr. 182.) Bru then took Wyatt back to the front gate, dropped him off, and returned to Pier North C, the area where Respondent's employees were unloading the vessel. (Tr. 183.)

Bru later received a second letter by hand delivery. This letter, dated February 21, 1996, and signed by Gonzales, stated:

> On Tuesday, February 20, 1996, you were observed on Pier North C, Alabama State Docks, which was in the possession of Golden Stevedoring Co., Inc., where Golden Stevedoring Co., Inc., was handling pipe produced by American Cast Iron Pipe Company, Inc., Birmingham, Alabama for shipment aboard the vessels Ikiena and Artemis S.B.
>
> It is our understanding that you were directed by a security officer of the Alabama State Docks Department to leave Pier North C and not to enter Pier North C again while the Ikiena and Artemis S.B. were being loaded by Golden Stevedoring Co., Inc.[52]

On Wednesday, February 21, 1996, you were again observed on Pier North C where Golden Stevedoring Co., Inc., was conducting its operations loading the Ikiena.

> You have no legitimate business on the Pier North C while Pier North C is being used by Golden Stevedoring Co., Inc.
>
> We have requested the Alabama State Docks Department security to remove you from Pier North C.

[50] The Union represents the employees of other employers operating on the State Docks, as well as the employees of Golden Stevedoring.

[51] Longshoremen refer to "discharging" a vessel rather than unloading it, but to avoid confusion, I will reserve the term "discharge" for its usual meaning in the employment law context.

[52] Contrary to the Respondent's "understanding," the record does not establish that a security officer asked Bru to leave. I credit Bru's testimony that the officer only asked Wyatt to leave.

> THIS IS A SECOND WARNING! You have been trespassing on the property in the possession of Golden Stevedoring Co., Inc., in violation of the laws of the State of Alabama. Further trespassing on property in possession of Golden Stevedoring Co., Inc., will result in a warrant being issued for your arrest. [GC Exh. 9.]

The record does not establish that any employee of Golden Stevedoring ever saw this letter. Bru testified on cross-examination that, to his knowledge, no employee of the Respondent was given either letter. (Tr. 275–276.)

The Respondent argues both that it was within its legal rights to send these letters to Bru, on the basis that he was actually a trespasser on property within Respondent's control, and that the letters could not interfere with, restrain, or coerce employees in the exercise of Section 7 rights because Bru was not an employee and no employee ever saw them.

The General Counsel responds that even though Bru is not an employee of Respondent, he is an employee of the Union, and that the law only requires the person coerced to be an "employee," not an employee of the coercer. Additionally, the General Counsel argues, employees of the Respondent delivered the letters to Bru. (Tr. 1891–1892.)

The Supreme Court held in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), that an employer lawfully may tell union officials who are not its employees to leave its property. From that principle flows the corollary that an employer may have such a nonemployee arrested for trespassing if he refused to leave.

However, when an employer's exercise of this property right is evaluated, the way the employer normally uses the property provides important context. For example, it matters whether the property in question is a laboratory where chemists compound the manufacturer's secret ingredient, or whether, at the other extreme, the property is a showroom, which the employer has opened to the public.

Thus, in *Albertson's Inc.*, 289 NLRB 177 (1988), individuals who previously had worked for the supermarket returned after they had been discharged lawfully and ate in the market's delicatessen area, which was open to the public for exactly that purpose. The discharged employees also brought union officials with them, and the officials also partook at the delicatessen.

The Board reversed a judge's conclusion that respondent did not violate the Act when its manager threatened to have the individuals arrested if they did not obey his demand to leave. Citing *Harolds Club v. NLRB*, 758 F.2d 1320, 1323 (9th Cir. 1985) and *Brunswick Food & Drug*, 284 NLRB 661 fn. 5 (1987), the Board held that because the activities of these individuals supported the normal use of the delicatessen and were not obtrusive, it was immaterial that the conduct took place on the respondent's property.

In the present case, the Respondent's property interest is even more attenuated. Although Respondent leases a facility within the Alabama State Docks, it did not seek to have Union Organizer Bru removed from this facility, and the Respondent does not even claim that Bru trespassed there. Rather, Respondent sought to exclude Bru from other portions of the State Docks. Specifically, Respondent asserted that it had the right to oust Bru from a parking lot adjacent to its facility and from a Pier, "North C."

Respondent makes an elaborate argument regarding its property interest in these parts of the Alabama State Docks, and its asserted right to exclude Bru from any area on the Docks where its employees happen to be loading or unloading a vessel. However, Respondent has presented no evidence to establish that Bru ever came close enough to any of these locations to interfere with this work in any way. I find that Bru never interfered with the Respondent's operations but merely viewed them from a distance sufficient to stay out of the way.

Respondent has not established it had any property interest in Pier, "North C," except for its own right to be present. I find the evidence is also insufficient to establish that Respondent had the right to exclude Bru from a parking lot adjacent to its facility.

Additionally, the Respondent's argument does not overcome the reality of how the State of Alabama operates its docks, and what people it allows on them. In view of the guard houses, it certainly does not appear that the State of Alabama allows unescorted tourists to drive up and down the docks to sightsee. On the other hand, a large number of companies do business on the Docks, and employees of many different companies have access.

The Alabama State Docks more closely resemble a construction site, with many different companies and their employees sharing the property while they performed work, than a single employer's private property, over which it maintained tight and exclusive control. The Respondent threatened Bru with arrest because the union official was present in areas over which Respondent had far less than exclusive control, and even though Bru's presence did not impede the Respondent's work.

The State of Alabama had allowed Bru to pass the guardhouse and enter the Docks that it owned. The State of Alabama certainly had authority to demand that Bru leave, but the record does not establish that anyone else had such authority. However, the State of Alabama did not ask Bru to leave.

Bru's testimony had the ring of truth when he quoted the Alabama State Docks police chief as saying, 'Well I don't have any problem with you being here, Mr. Bru, but I have a problem with Carey Wyatt being here because he's not supposed to enter through the front gate." (Tr. 180–182.) Considering that other companies operating on these docks had collective–bargaining relationships with the Union, it seems logical that Bru would have free access to the docks so that he could conduct union business.

Moreover, I find that Bru clearly enjoyed the status of an "employee" under the Act. Many cases have held that the definition of "employee" in Section 2(3) of the Act is broad.[53] No one has contended that Bru occupied a supervisory position with the Union, and the record does not indicate any other way in which he would fail to meet the Section 2(3) definition.

Having found that Bru satisfies the statutory definition of "employee," I must now determine whether it matters that he is not, has never been, and has never applied to be an employee of

[53] See, e.g., see also *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), and other cases cited below.

Respondent. The Board's decision in *Pacific Dry Docks Co.*, 303 NLRB 569 (1991), suggests that the identity of Bru's employer makes a difference in determining whether the arrest threat violated Section 8(a)(1).

In that case, a former employee named Aguiar visited the respondent's facility on the day of a Board-conducted election. The respondent's general manager became angry with Aguiar and threatened to call the police if Aguiar did not leave.

Aguiar clearly was an "employee" within the broad scope of Section 2(3) of the Act, but the Board did not find that the manager's threat violated Section 8(a)(1). To the contrary, the Board held that "the Respondent's employees' Section 7 rights were not chilled by [the general manager's] display of anger" towards Aguilar. "[W]e emphasize that there is no evidence that any employee heard [the general manager] threaten to call the police or to have Aguiar arrested if he did not leave the yard." 303 NLRB at 571. This language would support the Respondent's argument that its letters to Bru could not interfere with, restrain or coerce employees because none of its employees had read the letters or knew about their contents.

Still, I believe the law on this point has changed since the Board issued the *Pacific Dry Dock* decision in 1991, but the change is not the result of the Supreme Court's later decision in *Lechmere*. Indeed, the Court's rationale in *Lechmere* would, if anything, bolster the Board's holding in *Pacific Dry Dock* that a respondent's threat to cause the arrest of an individual affiliated with the union would not interfere with employees' Section 7 rights if (1) the person threatened was not the respondent's employee and (2) none of the respondent's employees knew about the threat.

However, more recent Board cases suggest that this aspect of *Pacific Dry Docks* no longer represents the current state of the law. For example, in *Mr. Z's Food Mart*, 325 NLRB 871 (1998), the Board stated:

> We note the judge's analysis . . . finding that the Respondent violated Sec. 8(a)(1) by prohibiting nonemployee organizers from distributing leaflets in front of three of its stores and threatening to call and calling the police to evict them, is consistent with our decision in *Indio Grocery Outlet*, 323 NLRB No. 196 (1997). [Id. 871 fn. 2.]

In the cited *Indio Grocery Outlet*, the Board does not discuss the significance of whether or not the respondent's employees heard or knew about respondent's threat to have the union officials arrested for trespass. In view of the Board's holdings in *Indio Grocery Outlet* and *Mr. Z's Food Mart*, and in light of my finding that Bru satisfies the Section 2(3) definition of "employee," I reject Respondent's defense that the threats of arrest did not violate Section 8(a)(1) because not communicated to an employee.

Although I find that the threats of arrest contained in the Respondent's letters to Bru did violate Section 8(a)(1), as alleged, I do not conclude that Respondent made an attempt to have Bru arrested which would constitute a separate unfair labor practice. The Respondent may well have called the Alabama State Docks police when it was aware that Bru was near a location where Respondent's employees were performing work, but the Act does not make that action unlawful.

Calling the police to investigate Bru's presence is quite different from taking some more direct action focused on having Bru arrested or issued a criminal citation. The Union was on strike against Respondent, and the record establishes that at times, there were instances of misconduct associated with the picketing. Asking the police to find out if a union official had a legitimate reason for being on the Docks in the vicinity of Respondent's employees is quite different from insisting that the police arrest this person regardless of probable cause.

In sum, I find that the Respondent violated Section 8(a)(1) of the Act by the threats of arrest in its February 2 and 21, 1996 letters to Bru, as alleged in complaint paragraph 8(d). I do not find that Respondent violated the Act by attempting to have Bru arrested, as alleged in complaint paragraph 8(e), and recommend that this allegation be dismissed.

L. Alleged Refusal to Reinstate Strikers

Complaint paragraph 16 alleges that on about November 11, 1996, the Union made unconditional offers to return to their former positions of employment on behalf of Donald Burrell, Mike Linsey, and James Lambert. Complaint paragraph 16 alleges that since on or about November 11, 1996, the Respondent has failed and refused to reinstate Mike Lindsay,[54] that since on or about December 10, 1996, Respondent failed and refused to reinstate James Lambert, and that since on or about January 21, 1997, it has failed and refused to reinstate Donald Burrell.

Respondent has admitted that the Union made unconditional offers to return to work on behalf of the strikers on November 11, 1996. Respondent also has admitted that it has failed and refused to reinstate Mike Lindsay. However, the Respondent has denied that it failed and refused to reinstate Lambert and Burrell.

1. Refusal to reinstate Michael Lindsay

Although Respondent has admitted it refused to reinstate Lindsay, and although I have found that Lindsay is an unfair labor practice striker who has made an unconditional offer to return to work, the controversy does not end at that obvious point. The Respondent has asserted that Lindsay engaged in strike misconduct sufficiently serious that he forfeited his right to reinstatement under the law.

On direct examination, Respondent's president, Gonzales, described the reasons he decided not to reinstate Lindsay:

> Q. Mike Lindsay was not rehired after the strike. Did you make the decision not to hire him?
> A. Yes I did.
> Q. What was the basis for that decision?
> A. Misbehaving.
> Q. What do you mean by that? I mean in what way?
> A. Being abusive in many ways.
> Q. Like what?

[54] Certain pleadings spell the name "Linsey," but I credit the discriminatee's testimony that his name is spelled "Lindsay."

A. Threatening people on the way to work. Trying to stop them from coming and passing the picket line.

Q. You said he was misbehaving?

A. That's correct.

Q. The behavior you mentioned is threatening people on their way to work and trying to stop people from crossing the picket line?

A. Using abusive language. [Tr. 89.]

The testimony of Respondent's president establishes that Respondent based its decision not to reinstate Lindsay solely on the misconduct described above, which took place while Lindsay, a striker, was on the picket line. (Tr. 91.) Therefore, the proper legal standard to apply arises from the Supreme Court's decision in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). See *E. W. Grobbel Sons,* 322 NLRB 304 (1996). In *Burnup & Sims*, the Supreme Court described the test as follows:

> In sum, Section 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct. [379 U.S. at 23.]

Therefore, I must determine whether or not Lindsay engaged in the conduct which Respondent cites as the basis for its decision not to reinstate him.

To support its allegations that Lindsay had engaged in picket line misconduct, Respondent called Joseph Miller, who had been employed by a temporary agency and worked behind the picket line for Respondent during the strike. Miller testified that sometime "around June" 1996, he had difficulty crossing the picket line because the pickets "would turn around and walk across the pedestrian walkway so you couldn't get through." (Tr. 1376.) Miller further testified about an exchange he had with one of the pickets:

> Q. What was said to you?
>
> A. He—they started hollering, You scabs. You took our jobs and all this. And I told them, I said, No, I said, We didn't take your jobs. I said, you walked off from your job. And he started cussing me and then I said something back to him and then he said that he would cut my throat and all that.
>
> Then I just went on through the picket line and went on to work, never paid any more attention to him.
>
> Q. Do you know who that person was that said—that said, I'm going to cut your throat?
>
> A. Yes, ma'am. Mike Lindsey.
>
> [Tr. 1376.]

Respondent also called Miller's wife, Wanueta Charlene Miller. She testified that sometime after July 4, 1996, she was driving her husband to work. She entered the dock area to drop her husband off without incident, but on her way back out, traffic forced her to stop at an intersection. According to Miller, a picket she later identified as Lindsay approached to within three feet of her or vehicle (Tr. 1352) and described her husband in the following vulgar terms: "'Your husband's a f_____ scab.' He repeatedly said my husband was a pussy. He told me that he was going to f___ my world up and he just kept saying, bitch, I'm going to f___ you up. He kept coming

closer and closer to my car. He kept saying that if I crossed the line again—you know, like I say, he kept saying, 'I'm going to f___ you up.'" (Tr. 1350.)

Jesse J. Horton, Jr., who performed work for Respondent behind the picket line, testified that on one occasion Lindsay called him a "goddam scab" and said he would "whip" Horton's "ass." Horton did not recall the date of this incident, and his testimony was not clear as to how far Lindsay was from him at the time of the alleged comments. (Tr. 1716–1719.)

Respondent also called Daniel Jarvis. As the Respondent's "town runner," Jarvis crossed the picket line frequently during the strike. (Tr. 1824.)

According to Jarvis, at first, when Lindsay was trying to persuade Jarvis to join the strike, he treated Jarvis politely. However, Jarvis testified, when he continued to work behind the picket line, Lindsay's attitude changed.

According to Jarvis, Lindsay began "flipping the bird" when Jarvis crossed the picket line, and Jarvis returned this vulgar display. Lindsay's speech became commensurate with his sign language.

Jarvis testified that on one occasion when he crossed the picket line, Lindsay "said something like he was going to come into my house and he knew where I lived, he was going to rape my mother and kill me." Jarvis replied, "Come on," that "me and my grandfather would be there waiting for him." (Tr. 1827.)

Jarvis further testified that Lindsay "spit at me twice and flipped a cigarette in the truck on it." (Tr. 1828.)[55] This cigarette didn't "just blow in the truck," Jarvis added, "He thumped it in there on me." (Tr. 1829.) Jarvis believed that the cigarette incident probably took place on the same day Lindsay threatened to kill him. (Tr. 1828.)

Lindsay denied trying to spit on anyone and also denied threatening to kick anyone's "ass." (Tr. 1737.)[56] With respect to the allegation that Lindsay threw a lighted cigarette into Jarvis' truck, Lindsay stated that he guessed "the wind caught it and took it in his window." (Tr. 1739.)

Lindsay also denied using curse words on the picket line other than "calling people some damned scabs, you know, nothing other than that." (Tr. 1736.) He specifically denied ever going up to a woman in a car and calling her a bitch. In fact, he denied ever approaching a woman in a car while he was on the picket line. (Tr. 1737.)

Lindsay also testified that he met with Gonzales, who told Lindsay that he would not be reinstated because of picket line misconduct. Gonzales described for Lindsay some of this conduct, including the "whip your ass" comment. According to Lindsay, he replied to Gonzales, "Well, Mr. Gonzales, if I was going to say I was going to whip your butt, one of us would walk out with a butt-whipping." (Tr. 1735–1736.)

A substantial amount of evidence, from a number of different witnesses, paints a consistent picture of Lindsay's conduct at various times on the picket line. Lindsay did deny this conduct, and buttressed his denial with an emphatic assertion that he did not make idle threats, but his choice of words ("if I told somebody that I was going to kick their ass, one of us would get their ass kicked") does not suggest he had a particularly peaceful disposition.

I do not credit Lindsay's testimony and find that he engaged in the acts described by Respondent's witnesses. The question remains as to whether this misconduct was of sufficient severity that it deprived Lindsay of his right to reinstatement. I find that it was that serious.

The testimony of the various witnesses demonstrates a pattern of behavior that reasonably would tend to coerce or intimidate employees in the exercise of rights protected under the Act. Lindsay's conduct exceeded the bounds of peaceful and reasoned conduct to the extent that Respondent was justified in denying him reinstatement. See *Clear Pine Mouldings*, 268 NLRB 1044 (1984).[57]

Therefore, I find that Respondent did not violate the Act by refusing to reinstate Lindsay. I recommend that this allegation be dismissed.

2. Alleged refusal to reinstate James Lambert

Respondent has denied the complaint allegation that since about December 10, 1996, it has refused to reinstate James Lambert. Rather, it contends that it offered Lambert reinstatement by letter on November 14, 1996, and notified the Union's attorney of this offer by letter dated November 15, 1996.

However, Respondent also takes the alternative position that Lambert had abandoned his job with the Respondent before the strike. Therefore, according to Respondent, at the time of the strike, he had no rights as an employee, and Respondent had no duty to reinstate him. (Tr. 1466, 1475.)

The evidence establishes that Lambert suffered an injury in June 1995, and had not returned to work when the strike began on January 29, 1996. According to Lambert, one day while riding by, he observed the picket line and learned in that way about the strike. He decided to join the picketers. However, he did not know on what date he began picketing.

Lambert testified that he went down to see Respondent's president, Gonzales, the day after the strike ended. (Tr. 1433.)

[55] According to Jarvis, Lindsay was about 6 feet away and that the spittle came within about two feet of hitting him.

[56] On cross-examination, Lindsay testified in part as follows:

> Q. And is it your testimony that you've never told anybody you'd kick their ass without doing it?
>
> A. Rephrase that.
>
> Q. Well, have you ever told anybody you would kick their ass, but you didn't kick it?
>
> A. Well, if I told somebody that I was going to kick their ass, one of us would get their ass kicked. And, no, sir, I don't make idle threats, if that's what you're insinuating. [Tr. 1765–1766.]

[57] In *Clear Pine Mouldings*, 268 NLRB supra at 1046, the Board stated, in part,

> [W]e 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." [Citing *Associated Grocers v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977), denying enf. in part 227 NLRB 1200.] 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." [Citing *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977).]"

After being told that Gonzales was out of the office, Lambert waited 15 minutes and then left, because he had to pick up his children at school. (Tr. 1434.)

Lambert said that he returned 3 or 4 days later but still couldn't see Gonzales. (Tr. 1434.) He claimed that, in total, he returned to Gonzales' office "about three or four times." (Tr. 1435.)

Finally, on December 10, 1996, Lambert got to meet with Gonzales in his office. Gonzales asked him why he waited. Lambert replied, "I didn't receive—didn't have no letter to come back on the 18th." (Tr. 1436–1437.)

According to Lambert, Gonzales told him that he sent a letter to "come about the 18th. He said, Why didn't I come show up on the 18th?" Lambert replied that he didn't know anything about it on the 18th. "The only thing I know is it said return back to work." (Tr. 1437.) Lambert further testified:

> Q. Okay. And then what was said?
>
> A. He asked me about where do I live? And I asked him, I really couldn't understand what he was saying and I couldn't—I just told him I didn't know where I lived.
>
> . . . .
>
> Q. Okay. Why did you tell him that you didn't know where you lived?
>
> A. Because I figured that he should already know where I lived. He got my address.
>
> Q. And had you received a letter from Mr. Gonzales regarding the end of the strike?
>
> A. No, sir. [Tr. 1437–1438.]

Based on this testimony, and on the fact that Lambert did not return to work for the Respondent, the General Counsel argues that Respondent conditioned the reinstatement of Lambert on his reporting for work right away, or at least by some date the Respondent arbitrarily chose. The General Counsel's brief contends that "The Respondent has no justification in making reinstatement conditional upon returning to claim a job by a certain date. Therefore, the Respondent's justification for not hiring Lambert does not support its action. Thus, the Respondent's failure to reinstate Lambert after he appeared for [employment] within a reasonable time after the offer of reinstatement was made violated Section 8(a)(1) and (3) of the Act. *A.P.A. Warehouse, Inc.*, 302 NLRB 10, 12 (1991)."

However, the General Counsel's argument depends upon whether Lambert's testimony is credible. I do not credit Lambert because, as discussed further below, documentary evidence thoroughly undermines his credibility.[58] This documentary evidence largely concerns when Lambert received his physician's permission to return to work.

The evidence clearly establishes that Lambert suffered an on-the-job injury about June 9, 1995. Lambert testified that he received a "return to work" release signed by a physician in September 1995, and took it to Respondent's superintendent, Kenneth Johnson.

According to Lambert, the doctor's slip restricted him to light duty (Tr. 1450), and Johnson told him "there ain't no work on the dock, not for me." (Tr. 1451.) However, the evidence establishes that Lambert began receiving "return to work" slips at least as early as June 20, 1995. (R. Exh. 47–1.) Although the June 20, 1995 slip, and two others he received later in June 1995 did contain work restrictions, on July 5, 1995, Lambert received a "return to work" slip, which was explicitly without restrictions. (R. Exh. 47–4.)

Lambert claimed in his testimony that when he spoke with Respondent's superintendent, Kenneth Johnson, in September 1995, he was seeking light duty work consistent with the restrictions on his "return to work" slip. (Tr. 1452, 1477.)[59] However, I do not credit this testimony, because the physician had already released Lambert to work without restrictions on July 5, 1995. (R. Exh. 47–4.)

Additionally, during cross-examination, Respondent's attorney asked Lambert if he ever took a "return to work" slip that said "without restrictions" to Kenneth Johnson. Lambert responded, in effect, that he didn't know, because he just looked at the words "return to work" at the top and paid no attention to the rest of the slip.[60] However, this testimony is not consistent with Lambert's earlier testimony that when he visited Kenneth Johnson in September 1995, "I was looking for light duty work. That's what my doctor had on my paper, for light duty work." (Tr. 1452.)

Moreover, Lambert's testimony does not explain why he delayed 2 months after receiving an unrestricted release to return to work before asking the Company to put him back on the job. This circumstance also makes me doubt the reliability of Lambert's testimony.

An obligation to offer someone reinstatement depends upon the status of that person and the nature of the strike. If the evidence establishes that Lambert was an employee of the Respondent at the time the strike began, and went on strike, then he has the same reinstatement rights as other striking employees.[61] On the other hand, if Lambert was not employed by Respondent at the time the strike began, he is not entitled to reinstatement rights.

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[58] Additionally, Lambert's response when Gonzales asked for his address (falsely professing that he did not know his own address), and the differences between his testimony on direct and cross-examination make me concerned about the reliability of Lambert's testimony.

[59] Lambert testified, in part, as follows:

> Q. Okay. But every time that you delivered a return to work slip, Mr. Johnson told you that he didn't have any light duty work on the dock for you.
>
> A. Yes. [Tr. 1477.]

[60] Lambert testified: "I don't know nothing about all that restriction and without and was my first time of getting hurt on the job. I don't know nothing about all that right there and I ain't paid no attention to none of that. I was just looking on this and return back to work on the top right there." (Tr. 1469.)

[61] The instant situation is different from that *Pirelli Cable Corp.*, 323 NLRB 1009 (1997), in which an employee on workers compensation leave at the time a strike began received a letter from the employer, demanding that he return to work. When the injured employee was unable to comply, the employer unlawfully determined that he was on strike. In the present case, when the strike began Lambert no longer was receiving workers compensation benefits, and had received a doctor's release to return to work.

As noted above, after Lambert received the physician's permission to return to work without restrictions, he took no action for a substantial period of time. The record does not establish that Lambert had any other reason to delay return to work.

In that regard, after he was injured, Lambert filed a workers' compensation lawsuit against the Respondent. He settled that lawsuit, although the record is not entirely clear as to when that settlement occurred. However, Lambert received his last workers' compensation check some time before October 1995. (Tr. 1459.) Thus, the facts would not support a conclusion that a pending workers' compensation action impeded his return.

Certainly, Lambert was not receiving workers compensation when the strike began 3 months later. Although physically able, he was not working for the Company at the time.[62] Moreover, the record does not establish any other way in which Lambert had an employment relationship with Golden Stevedoring at the time the strike began. I find that the government has failed to establish that Lambert was an employee of Golden Stevedoring at the time of the strike. Since he was not an employee, he cannot be entitled to reinstatement.[63]

In sum, I find that the evidence does not establish that Respondent discriminated against Lambert, as alleged in the complaint. I recommend that this allegation be dismissed.

3. Alleged refusal to reinstate Donald Burrell

The Respondent has denied the complaint allegation that since on or about January 21, 1997, it refused to reinstate Donald Burrell. Its answer asserts that it offered reinstatement to Burrell by letter on March 26, 1997.

Respondent's answer raises, as a defense, that Burrell engaged in "serious acts of interference, restraint and coercion during the strike" and, as another defense, that Burrell had not been capable physically of performing the duties of his job.

The evidence establishes that Burrell participated in the strike, and was entitled to reinstatement as an unfair labor practice striker. At the end of the strike in November 1996, Burrell received a copy of a letter sent to strikers by the Union's attorney, notifying them to report back to work. Burrell and several other strikers went to the Respondent's facility, and spoke individually with Respondent's president, Gonzales.

Burrell's own testimony establishes that because of an injury, he was not physically capable of returning to work at the time of this conversation with Gonzales. Thus, Burrell stated that his physician released him to return to work on January 20, 1997 (Tr. 1004), which was about 2 months after the conversation he had with Gonzales at the end of the strike.

From the testimony of both Burrell and Gonzales, it is clear that during their meeting in November 1996, Burrell indicated that he wished to return to work after his physician gave him a medical release to do so. Similarly, it is clear that Gonzales said nothing to suggest that Burrell would not be welcome to come back at that time.

Thus, Gonzales testified that he referred to the cast on Burrell's leg and asked him when he would be out of it. According to Gonzales, Burrell said,"I got to see my doctor. It's probably going to take a month or so. And then he said I'll get back when I get ready. *And I said okay*." (Tr. 94; Emphasis added.) Thus, Gonzales' own testimony establishes that he led Burrell to believe that he would be reinstated when released by his doctor to return to work.

Respondent placed into evidence a March 26, 1997 letter directing Burrell to report to work. (R. Exh.38.) Respondent contends that this letter refutes the complaint allegation that it failed to offer Burrell reinstatement.

However, based on the testimony of Gonzales, which I credit, I find that he personally had offered Burrell reinstatement in their meeting in November 1996, with Burrell to return to work when he received his doctor's release to do so. The difficulty here does not concern a failure to offer Burrell reinstatement, but Respondent's failure to make good on that offer.

Burrell testified that on January 21, 1997, the day after the date his physician stated Burrell could return to work,[64] he went to Gonzales' office, told a secretary about his release to return to work, and asked to see Gonzales. When Gonzales was not available, he went to Superintendent Kenneth Johnson and told him he was ready to report to work. According to Burrell, Johnson said, "You talk to Mr. Gonzales." (Tr. 1003–1005.)

Burrell stated that he returned to Gonzales' office that afternoon but received word that Gonzales had gone home. Burrell then left and did not return to the Respondent's offices. I credit

[62] Lambert did not know about the strike when it began, but only learned of it later when, while driving past, in March 1996, he noticed some pickets. (See Tr. 1481, "I was riding around and I saw them out there on the picket line.") Since Lambert was not an employee of Respondent when the strike began, it is clear that he was not an employee of Respondent 2 months later, when he found out about it. If a non–employee obtains a picket sign and patrols in front of the struck business, those actions do not confer upon him the same employee status enjoyed by the strikers, even though he professes common cause with them.

[63] There is some dispute in the record as to whether Lambert did, or did not receive a letter from Gonzales offering him reinstatement. The Respondent's answer contends that it made such an offer, but Lambert denied receiving it. That denial, of course, provides a perfectly reasonable explanation for why Gonzales would ask Lambert for his address. It appears likely Respondent mailed such an offer to Lambert, but that he did not receive it.

It may be argued that by making an offer of reinstatement to Lambert, Respondent conferred on him an employee status which he otherwise would not possess. Moreover, it is true that once an employer has offered reinstatement to a striker, and the striker accepts the offer, the employer must treat the returning strike in a nondiscriminatory manner. The fact that the employer had no legal duty to offer the striker reinstatement, and did so gratuitously, does not privilege the employer to discriminate against the striker after his return to work. See *Diamond Walnut Growers*, 312 NLRB 61 (1993); *Rose Printing Co.*, 304 NLRB 1076 (1991).

However, those cases may be distinguished from the instant situation, involving an unsuccessful attempt to offer reinstatement to someone who had no status as an employee at the time. Since Lambert, by his own testimony, did not receive such an offer, it could not be effective in creating an employment relationship where none existed at the time.

[64] Based on Burrell's testimony on cross–examination, it appears that Burrell actually saw the doctor somewhat earlier in the month, but that the physician set January 20, 1997, as the date when Burrell would be medically able to return to work. (Tr. 1035.)

Burrell's testimony. Further, I find that Burrell's conversations with Superintendent Johnson, as well as his communication with the secretary, placed the Respondent on notice of Burrell's availability, desire, and fitness for work.

As an unfair labor practice striker, Burrell was entitled to reinstatement at that time. It does not matter that Respondent later sent Burrell the March 26, 1997 letter directing him to report for work. Respondent's actions on January 21, 1997, and its inaction thereafter, clearly conveyed the message that it did not intend to reinstate Burrell and that any further attempt to obtain reinstatement would have been futile. The law does not require Burrell to engage in a futile act.

Respondent raises the defense that Burrell engaged in acts of strike misconduct so severe that it did not have a duty to reinstate him. The record does not establish that Burrell engaged in such misconduct and therefore, I reject this defense.

Respondent also raises as a defense that on April 10, 1997, Burrell filed an application for Social Security disability insurance benefits. On that application, he stated "I became unable to work because of my disabling condition on October 28, 1996. I am still disabled." (R. Exh. 34.) In effect, Respondent contends that if Burrell had become disabled on October 28, 1996, and remained disabled on April 10, 1997, then he was not able to return to work when he sought reinstatement.

Respondent does more than argue that the disability application proves Burrell could not do his former work. Respondent asserts that Burrell should not even be able to claim that he could; having professed to one agency of the government that "I am unable to work," Burrell should not be allowed to say to another agency, "Yes I can."

Preventing someone from explaining an inconsistency differs drastically from hearing the explanation but rejecting it as unpersuasive. However, that is the thrust of Respondent's argument. In legal terms, Respondent is raising an estoppel theory, and it may well present an issue of first impression for the Board. At least, the Respondent has not relied upon Board precedents in making this argument, but instead has cited decisions of certain of the United States Courts of Appeals, rather than of the Board, to support its estoppel argument.

The authority cited by Respondent consist of cases filed against employers by individuals alleging that employers had discriminated against them in violation of the Americans With Disabilities Act (ADA).[65] At some risk of oversimplification, the employment discrimination portion of that statute may be described as prohibiting employment discrimination against a qualified individual with a disability.[66] It requires employers to make reasonable accommodations, which allow such individuals with disabilities to work.

On occasion, a person claiming to be the victim of such discrimination will also have filed a Social Security disability application. To qualify for such benefits, the person must be unable to engage in "substantial gainful activity"[67] and, typically, will state on the application that he or she is unable to work.[68] An employer defending a lawsuit under the ADA may assert that since the plaintiff claimed on his Social Security disability application that he couldn't work at all, he should not be entitled to claim inconsistently that he can work if the job or work environment were modified to accommodate his disability.

Respondent's argument might suggest that considerable judicial precedent supports its estoppel theory, but my own review of the cases does not disclose such certainty among the circuits. Moreover, after the hearing closed and the receipt of briefs, the United States Court of Appeals for the Eleventh Circuit, in which the Respondent is located, issued its decision in *Talavera v. Sch. Bd. of Palm Beach County,*[69] which does not support the Respondent's theory.[70]

The *Talavera* case involves an interpretation of the ADA, not the National Labor Relations Act. However, understanding the Court's reasoning may be helpful in deciding what effect Burrell's Social Security disability application should have under the Act applied here.

Again with some risk of oversimplification, the Court's reasoning may be described as follows: Since the Social Security Administration does not take into account an employer's legal duty to make accommodations which allow an individual with a disability to work, any decision by the Social Security Administration that someone cannot work only means that the person cannot work *without accommodation*. It cannot be assumed that this individual still would be unable to do a job after the employer has made the reasonable accommodation required by the Americans With Disability Act.[71] Therefore, in *Talavera*, the Court stated, in part, as follows:

> Whether in any particular situation there is an inconsistency between applying for [Social Security disability] benefits and bringing an ADA claim will depend upon the facts of the case, including the specific representations made in the application for disability benefits and the nature and extent of the medical evidence in the record.

[65] 42 U.S.C. § 12101.

[66] The Americans With Disabilities Act defines the term "qualified individual with a disability'' to mean, in part, "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

[67] The Social Security Administration describes its disability evaluation process at 20 CFR § 404.1520 which states, in subpar. (b), "If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience."

[68] As discussed below, the term "unable to work" used on the disability application is neither as precise nor as narrow as the term of art "substantial gainful activity" used in the Social Security disability regulations.

[69] 129 F.3d 1214 (11th Cir. 1997).

[70] United States Courts of Appeals in some other circuits also have concluded that judicial estoppel should not create an absolute bar to an ADA plaintiff who also filed an application for Social Security disability benefits. See, e.g., *McCreary v. Libbey-Owens-Ford Co.*, 132 F.3d 1159 (7th Cir. 1997), *Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997); and *Johnson v. State of Oregon Department of Human Resources*, 141 F.3d 1371 (9th Cir. 1998).

[71] Presumably, a statement that "I cannot work" on a Social Security disability application must be understood, in the context of that law, to mean "I cannot work without an accommodation."

> However, we do hold that an ADA plaintiff is estopped from denying the truth of any statements made in her disability application. Our basis for this holding is that an ADA plaintiff should not be permitted to disavow any statements she made in order to obtain [Social Security disability] benefits.

The Equal Employment Opportunity Commission (EEOC) has reached a similar conclusion. On February 12, 1997, the EEOC issued notice number 915.002, discussing, among other issues, the same one presented to the court in *Talavera*. The EEOC noted that the definitions of disability used in the Social Security Act and the ADA are not the same. Similarly, the EEOC observed, the statutory purposes of the Social Security Act and the ADA are different.

After discussing the distinctions between the Social Security Act and the ADA, the EEOC concluded that "an individual who asserts that s/he is both 'totally disabled' and a 'qualified individual with a disability' has not necessarily made inconsistent representations. Accordingly, the doctrine of judicial estoppel should not be used to prevent the individual from raising an ADA claim."[72]

This analysis is persuasive, but, I believe there is another reason, apart from those articulated by the Eleventh Circuit in *Talavera* and by the EEOC in its notice, for deciding that judicial estoppel should not be applied. When a claimant states on an application for Social Security disability benefits that he is unable to work, he is not making a statement of fact so much as alleging a conclusion of law.

The form provided by the Social Security Administration, which the claimant signs to initiate the legal process, does include a statement that the claimant "became unable to work" on a date the claimant specifies. However, the claimant does not have to prove he actually became "unable to work" to establish entitlement to disability benefits.

The claimant does have to prove a number of requirements specified in Society Security regulations, including the absence of "substantial gainful employment," but this term of art is not precisely the same as being "unable to work." Moreover, although a claimant who satisfies this requirement may then establish entitlement to disability benefits by showing the effect of his medical impairments on his ability to work, he may also establish entitlement by an alternate method based solely on the severity of his medical condition.[73]

For example, considering the regulations in effect during the time period relevant to the complaint, a claimant with a medically severe condition, who was not engaged in "substantial gainful activity," could establish entitlement to Social Security disability benefits by proving he had an "organic loss of speech due to any cause with inability to produce by any means speech which can be heard, understood, and sustained." See 20 CFR Part 404, appendix 1, "Listing of Impairments," Listing 2.09.

However, a person with an organic loss of speech can still do many things. For example, assuming he had the other necessary qualifications, he could still work, in many instances, as a lawyer, veterinarian, plumber, or longshoreman. But to start the legal machinery to obtain the Social Security benefits for which he might qualify, this claimant would still sign an official form giving a date on which he became "unable to work."

It is not logical to assume that a government agency would make an applicant state, as a predicate to receiving benefits, that he had medical problems more severe than required by the regulations for entitlement to those benefits. Therefore, the phrase "became unable to work" must be considered an abbreviated way of alleging eligibility. At its heart, it is a legal conclusion.

The Social Security disability regulations are so complex that a claimant may well be unaware of whether his medical condition qualifies him for benefits or not. Such a judgment depends upon both medical and legal knowledge, which the claimant may not possess.

To determine whether his condition meets the legal and medical requirements, the individual must file a claim, provide the medical information, and wait for the decision of the reviewing doctors and judge. It would be draconian to penalize a claimant for signing a claim form stating he was "unable to work" when signing that form was the only way to reach a medical and legal determination of the underlying issue.

I find that Burrell's signing of the Social Security disability claim did not estop him from asserting, in this proceeding, that he was able to return to work on January 20, 1997. In making this finding, I note that Burrell did not appeal his disability claim to the administrative law judge level after it was denied. The decision not to appeal is tantamount to accepting the "verdict" of the reviewing doctors that he was, in fact, able to work. I find that to be the case.

In other respects, the Respondent has failed to prove any justification for failing to reinstate Burrell. I find that its failure to do so violates Section 8(a)(3) and (1) of the Act, as alleged.

M. November 1996—Refusal to Reemploy Larry Scott

Complaint paragraph 18 alleges that since about late November 1996, a more precise date being unknown, Respondent refused to reemploy Larry Scott. The Respondent admits this allegation. However, Respondent denies the complaint's conclusion that this refusal violated the Act.

At the outset, some unusual things about this allegation should be noted for clarity. First, even though Scott had been employed by Respondent and participated in the strike, the complaint does not allege that Respondent refused to reinstate him. Rather, it alleges that Respondent refused to ***reemploy*** him.

The government appears to concede that Scott engaged in strike misconduct, which would disqualify him from being entitled to reinstatement. However, the General Counsel does contend that the Respondent unlawfully refused to hire him again later. Thus, the General Counsel's opening statement included the following explanation:

> Our allegation is not that he was unlawfully refused reinstatement from the strike. The Company's position is that he was engaged in strike misconduct and we have no

[72] EEOC notice number 915.002, Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person Is a "Qualified Individual with a Disability" Under the Americans with Disabilities Act of 1990 (ADA), February 12, 1997.

[73] 20 CFR § 404.1520.

> allegation, we have no way to refute that. However, that wasn't why they didn't hire him. What was told to him was that you are not being hired because you are refusing to implicate the Union in advocating strike misconduct.

Respondent's president, Edgard Gonzales, testified that he did not rehire Scott because during the strike, Scott had thrown rocks at cars and this action had been documented on videotape. Gonzales also gave two other reasons for refusing to rehire Scott. First, Gonzales believed that Scott had a criminal record.[74] Second, according to Gonzales, on one occasion, Scott had brought a knife to the jobsite.[75]

With respect to the knife incident, Respondent called Ray Sanders as a witness. Sanders, a forklift operator for the Respondent, testified that he had a conversation about the Union with Larry Scott while they were in the hold of a ship. I find that this conversation took place before the strike.

According to Sanders, Scott pulled a knife, called a "Dutch," which was about 8–10 inches long. (Tr. 1517–1519.) Sanders complained to Gonzales, saying "I couldn't drive the [fork]lift and concentrate with somebody in the back of me with a knife." (Tr. 1519–1520.)

At the time, which was tense because of conflicts with the Union before the strike, Gonzales decided not to discharge Scott but instead called Scott's probation officer.[76]

With respect to the alleged picket line misconduct, Steven Lee Demler, an independent truckdriver who had to cross the picket line to make deliveries, gave testimony indicating that Scott had thrown a rock, causing damage to Demler's truck. (Tr. 1398–1402.) Based on my observations of the witnesses, I credit Demler.

Demler filed a complaint, which resulted in Scott being arrested. However, according to Demler, who attended the preliminary hearing, the judge dismissed the case because the amount of damage to the truck exceeded the jurisdictional limit of the court. (Tr. 1413.)

Respondent also showed a videotape it made at the picket line. The tape is somewhat fuzzy, and it does not establish that Scott threw the rocks. However, Demler identified Scott and himself on the tape and Demler's testimony, together with the tape, establish by a preponderance of the evidence that Scott did throw the rock. Moreover, when he testified, Scott did not clearly deny it. On cross-examination, Respondent showed Scott the videotape, and then asked him about it:

> Q. BY MR. DARBY: What were you doing when your arm went over your head in a throwing motion?
>
> A. I was probably throwing a rock, throwing something, a cigarette or something. I don't know what I was throwing.
>
> Q. You may have been throwing a rock; is that right?
>
> A. I wasn't throwing it at no truck.
>
> Q. You may have been throwing a rock?
>
> A. Uh-huh.
>
> Q. Let me ask you this. Did the rock hit that truck while you were there?
>
> A. I don't know. [Tr. 792.]

Scott's response, "I was probably throwing a rock," certainly does not refute Demler's testimony that he was, indeed, throwing a rock. I find that Scott did engage in the picket line misconduct which formed part of the basis for deciding not to rehire him.

It may be argued that Scott's pulling a knife on another worker before the strike could not motivate the decision not to rehire him because the Respondent did not discharge Scott for it at the time. However, I reject that argument. The record establishes that it was not too uncommon for a longshoreman to carry a knife, which would suggest that this conduct, without more, might not cause sufficient concern to prompt a discharge. Moreover, because of the tensions before the strike, the Respondent had an additional reason not to take action which might cause unrest among the employees.

Scott's action during the strike indicated a continuing propensity for violent behavior. When Respondent considered that tendency together with the fact Scott had pulled a knife on an employee and with Scott's criminal record, the case became more compelling that a substantial risk would arise if Scott returned to the jobsite.

Applying a *Burnup & Sims* analysis, I find that the government has not proven that the asserted picket line misconduct did not, in fact occur. To the contrary, I find that it did occur. Moreover, the strike-related conduct had added portent in light of the prestrike incident when Scott pulled a knife at work. Evaluating this matter under *Burnup & Sims*, I conclude that Respondent acted lawfully in failing to rehire Scott.

Because two of Respondent's reasons for deciding not to rehire Scott do not involve strike misconduct, I also will evaluate the case under *Wright Line*. I find that the government has established a prima facie case. It has proven that Scott engaged in union activities which the Respondent knew about, that Respondent failed to rehire Scott, and that there was a link between Scott's protected activities and this adverse employment action.

However, the Respondent has amply rebutted the prima facie case by showing that Scott engaged in picket line violence, and that in light of Scott's bringing a dangerous weapon to work and having a criminal record, it was reasonable to fear what might happen if Scott returned to the workplace. I find that in light of this behavior, the Respondent would not have hired Scott in any event, regardless of his protected activities.

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[74] At the hearing, I rejected an exhibit (R. Exh. 61) purporting to recite Scott's criminal record. However, the evidence, including Gonzales' credible testimony about his conversation with Scott's parole officer, provides ample basis to conclude that at the time he decided not to rehire Scott, Gonzales held a reasonable, good-faith belief that Scott was a felon.

[75] When a reason for an allegedly discriminatory act relates to the discriminatee's conduct on the picket line, the Board does not analyze the case under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Instead, it applies the analytical framework of *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). See *E. W. Grobbel Sons,* 322 NLRB 304 (1996). In this case, however, the Respondent asserts reasons for its action related both to picket line misconduct and to events before the strike. Therefore, I will discuss both standards.

[76] Scott did not deny having a previous conviction or being on probation.

Therefore, I recommend that the allegation raised in complaint paragraph 18 be dismissed.

N. November 1996 – Alleged Statement by Gonzales

Complaint paragraph 8(f) alleges that some time in November 1996, Respondent, by Edgard Gonzales, "advised an employee that he would be rehired if he implicated the Union in strike misconduct." Respondent denied this allegation.

At the close of the General Counsel's case Respondent moved to dismiss this allegation, arguing that the complaint does not allege, and the proof did not establish, that Gonzales told an employee he would be rehired if he lied about the Union's involvement in strike misconduct. The evidence establishes at most, according to Respondent, that Gonzales told an employee he would be rehired if he told the truth about the Union's involvement in strike misconduct. Telling an employee he would be rehired if he told the truth, Respondent contends, does not violate the Act. (Tr. 1857.)

In opposing Respondent's motion to dismiss the allegation, the General Counsel argued that the employee involved, Larry Scott, "testified that he was told that if he—that he could have his job if he would state that the Union was responsible for putting him up to illegal or unlawful picket line misconduct. That's a credibility resolution you'll have to make." (Tr. 1892.)

From the General Counsel's argument on the record, as well as from the specific language of the complaint itself, it does not appear relevant to the government's theory whether the statement Gonzales sought to elicit from Scott would be true or false. Stated another way, the complaint itself does not allege that the Respondent was soliciting Scott to lie about the Union, and nothing that the General Counsel said on the record indicates that it mattered to the government whether Gonzales was trying to get Scott to tell a lie or tell the truth.

However, that distinction makes a difference. Suppose for the sake of analysis that union officials did tell Scott to engage in picket line violence, and that Gonzales was merely trying to get Scott to tell the truth. In that event, the complaint really is alleging that encouraging Scott to tell the truth about unprotected activity somehow interferes with employee rights to engage in protected activity.

Specifically, the complaint alleges that the Respondent interfered with, restrained and coerced employees in the exercise of Section 7 rights by advising an employee that he would be rehired if he implicated the Union in strike misconduct. Indisputably, however, engaging in strike misconduct is not one of the employee rights protected by Section 7. Encouraging truthful testimony about misconduct condemned by law does not, in any obvious way, discourage employees from engaging in conduct protected by the law.

On the other hand, soliciting an employee to lie about the Union's involvement in strike misconduct obviously could chill the exercise of employee rights. Union officials and members, faced with the prospect of defending against false allegations of misconduct during a strike could become more reluctant to call a lawful strike. "Trumping up" false charges or evidence against the Union would constitute a serious violation of the labor law. However, that is not what the complaint alleges.

Additionally, that is not what the complaint means. At hearing, when Respondent moved to dismiss this allegation, the General Counsel either could have clarified its meaning, or moved to amend the complaint. Thus, the General Counsel could have explained that paragraph 8(f) was alleging that Respondent attempted to suborn false statements about the Union, using the promise of a job as the payoff. Or, the General Counsel could have moved to amend the complaint by inserting one word, "falsely," between "he" and "implicated." The General Counsel did neither.

Insertion of that one word presumably would have added to the government's burden of proof. However, at the hearing, the General Counsel did not attempt to introduce evidence to establish either that the Union was not implicated in strike misconduct, thereby showing that the solicited statement would have been false, or that Gonzales did not believe the Union to have been implicated in such misconduct, thereby showing he was trying to get Scott to lie.

Therefore, I conclude that the complaint does not allege that the Respondent encouraged Scott to make false statements about the Union. However, it is not apparent how encouraging an employee to make true statements about unprotected activities would interfere with any employee's right to engage in protected activities. Paragraph 8(f) of the complaint does not allege a violation of Section 8(a)(1) of the Act. I recommend that it be dismissed.

In case the Board disagrees with me, I will discuss the evidence and resolve credibility issues in the discussion below.

At the end of the strike, Larry Scott went to the office of Edgard Gonzales to seek reinstatement.[77] Scott testified that Gonzales invited him to sit down, and described the conversation as follows:

> Q. Then what was said?
>
> A. He said, what did you come here for, like that. I said, everybody else went back to work. I said, I got a letter saying I could come back to work. He said, not you.
>
> Q. I'm sorry. He said what?
>
> A. He said, not you. He said, your service is no longer needed. I said, well, I got a letter. He said, I didn't send you no letter. I said, well, everybody else went back to work, why can't I go back to work, you know. He said, your service is no longer needed. He said because you put down tacks and thrown rocks at my truck. I said, I didn't throw no rocks at your truck and I said, I ain't put down no tacks. I said, because I caught a flat tire with those tacks that was out there. He said, you put them tacks down. I said, no. I said, you put the tacks down, like that. He said, well, you was throwing rocks at my truck. I said, I didn't throw no rock at your truck. I said, Ms. Norma, I said your wife throwed rocks at the truck and you put down the tacks.
>
> So he said, the Union put you up to do that. I said, no Union put me up to throw no rock and put down no tacks because I didn't put down no tacks and I didn't throw no rocks. *He said, you tell me that the Union told you to put down those tacks and throw those rocks, he said, you can get your job back.* I said no. I said, I ain't put down no tacks and I ain't throwed no rocks.
>
> So he started saying some more kind of—he went through the whole thing again. He said, did you put them tacks down. I said, your wife put the tacks down. He said, did you throw the rocks. I said, you throwed the rocks.
>
> We went back over it again. *He said, you want your job, you put down the rocks, the Union told you to put down the tacks and throw the rocks.* I said, you put down the tacks and your wife throwed the rocks, like that. He said, you can't say that. Get the hell out of my office. I shot him the bird and walked out.
>
> Q. Have you ever had any contact with the company about a job again?
>
> A. No, sir. [Tr. 741–743; emphasis added.][78]

Edgard Gonzales testified that he made a tape recording of his conversation with Scott, and Respondent introduced this tape into evidence. (R. Exh. 30.) Respondent also played it for Scott while he was on the witness stand.

Scott testified that the tape he heard was accurate, but he indicated it was not complete. Scott said that the tape did not include an exchange between Gonzales and Scott as Scott was leaving the office. Although Scott's testimony is not altogether clear on what the tape left out, it generally is to the effect that Gonzales again offered to rehire Scott if Scott said that the Union told him to throw rocks and spread tacks.

In sum, Scott does not contradict the substance of the tape, which did not substantiate his version. With respect to the parting comment which Scott attributed to Gonzales, I am reluctant to credit Scott's testimony on this point. According to Scott, the parting comment was only one of at least three times Gonzales offered to rehire Scott if Scott said that the Union was behind the picket line misconduct. Yet the evidence does not establish the other two times.

[77] Scott testified that he received a letter concerning return to work. From the record as a whole, I conclude that Scott received this letter from the Union's attorney, not from the Respondent.

[78] It may be noted that at this point, Scott was not an employee of Respondent, because Respondent had made a lawful decision not to reinstate Scott because of his misconduct on the picket line and elsewhere. However, he was still an "employee" as Sec. 2(3) of the Act defines that term. See *Thomas Steel Co.*, 289 NLRB 389, 392 (1986); *Little Rock Crate Co.*, 227 NLRB 1406 (1977); and *Town & Country Electric*, 309 NLRB 1250, 1255 (1992). See also *Eastex, Inc. v. NLRB*, 437 U.S. 811 (1971). In determining whether what Gonzales said violates Sec. 8(a)(1) of the Act, it does not matter that Scott's employment relationship with Golden already had been severed.

Moreover, it is clear that Scott was angry at the time he left Gonzales office. He made a vulgar gesture to Gonzales as he left, and Scott's description of the conversation suggests that he allowed anger to prevail over logic. Thus, Scott told Gonzales that Norma Gonzales threw the rocks and spread the tacks, even though the evidence doesn't support such an allegation and, apparently, Scott didn't believe it.

If Scott were sufficiently upset to accuse the company president's wife of throwing rocks on the picket line, the same anger probably affected his memory as well. In these circumstances, and notwithstanding his efforts to recall and relate the facts accurately, I do not find his recollection to be reliable.

I find that Gonzales did not make the offer attributed to him by Scott, and alleged in complaint paragraph 8(f). Even were I to find that paragraph sufficient to describe a violation of Section 8(a)(1), I would recommend that this allegation be dismissed.

O. Complaint Paragraph 7(b) Dismissed

For clarity, I note here the disposition of the allegation in complaint paragraph 7(b). At trial, the Respondent moved to dismiss the allegation in complaint paragraph 7(b) for lack of proof. The General Counsel stated he had "no defense" to the motion to dismiss and I granted the motion.

CONCLUSIONS OF LAW

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

2. International Longshoremen's Association, AFL–CIO, South Atlantic and Gulf Coast District is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated the Act by the following conduct: By threatening employees with closure of the facility, as alleged in paragraph 8(c) of the complaint; by threatening to cause the arrest of a union official if he engaged in Union or protected concerted activities on the Alabama State Docks, as alleged in paragraph 8(d) of the complaint; by suspending employees Leon Autry, Donald Burrell, and Larry Scott on July 20, 1995, insofar as the suspension extended beyond that date, and issuing to them "final warning" letters as alleged in paragraph 9 of the complaint; by refusing to accord employee Donald Burrell his reinstatement rights as an unfair labor practice striker, as alleged in paragraph 17 of the complaint; and by unilaterally changing its disciplinary system from one predominantly involving oral reprimands to one using written warnings, without notifying the Union of the change and affording it the opportunity to bargain, as alleged in paragraph 23 of the complaint.

4. Apart from the violations described in paragraph 3, above, Respondent did not, in any other manner alleged in the complaint, violate the National Labor Relations Act.

REMEDY

Since Respondent has been found to have violated the Act, it must remedy those violations fully. The remedy shall include posting a notice, as set forth in appendix "A" of this decision, to address Respondent's unlawful threat of plant closure and the other violations found herein.

The remedy shall include ceasing its practice of issuing written warnings in lieu of oral reprimands, and expunging from the files of all employees in the bargaining unit any and all written notices of disciplinary action which it issued at any time after July 12, 1995, the date on which a majority of the employees in the bargaining unit selected the Union to represent them.

The remedy shall also include rescinding the disciplinary warnings issued to Leon Autry, Donald Burrell, and Larry Scott on July 20, 1995 (GC Exhs. 2, 3, and 4), and expunging all references to warnings from their files. In view of my finding that Respondent did not violate the Act by sending these employees home early on July 20, 1995, the remedy does not include making them whole for losses of pay they suffered on that date, but Respondent shall make them whole for losses they suffered on July 21, 1995, because Respondent's suspension unlawfully precluded them from working on that date.

Although the disciplinary warnings issued to Autry, Burrell, and Scott indicate that Respondent also had imposed disciplinary layoffs on these employees by telling them to quit work early on July 19, 1995, the evidence does not establish that to have been the case. Rather, the evidence indicates that weather conditions forced the Respondent to send the three men, and other workers, home early on that date.

However, since the July 20, 1995 disciplinary notices purport to be "Final Warnings," and apparently claim that status based upon the three men having received discipline the previous day, the remedy will include ordering the Respondent to expunge from its files all references indicating that Autry, Burrell, or Scott received discipline on July 19, 1995. This portion of the remedy is not based on a finding that Respondent discriminated against these employees by sending them home early on July 19, 1995, but on the need to eliminate all vestiges of the warnings Respondent unlawfully issued on July 20, 1995, including the inaccurate claims in these warnings that the the employees had been disciplined previously.

The remedy shall also include an order that Respondent offer immediate and full reinstatement to Donald Burrell, and make Burrell whole, with interest, for all losses he suffered by reason of Respondent's unlawful refusal to reinstate him on January 21, 1997.

[Recommended Order omitted from publication.]