New Orleans Cold Storage & Warehouse Co., Ltd. ***and*** **Nelson Pierre.** Case 15–CA–12931

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On October 14, 1997, Administrative Law Judge George Carlson II issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, New Orleans Cold Storage & Warehouse Co., Ltd., New Orleans, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Charles R. Rogers, Esq., for the General Counsel.
Murphy J. Foster III, and *Matthew M. Courtman, Esqs.,* for the Respondent.

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

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

In sec. II,C, of his decision, the judge stated that "so long as employees did not attempt to exercise their rights under the contract the relationship [between the Respondent and the Union] was good." In the same section, the judge also described comments made by Company President Gary Escoffier at an August 16, 1994 meeting, with the Charging Party as a confirmation of "Respondent's animosity towards employees who filed grievances." The record in this case describes the parties' relationship and the Respondent's animus solely as they relate to the Charging Party's grievance activity and his exercise of rights under the collective-bargaining agreement. This evidence is insufficient on which to base the judge's more general characterizations. We disavow these statements.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by issuing discriminatory written warnings to employee Pierre, Member Brame disavows the following statement by the judge in sec. II,A, par. 16, of his decision: "Respondent introduced no documentary evidence to corroborate Rickey Calligan's testimony that Respondent had to buy any pallets. The record does not establish that Respondent sustained a monetary loss." No company purchase in predetermined, fixed quantities is ever likely to have sure proof.

[2] We deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

Guy C. Curry, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in New Orleans, Louisiana, on June 4 and 5, 1997. The charge was filed October 25 and was amended on November 10, 1994, and September 11, 1996.[1] The complaint issued on September 11, 1996. The complaint alleges one threat in violation of Section 8(a)(1) of the National Labor Relations Act and the reinstatement of Charging Party Nelson Pierre to a more onerous position, the issuance of warnings to Pierre, and the discharge of Pierre, all in violation of Section 8(a)(3) of the Act. Respondent's timely answer denies any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs[2] filed by the General Counsel, Charging Party, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the business of providing refrigerated warehousing for domestic and foreign cargo at its facilities in New Orleans, Louisiana, where it annually receives in excess of $50,000 for such services provided to customers located outside the State of Louisiana. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Brotherhood of Teamsters, Local Union No. 270, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Respondent, headquartered in New Orleans, provides refrigerated warehousing at several cities in the United States. Gary Escoffier is its president and chief executive officer (CEO). Respondent operates three warehouses in New Orleans, including the Nashville Avenue warehouse, the only facility involved in this proceeding. That warehouse contains some 80,000 square feet. In 1994 it had three "chill rooms" where products that were not frozen, such as fresh fruits and vegetables, were stored, and five freezers. Currently, there are no chill rooms. Cargo from ships and trucks is unloaded onto the docks at the warehouse by "lumpers." Thereafter, Respondent's checker/lift operators (CLTs) place the cargo in the warehouse. The Respondent employs approximately 15 CLTs at the Nashville warehouse. These employees are represented by the Union. The warehouse manager is Rickey Calligan.

[1] All dates are 1994 unless otherwise indicated.

[2] Subsequent to the hearing, I accepted G.C. Exh. 33, a compilation of receiving records subpoenaed by the General Counsel that were not produced until after the hearing closed. Respondent requested, and I granted to all parties, the opportunity to file supplemental arguments following my receipt of this evidence. The Charging Party filed a revised copy of his brief that helpfully cited the pages to which he referred in G.C. Exh. 33.

Prior to 1985, Respondent operated with job categories that included warehousemen, checkers, and lift truckdrivers, each classification receiving a different rate of pay. Due to competitiveness in the warehousing business, Respondent desired to assign employees to whatever task needed to be done. It negotiated with the Union to abolish the separate classifications, and the Union agreed to a single classification, CLT, and a single pay rate. Thereafter, through attrition, employees who could not perform all job functions were eliminated. By 1994, all unit employees were classified as CLTs, with the same pay rate.

Charging Party Nelson Pierre was a CLT at the Nashville warehouse. Initially employed on February 22, 1982, Pierre first worked as a lift driver in the freezer. Employees who work in the freezer wear a freezer suit for protection from the extremely cold temperatures. Pierre experienced physical problems, diarrhea, excessive sweating, and nausea when performing this work. He sought medical attention. His physician placed him on medication, but Pierre experienced no significant improvement. Despite Pierre's physical problems, there is no evidence of any deficiency regarding his work in the freezer. Although Escoffier testified that he was not satisfied with the manner in which Pierre stacked pallets, there is no probative evidence, such as a warning, documenting any such shortcoming. In 1983, having worked in the freezer for about 9 months, Pierre obtained a note from his physician. Upon presentation of the note to the warehouse manager, Pierre was assigned to work on the dock. Pierre worked on the dock for several years. In about 1986 Pierre began working in the produce department.[3] This work was performed in the chill rooms.

Pierre received three warnings when working in the chill rooms. On January 19, 1989, he was warned for tardiness. On June 17, 1992, he was warned for mistakenly pulling a wrong order which resulted in the loss of six sacks of carrots for which the Respondent had to pay. Pierre filed a grievance over this warning. On February 25, 1993, he was warned for missing 4-1/2 days of work.

In April 1993, Pierre began performing the duties of warehouse porter. He had sought this job assignment when he learned that the individual who had previously performed these duties was going to retire. Shortly after beginning this job, Pierre began experiencing problems with broken equipment. He requested to return to working in produce in the chill rooms, but no action was taken on his request. On December 28, 1993, Pierre filed a grievance protesting that he had not been properly paid for overtime for a 4-month period. On this same date, Respondent notified Pierre, who had been working from noon until 8 p.m., that his hours were to be changed so that he would work from 2 until 10 a.m. Since boats often dock late in the day, Pierre sometimes had to wait until the cargo was unloaded and placed in the warehouse before he could clean the loading dock. This change in hours assured that unloading would be complete and that Pierre would not have to wait to clean, thereby precluding overtime, the subject of Pierre's grievance. Pierre immediately filed another grievance over this change in hours. In this grievance he requested to be reassigned to the produce department. The grievance was denied.

There is no probative evidence of any deficiency in Pierre's performance as porter. Although Escoffier and Calligan testified that Pierre was not doing a particularly good job as porter, I do not credit their testimony. Pierre was never warned regarding any deficiency in his performance. Calligan testified that he worked too slowly. This assertion is belied by the uncontradicted evidence that, while Pierre was working as porter, Respondent assumed responsibility for assuring that that offices used by the military were clean. Pierre was assigned this work and awarded overtime in order to perform it. In view of Respondent's position that CLTs can be assigned any job, I find it incredible that Pierre, rather than another CLT, would have been assigned these additional duties if Respondent had been dissatisfied with the speed or quality of the job Pierre was performing.

On January 29, 1994, a Saturday, Pierre went to the warehouse and performed his duties as porter. He was absent on Monday, January 31. On February 1 he advised management that he had worked on Saturday because he knew he would be unable to work on Monday. Respondent issued Pierre a warning for insubordination, and on that same day, February 1, suspended him. Pierre wrote two grievances, one in response to the warning and another in response to the suspension. Pierre was discharged on February 8 and filed another grievance. This grievance was arbitrated, and the arbitrator, in a decision dated June 29, found, inter alia:

> It is a fundamental right of Management to set the hours of employment. I can also understand that Pierre was faced with a situation where he attempted to reduce the inconvenience to the Company when he worked on the Saturday so that the work of the porter would be completed when the office was opened on Monday morning. . . . Pierre was an employee of twelve years. While his working record was not entirely satisfactory to the Company, in my opinion discharge [i]s an excessive penalty for his offense. . . . The penalty of discharge is reduced to suspension without pay.

On July 6, Union Business Agent Robert Louis, after learning of the arbitration award, telephoned CEO Gary Escoffier and discussed Pierre's reinstatement. Escoffier stated that he thought the best place for Pierre was as a lift driver in the freezer. Louis called Pierre, saying that Respondent wanted him to return to work as a lift driver in the freezer. Pierre protested, stating that he wanted to return to performing the duties of porter. He advised Louis of his prior physical problems, but it does not appear that Louis ever mentioned Pierre's past physical problems to Escoffier. Louis again called Escoffier who, this time, was adamant that Pierre would return to the freezer.[4] He cited the management rights clause of the collective bargaining agreement which, inter alia, provides that Respondent has the right to manage the plant "in order to provide a maximum of operating efficiency." Louis called Pierre and told him that Respondent had given "an ultimatum. Either you work in the freezer or you stay home." Louis advised Pierre to return and then file a grievance.

At the time of Pierre's reinstatement, Calligan assigned a new employee, Joe Ortega, who had been working in the freezer, to work in produce. He asserted that this was so that Ortega could learn this job; however, the record does not establish any significant difference in the skills required of a CLT who works in the freezer as opposed to the chill rooms in which

[3] The record does not establish exactly when Pierre began working in produce.

[4] When Louis first called him, Escoffier had not received his copy of the arbitrator's award. The record does not reflect when Escoffier became adamant that Pierre was to return to the freezer.

produce was stored. Rather, the difference is in the working conditions. CLTs who work in the freezer must wear freezer suits. Although Escoffier did not testify concerning consultation with Calligan, Calligan testified that he decided to assign Pierre to the freezer because I "had a full crew back there, and he [Pierre] had poor performance up there [in produce]. And the reason why I put him up in front with the freezers is that I can really keep an eye on his duties." Calligan's subsequent testimony that he sought to "keep an eye" on Pierre because "I was really trying to help him out," is not credible.

On July 11, Pierre returned to work. He reported to warehouse manager Rickey Calligan. Before starting work, Pierre asked why he was not "put back in my position." Calligan told him, "Gary [Escoffier] said you was writing too many grievances. That's why you didn't get your job back."[5] On July 11, Pierre, consistent with his conversation with Louis, filed a grievance seeking reinstatement to "my job . . . as a porter or in the produce dep[artmen]t." He cited his seniority. This grievance was not heard until August 16.[6]

On July 11, Calligan had advised Pierre that he would be given a 3-week grace period to reacquaint himself with the job. On July 15, Calligan prepared a written memorandum of a verbal warning that he gave to Pierre for making a mistake on a receiving tally. Calligan acknowledged that he had never before, or after, made a written memorandum of a verbal warning. On July 20, Pierre applied for, and received, a 1-week vacation from July 25 until August 1.[7]

Although Pierre had experienced an adverse physical reaction when performing work in the freezer over a decade ago, in 1982 and 1983, he acknowledged that his physical symptoms were less severe when he worked in the freezer in July and August 1994.[8] Pierre testified that he had been taught how to do the job and that "I did a good job at it. . . . I never had an accident in there." After describing the manner in which he had been taught to stack the product, he testified that he "never had [any] problems" with regard to the work.[9]

On August 8, Calligan prepared a warning stating that Pierre had taken too much time to unload an order. He attached a receiving record to the warning which bears two time stamps reflecting the times of 9:32 a.m. and 1:56 p.m. Calligan testified that 9:32 a.m. is when he handed the receiving record to Pierre. He did not recall whether he or his assistant stamped the receiving record back in. CLTs do not stamp the receiving records. Calligan testified that the time-stamping of receiving records was the standard practice, although there had been times that he or his assistant "messed up" and forgot to stamp a ticket. The record establishes that this testimony is simply false. Jake Langston testified that there was no indication on the receiving tickets regarding the time taken to perform a task. This is confirmed by General Counsel's Exhibit 33. This exhibit consists of over 225 receiving records. Only 17 contain any time stamp, and only 7 contain two time stamps.

The record does not establish that Pierre was ever notified concerning this warning dated August 8. Neither Pierre's signature nor the signature of Shop Steward Lionel Toney, whose signature appears on the other written warnings issued to Pierre, appears on the August 8 warning. When asked about issuing this warning, Calligan was uncertain, ultimately acknowledging, "I can't really remember the whole thing." I find that Pierre was never advised that this warning had been written.

On August 9, Assistant Warehouse Manager Nathan Deville wrote a warning stating that Pierre had taken an excessive amount of time, from 9:02 until 11:30 a.m., unloading an order. No documentation was attached. Calligan presented this warning to Pierre on August 10.[10] When presented with the warning, Pierre explained to Calligan that he had been unable to get to the freezer because another employee, Mike Kent, was taking orders for shipment to the military out of the freezer. Once given access to the freezer, the job had taken him only 45 minutes. After hearing Pierre's explanation, Calligan said, "I'm sorry." The warning was not rescinded.

On August 10, Calligan wrote two warnings to Pierre. The first related to Pierre's alleged failure to fill in the number of pallets used in shipping an order and that Pierre "had failed to notify the office that the driver had to pay for the pallets." Calligan testified that this error had cost Respondent $108. When presented with this warning, Pierre explained to Calligan that there had been two trucks from the same company, one with no pallets and one with 50. The one with no pallets had come first, and the driver had used 17 of Respondent's pallets. After the second driver came, Pierre noted on the ticket that he had brought 50 pallets, enough to replace the pallets used by the first truck and to load the second truck. Calligan listened to Pierre's explanation and said, "Okay."[11] Although the warning also states that Pierre failed to fill in the case quantity shipped, Calligan testified that the reason he gave the warning was "he cost the company $108 for pallets, and the driver got away without paying for pallets, which causes me to buy pallets." Notwithstanding Pierre's explanation, the warning was placed in his file. Respondent introduced no documentary evidence to corroborate Calligan's testimony that Respondent had to buy any pallets. The record does not establish that Respondent sustained a monetary loss.

A second warning, also dated August 10, stated that Pierre took too much time to unload a container. The time taken was not reported on the warning; however, the receiving record on which Calligan purportedly based this warning bears time stamps of 1:32. and 6:27 p.m. As already noted, the CLT does not stamp the document. The record establishes that CLTs are

[5] Calligan denied making this statement, but I credit Pierre. In doing so, in addition to considering the demeanor of both Calligan and Pierre, I note that Escoffier made a similar comment on August 16 when he met with Pierre to discuss the grievance protesting his assignment to the freezer.

[6] Respondent contended that Pierre had skipped step 1 of the contractual grievance procedure, which provides for oral presentation of grievances at step 1. This was resolved, and the step 1 meeting was held on August 16.

[7] Respondent argues that this negates any basis for finding that Respondent harbored any animus against Pierre. The Charging Party argues that the vacation was required by the contract. I do not accept Respondent's argument, although, contrary to the argument of the Charging Party, it does not appear that the vacation was mandated by the contract.

[8] In 1994, Pierre experienced only intermittent problems with diarrhea.

[9] Although Escoffier asserted that Pierre had, in 1982 and 1983, experienced problems with stacking, Calligan did not cite this alleged shortcoming in 1994.

[10] I do not credit Deville's testimony that, since Calligan was absent on August 9, he gave Pierre the warning. Pierre testified that Deville never gave him the warning, and that he explained the circumstances when Calligan gave him the warning on August 10. I credit Pierre.

[11] I do not credit Calligan's denial that Pierre told him that the second driver brought extra pallets.

often unable to store the product immediately after it is unloaded since it has not been inspected. It is not unusual for cargo to sit for an hour or longer before being inspected. Pierre testified to occasions when the entire dock had been filled with uninspected meat. This testimony was corroborated by former employee Jake Langston, who noted that, when awaiting inspection, the produce was left on the front dock and also a side dock.[12]

As already noted, only seven of the receiving records in the General Counsel's Exhibit 33 contain two time stamps. Of those seven, three are for jobs assigned to Pierre and two of those, dated August 8 and 10, respectively, are duplicates of the receiving records that Calligan states he relied on when writing the warnings of August 8 and 10. An additional 10 receiving records bear one time stamp. It is, of course, impossible to determine whether these receiving records were stamped when they were given to the CLT or when they were stamped in as being completed. I note that 3 of these 10 receiving records with one time stamp were for jobs assigned to Pierre.[13]

On August 10, at the end of the workday, Calligan, in the presence of shop steward Toney, presented Pierre with three warnings, the two he had written on August 10 and the one Deville had written on August 9.[14] Calligan acknowledged that, prior to issuing the warnings to Pierre, he had not sought to speak to Pierre regarding the alleged errors. Despite Pierre's explanations, Calligan did not rescind any of the warnings.

On August 16,[15] a step 1 meeting was held concerning Pierre's July 11 grievance, in which he requested reinstatement to the position of porter or a job in produce. Escoffier, Calligan, and Shop Steward Lionel Toney were present. Pierre protested that Business Agent Louis was absent, and, when Escoffier pointed out that Toney was present, Pierre objected, stating that Toney "talks with two tongues. I can't trust him."[16] Despite Pierre's objection, the meeting proceeded. Escoffier told Pierre that the only reason he had been reinstated was because the arbitrator felt "sorry for you; you didn't win anything."[17] Pierre responded that, in view of the aggravation being given to him, he should receive a raise. Pierre testified that, in further conversation at the meeting, Escoffier told Pierre that he "was writing too many grievances for him to put me anywhere."[18] Pierre responded, "If you stop writing these letters to me, I'll stop writing the grievances."[19] After this meeting, shop steward Toney talked with Pierre. He noted that Respondent had been giving him a lot of warnings and that Pierre had been writing grievances. He pointed out to Pierre that the Respondent was giving him another chance. Pierre continued to be assigned as a fork lift driver in the freezer.[20]

At the hearing, Escoffier testified that he believed Pierre did not want to work as porter. He was asked, "[I]s that [conclusion] based on his grievance from December 1993 [in which Pierre sought to return to produce]"? Escoffier responded, "Yes, it is."

On August 31, Pierre was terminated. Shop Steward Toney stopped Pierre as he was leaving work, stating that he was wanted in the office. In the office, Calligan handed him a termination notice and asked him to read it.[21] Pierre did so. No specific deficiencies were cited by Calligan. Pierre was not asked to explain any discrepancies on Respondent's receiving records. The notice, signed by Calligan, states:

> Nelson Pierre has previously been warned about errors he was making. He has been verbally warned, written up and suspended. Due to the history of his poor workmanship[,] I have no other option but to terminate him.

Pierre had received no further warnings after August 10. On August 31, Calligan did not advise Pierre of any additional deficiencies in his performance. At the hearing, Calligan contended that Pierre had made three errors in tallies on August 29 and 30. He referred to a receiving record dated August 29 (G.C. Exh. 32, p. 3) upon which Pierre had shown 734 cartons were received, whereas his tally of 19 pallets with 35 cartons and a partial pallet with 34 cartons yielded a total of 699. Despite this apparent discrepancy, Calligan testified that the 734 figure was correct; however, a duplicate of this receiving record included in the General Counsel's posthearing exhibit reflects that the

[12] None of Respondent's witnesses disputed this testimony.

[13] Counsel for the Charging Party has submitted 642 delivery tickets as a posthearing exhibit. I rejected these documents when I issued an order admitting G.C. Exh. 33. In resubmitting these exhibits, counsel for the Charging Party correctly notes that my Order stated that these documents reflected receipt of a shipment whereas they actually reflect shipments loaded and delivered out of Respondent's facility. Notwithstanding my mischaracterization of the function of these documents in my Order, I adhere to my ruling that these documents add nothing to my consideration of the issues before me. The documents on which Respondent purportedly relied are the receiving records that were the subject of testimony at the hearing. No delivery ticket was placed into evidence. The delivery tickets, although apparently produced by Respondent with the receiving records, were not the subject of a subpoena. The General Counsel's posthearing exhibit establishes, contrary to Calligan's testimony, that time stamps were the exception, not the normal practice. The delivery tickets are cumulative. For all the foregoing reasons, the delivery tickets proffered by the Charging Party are rejected. I shall place these documents in a rejected exhibit file to assure their preservation in the form in which they were sent to me.

[14] I do not credit Calligan's uncorroborated testimony that the warnings were presented at different times. These three warnings all bear Shop Steward Toney's signature. Toney, called as a witness by Respondent, was not questioned about this. Pierre credibly testified that Calligan gave him three warnings at the same time.

[15] The date of this meeting was not established in testimony at the hearing. A September 8 letter from Escoffier to Louis regarding the grievance Pierre filed after his discharge reveals that this meeting attended by Escoffier, "with Lionel Toney present," was August 16, after Pierre had received the three warnings from Calligan, one dated August 9 and two dated August 10. Pierre, in testifying about this meeting, specifically referred to "three papers" that related to his allegedly taking too much time to do his work. I find that he was referring to these three warnings.

[16] Neither Escoffier nor Louis are required to be present at a Step 1 grievance meeting. The presence of Escoffier, but absence of Louis who had told Pierre to file the grievance, was clearly a concern to Pierre since he did not trust Toney.

[17] Escoffier did not deny making this statement.

[18] Escoffier's statement is not alleged as a violation of the Act. Although he denied taking any adverse action against Pierre because of his filing of grievances, he did not deny making this statement.

[19] Insofar as step 1 grievances are to be presented orally within one week of the occurrence, Pierre's refusal to sign the three warnings, and his protest of them at this meeting, would have constituted the simultaneous presentation of three grievances. Escoffier's comment, that Pierre was "writing" too many grievances may well have related to his position that a grievance should not be written until step 2 of the grievance procedure, after completion of the oral step, step 1.

[20] The grievance was not processed to step 2 of the grievance procedure.

[21] The document is dated August 30. It is undisputed that it was given to Pierre on August 31.

number was corrected to 699. (G.C. Exh. 33(232).)[22] Thus Pierre's tally was correct. Calligan did not speak with Pierre concerning this alleged discrepancy. On one of the August 30 receiving records, Calligan testified that Pierre had shown receipt of 475 cartons, whereas the tally showed 13 pallets of 35 and a partial pallet of 21, which would have resulted in a total of 476, a discrepancy of one carton. On the other August 30 receiving record, Pierre correctly recorded that 370 cartons were received; however his tally reflects only 367. Pierre had explained to Calligan that the inspector had taken three cartons. Thus, although 370 cartons had been shipped and received, when Pierre tallied the cartons, there were only 367. The total was correct. Although Calligan stated in a pretrial affidavit that "I let this mistake go," he did not mention this in his testimony.[23] I fail to see that this was a "mistake." Even if it was a mistake, Calligan said that he "let this mistake go."

Typically, employees corrected tally errors before they came to management's attention. When asked about who caught mistakes on tallies when shipments came into the plant, former employee Jake Langston responded that it was the "secretary," an individual who worked in the office. The secretary would notice any discrepancy in the tally and "call you and ask you."[24] Documentary evidence reveals that employees received warnings for tally errors that resulted in a monetary loss to Respondent, such as signing for product not received or overshipping (shipping too much product), or that had an impact on a customer, such as shipping the wrong product or undershipping.[25] There is no evidence that any employee, other than Pierre, was ever disciplined for a clerical error on a tally that did not result in a monetary loss, shipment of the wrong product, or undershipment to a customer.

On receiving the termination notice, Pierre told Calligan, "This is wrong again." He then left. Pierre attempted to contact business agent Louis, but was unable to do so. Thereafter he attempted to file a grievance. The manner in which he did so does not appear in the record; however, by letter dated September 8, 1994, Escoffier advised Louis that he had "received a Step 2 Grievance from Nelson Pierre and once again Mr. Pierre has ignored the grievance procedure and skipped Step 1." The subject of the letter is stated to be "Grievance by Nelson Pierre 8/31/94." Thus, it would appear that Pierre, as was his practice, had reduced his grievance to writing. Escoffier appears to consider the reduction of a grievance to writing to constitute skipping the first step of the grievance procedure. A letter from Escoffier to Louis, dated November 8, denied the request of the Union to waive step 1 of the grievance procedure. At the hearing, Respondent presented Business Agent Louis, who testified that the relationship between Respondent and the Union was "rather good. We had our arguments from time to time, but nothing that lasted overnight." Shop Steward Toney testified that, except for Pierre, he "did not know of any other employees who filed grievances against the company."

On December 21, the Acting Regional Director for Region 15 issued an Order to Show Cause why the issue concerning the position to which Pierre should have been reinstated should not be submitted to the arbitrator who had directed Pierre's reinstatement. In a supplemental decision dated July 31, 1995, the arbitrator noted that the only classifications in active use at Respondent's warehouse were "engineers" and "checkers/lift truck", that there was no classification of "porter." He found that it was beyond his authority to order Respondent "to assign job duties to the grievant that would impinge on the management right of the employer to exercise discretion and control of the management of the plant in order to provide a maximum of operational efficiently." Thus he found that Pierre could be assigned any set of job duties other than "engineer."

B. Respondent's Motions

Respondent has moved for dismissal of the 8(a)(1) allegation relating to the threat of unspecified reprisals as a result of Pierre's grievance filing activity.[26] Respondent argues that this allegation, which was specifically set out in a charge for the first time on September 11, 1996, is barred by Section 10(b) of the Act. The original charge in this case, filed on October 25, 1994, alleges that Pierre was terminated for filing grievances.[27] This allegation is repeated in the first amended charge, filed on November 25, 1994, which also alleges the failure of Respondent to reinstate Pierre to the position of porter. The second amended charge, filed on September 11, 1996, additionally sets out the allegation of a threat.

Amendments to a timely charge are deemed to relate back to the date of filing of the original charge, so long as the matters alleged are similar and arise out of the "same course of conduct" as is contained in the original charge. *Pankratz Forest Industries*, 269 NLRB 33 (1984); see also *Helnick Corp.*, 301 NLRB 128 (1991). The initial charge in this case specifically alleges that Pierre was discriminated against as a result of his grievance filing activity. Thus, there is no question but that the 8(a)(1) allegation set out in the second amended charged is similar to, and arises out of the same course of conduct as, the conduct that was the subject of the original charge. Respondent's motion to dismiss the 8(a)(1) allegation on procedural grounds is denied.

Respondent has also moved for dismissal of the complaint allegation that Pierre was reinstated to a more onerous position. Respondent argues that this allegation is precluded by the supplemental finding of the arbitrator that Respondent was not required to reinstate Pierre to his duties as porter since the classification of porter did not exist. Rather, as set out above, employees work in the classifications of engineer or checker/lift truck (CLT).

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[22] I additionally note that the extraneous writing that appears on G.C. Exh. 32 p. 3, to which Calligan referred when he testified, does not appear on G.C. 33(232).

[23] I have made the foregoing finding on the basis of a pretrial affidavit given by Calligan and included in the formal papers as an attachment to Respondent's Motion for Summary Judgment, G.C. Exh. 1(p). A duplicate of this motion was placed into evidence, without the affidavit, as R. Exh. 6. At that time I was unaware that this evidence was already before me and noted that I would rely on the testimony. There is no testimony reflecting that Pierre reported the basis for this discrepancy and that Calligan "let this mistake go." I therefore am relying on this statement in Calligan's affidavit which is in the record before me.

[24] Receiving records in evidence reflect various tally corrections. See, e.g., G.C. Exhs. 33(32), (41), and (73).

[25] The record contains one warning issued to an employee in 1996 for undershipping.

[26] Respondent filed a Motion for Summary Judgment on May 23, 1997. The Board, on May 28, 1997, denied the motion as untimely since it was filed less than 28 days before the scheduled hearing date of June 4, 1997. At the hearing, counsel raised the same issues that had been the subject of its Motion for Summary Judgment.

[27] Respondent's brief inadvertently states that this charge related to Pierre's reinstatement rather than his termination.

In addressing this argument, I note that Pierre filed a charge, Case 15–CA–12507, alleging that his termination in February 1994 was unlawful. Case 15–CA–12507 is not before me. When Pierre raised the issue of his reinstatement, by filing the charge in the instant case, Case 15–CA–12931, the Acting Regional Director issued an Order to Show Cause why the issue relating to Pierre's reinstatement should not be submitted to the arbitrator. By letter dated January 17, 1995, the Acting Regional Director noted that he had deferred the prior charge, and he referred to Pierre's reinstatement as "a continuation of the arbitral proceeding concerning the February 1994 discipline of Pierre." The arbitrator's supplemental decision does not address Pierre's allegation, set out in the charge in Case 15–CA–12931, that he was discriminatorily reinstated because of his protected Section 7 activity. Rather, the decision is limited to interpretation of the contract. The arbitrator is explicit in stating that he has "no authority to create a classification of 'porter' [or] to order the company to assign job duties to the grievant that would impinge on the management rights of the employer as set out in article XIII" of the collective-bargaining agreement.

I find no merit to Respondent's argument that consideration of the issue regarding Pierre's reinstatement is precluded by the arbitrator's supplemental award. Although the Acting Regional Director referred to the issue of Pierre's reinstatement as a "continuation of the arbitral proceeding" in his letter dated January 17, 1995, the issuance of the complaint herein suggests otherwise. The issue raised by the complaint, and the issue that is before me, is whether Pierre was discriminatorily assigned more onerous job duties in retaliation for his grievance filing activities. The only issue decided by the arbitrator was that the contract did not preclude the assignment of whatever CLT duties management decided to assign. The issue regarding discriminatory reinstatement is not factually parallel to the issue decided by the arbitrator, and it was not considered by him.

The deferral of the charge in Case 15–CA–12507 does not preclude my consideration of the unfair labor practices raised by the instant complaint in Case 15–CA–12391. In *Barton Brands*, 298 NLRB 976, 979 (1990), as in the instant case, the charging party had been discharged after being reinstated. The charging party had filed a prior unfair labor practice charge to which the Regional Director deferred regarding the original discharge. Id. at 977. In that case, as in the instant case, the second charge was filed after the charging party was fired a second time. In *Barton Brands*, the arbitrator's award had prohibited the charging party from holding union office. The charging party was discharged after being elected president of the local union. In finding the second discharge unlawful, the Board found it unnecessary to pass on the prior discharge, noting that the prohibition on holding union office was repugnant to the Act. The Board specifically stated that its determination was not dependent on a finding that the original discharge had been for engaging in protected activity. Id. at 980 fn. 14. Similarly, in the instant case, I need not consider the original discharge. The arbitrator, in his supplemental decision, clearly sets out that his supplemental decision is rendered within the confines of the contract. He did not consider the unfair labor practice issue of discriminatory reinstatement. The issue before me is whether Pierre was discriminatorily reinstated as a result of his grievance filing activity. This issue is not factually parallel to any issue decided by the arbitrator, and it was not considered by him. Consequently, I am not precluded from considering the unfair labor practice allegation.

C. Analysis and Concluding Findings

The analytical framework of *Wright Line*[28] is applicable in dual or mixed motive cases after the General Counsel has established employee union activity, employer knowledge of that activity, animus towards such activity, and adverse action taken against those involved in, or suspected of involvement in, that activity.

Pierre engaged in the union activity of filing grievances, and Respondent was aware of that activity.

In evaluating the evidence relating to Respondent's animus towards employee involvement in union activity, I am mindful that Respondent presented Business Agent Louis who described the relationship between Respondent and the Union as "rather good." The record confirms that, so long as employees did not attempt to exercise their rights under the contract, the relationship was good. Escoffier acknowledged that Respondent receives "[m]aybe one" grievance from the Nashville warehouse each year, and that, from Respondent's three New Orleans warehouses, Respondent annually receives "[j]ust a couple. There are years that go by with no grievances." Pierre had filed two grievances in 1993, and three grievances in February 1994. He had partially prevailed in an arbitration in which Respondent's discipline had been found to be excessive, and his discharge been reduced to a suspension. Calligan let Pierre know where he stood when he informed Pierre that "Gary [Escoffier] said you was writing too many grievances. That's why you didn't get your job back." The complaint alleges this statement as a threat of unspecified reprisal, but I find it quite specific. Calligan informed Pierre that he was not being returned to his former position because of his grievance filing activity. In so doing, Respondent threatened retaliation against employees who exercised their rights under the collective-bargaining agreement and violated Section 8(a)(1) of the Act.

Respondent's animosity towards employees who filed grievances was confirmed by Escoffier when he met with Pierre on August 16 regarding the job assignment grievance Pierre had filed on July 11, the day of his reinstatement. Escoffier made it a point to tell Pierre that the arbitrator felt sorry for him: "you didn't win anything," and then noted that he "was writing too many grievances for him [Escoffier] to put . . . [Pierre] anywhere." Business Agent Louis had told Pierre that Respondent had issued an ultimatum, that Pierre had no recourse but to return to the one job Respondent offered and file a grievance.[29] The record amply demonstrates that Respondent bore animus towards Pierre and that this animus was a direct result of his grievance filing activity.

The complaint alleges that Respondent discriminatorily assigned Pierre to a more onerous position. Before addressing the issue of whether the assignment was discriminatory, I must determine whether the work was, in fact, more onerous. The record here establishes that the driving of forklifts into Respondent's freezers, either to store cargo or to remove cargo for shipment, was the job performed by 10 of Respondent's 15

[28] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

[29] The explicit comments of Calligan and Escoffier were reinforced by shop steward Toney when he cautioned Pierre about filing grievances. When doing this, Toney did not acknowledge that Pierre had won the grievance regarding his discharge. Rather, Toney said that the Respondent was "allowing you another chance." Toney's attribution of Pierre's reinstatement to Respondent's largesse, rather than to Pierre's exercise of his contractual rights, provides insight into why Pierre believed that Toney talked with "two tongues."

CLTs. Despite the fact that this job was performed by the majority of Respondent's CLTs, I find that it was more onerous than working in produce or performing the duties of porter since it required significant exposure to below freezing temperatures and the inconvenience of wearing special clothing, a freezer suit. Indeed, when Pierre was assigned the job he was asked if he still had his freezer suit. Furthermore, there is no question that Pierre considered it more onerous; he wanted to be assigned to his former duties as porter or to the produce department where he worked in the chill rooms and was not exposed to below freezing temperatures. I find that working in below freezing temperatures, thereby creating the necessity for wearing special clothing, a requirement that did not apply to CLTs performing porter duties or forklift driving duties in produce, did constitute assignment of Pierre to a more onerous position.

Respondent's assignment of Pierre to the freezer was discriminatory. Calligan told Pierre that he was not getting his job back because he filed too many grievances. Escoffier's testimony that he concluded that Pierre did not want to perform the duties of porter because of his December 1993 grievance is disingenuous. Business Agent Louis had specifically informed Escoffier that Pierre wanted to return to performing the duties of porter. Calligan moved an employee from the freezer to produce, thereby creating a position in the freezer. Calligan testified that the "reason why I put him [Pierre] up in front with the freezers is that I can really keep an eye on his duties." Thus Pierre, by Respondent's own admission, was a marked man. Despite Calligan's incredible assertion that he placed Pierre in the freezer in order to help Pierre, the real motive was revealed when, on July 15, only 4 days after Pierre returned to work, Calligan issued Pierre a verbal warning. This warning was issued despite the 3-week grace period that Calligan testified he and Escoffier had decided to give Pierre. Not only did Calligan issue a verbal warning to Pierre, he made a written record of it, an action that was unprecedented. Contrary to his testimony, Calligan relied on this warning when he discharged Pierre. The termination notice recites, inter alia, that Pierre "has been verbally warned." I find that the assignment of Pierre to drive a forklift in the freezer was discriminatorily motivated, and, as hereinafter discussed, specifically made so that Calligan could create a paper trail upon which Respondent could purportedly rely as justification for Pierre's termination.

The record reveals no occasion in which any employee, except Pierre on July 15, has been disciplined simply because of a tally error. Indeed, most such errors are caught by the secretary and corrected by the responsible CLT. Any error that Pierre made was, of course, going to come to Calligan's attention since, as he testified, he placed Pierre where he could "keep an eye on his duties." The documentary evidence in this case reveals that the only warnings issued for tally errors have been when the errors cost Respondent money or have had an impact on a customer, such as shipping the wrong product or undershipping.

On August 10, Calligan presented Pierre with three written warnings. He had not investigated the circumstances regarding any of these warnings. Pierre explained, regarding the warning written by Deville, that he had no access to the freezer because employee Kent was taking orders for shipment to the military out of the freezer. After being given this explanation, Calligan said, "I'm sorry," but he did not destroy the warning. Similarly, regarding the pallets, Pierre explained that the second driver had brought sufficient pallets. Calligan said, "Okay," but did not destroy the warning. The failure to conduct a meaningful investigation and to give the employee who is the subject of the investigation an opportunity to explain are clear indicia of discriminatory intent. *K & M Electronics*, 283 NLRB 279, 291 (1987). In the instant case, Calligan did not conduct an investigation. When Pierre was presented with the warnings, he explained what had occurred. Calligan did not challenge Pierre's explanation of the facts. Calligan's retention of the warnings, after learning that Pierre's access to the freezer had been blocked and that the second driver had brought 50 pallets, reveals that Respondent was intent on building a case against Pierre.

I totally reject any contention that Respondent's records establish that Pierre performed his duties improperly or slowly. There are two time stamps on only 7 of over 225 receiving records produced by Respondent. Two of these resulted in warnings to Pierre. It obviously was not Respondent's practice to stamp the receiving records out and in. The CLT does not control when the receiving record is stamped in. I have no basis for assuming that the stamped receiving record accurately reflects either when a job was completed or how long it took to actually perform the job. Pierre specifically explained the circumstances when he had no access to the freezer. No witness disputed that delays in storing cargo often occur due to delays in inspection. Calligan relied only on the time stamps. He did not testify to, or investigate, the circumstances that allegedly caused Pierre to take excessive time.

Where it is found that a respondent's reasons for its purported actions are pretextual, the respondent has failed to sustain its *Wright Line* burden since the effect of this "is to leave intact the discriminatory motive established by the General Counsel." *Champion Rivet Co.*, 314 NLRB 1097, 1098 (1994). Calligan's written documentation of his verbal warning to Pierre, during Pierre's supposed 3-week grace period, was unprecedented. Respondent had no basis for any of the written warnings it gave Pierre. There is no probative evidence that he worked too slowly. There is no probative evidence that the confusion regarding the pallets resulted in any monetary loss to Respondent. Thus, I find that the warnings issued to Pierre were pretextual. Having so found, I find that that Respondent has not sustained its *Wright Line* burden. I find that Respondent, in violation of Section 8(a)(3) of the Act, issued the warnings to Pierre in retaliation for his grievance filing activity and in order to create a paper trail that could ultimately be used to justify his discharge. Respondent's documentation of Pierre's verbal warning with a written memorandum further confirms this finding.

Pierre specifically explained what had occurred regarding two of the warnings that Respondent issued to him on August 10. About 3 weeks later, on August 31, Respondent did not risk receiving an explanation from Pierre. It discharged him without confronting him with the alleged mistakes that he had made. Regarding the receiving record of August 29, as noted above, on a duplicate copy of the document upon which Calligan supposedly based his warning (G.C. Exh. 33(232)), the total has been corrected. Regarding the alleged error when an inspector took three cases, Calligan stated in an affidavit that he "let that mistake go." The remaining receiving record on which Calligan supposedly relied reflects, at the worst, a discrepancy of one carton. Calligan did not speak to Pierre to discuss what appeared to be a tally that was inconsistent with the total. There is

no contention that any of the above purported errors cost Respondent any money or resulted in the shipment of the wrong product or undershipment to a customer.

I find that the General Counsel has established Pierre's union activity, Respondent's knowledge of that activity, and its animus towards Pierre because he exercised his rights under the collective-bargaining agreement. Respondent has not established that it would have taken the same action against Pierre if he had not filed grievances. As discussed above, the record is devoid of evidence reflecting that any other employee has even been disciplined, much less discharged, for a tally error that did not result in monetary loss to Respondent or that had an impact on a customer, such as shipment of the wrong product or undershipment. Having created a paper trail of warnings, which I have found were pretextual, Respondent discharged Pierre without giving him an opportunity to address the alleged tally errors on which Calligan asserted he relied. The record establishes, and I find, that Respondent discharged Pierre in retaliation for his union activity in violation of Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. By threatening retaliation against employees who exercise their rights under the collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By assigning Nelson Pierre to a more onerous position, by issuing warnings to him, and by discharging him in retaliation for his grievance filing activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily warned Nelson Pierre, the Respondent must rescind the warnings of July 15 and August 8, 9, and 10, 1995.

Having discriminatorily assigned Nelson Pierre to a more onerous position and having discharged him, the Respondent must offer him reinstatement to the position of CLT performing the duties of porter and make him whole for any loss of earnings and other benefits computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, New Orleans Cold Storage & Warehouse Co., Ltd., New Orleans, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening retaliation against employees who exercise their rights under the collective-bargaining agreement.

(b) Assigning more onerous job duties to employees because they exercise their rights under the collective-bargaining agreement.

(c) Discharging, warning, or otherwise discriminating against any employee for supporting International Brotherhood of Teamsters, Local Union No. 270, or any other union.

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

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

(a) Within 14 days from the date of this Order, offer Nelson Pierre full reinstatement to the position of CLT performing the duties of porter 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.

(b) Make Nelson Pierre whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Rescind the warnings of July 15 and August 8, 9, and 10, 1994, issued to Nelson Pierre.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and warnings and, within 3 days thereafter, notify Nelson Pierre in writing that this has been done and that the discharge and warnings will not be used against him in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Nashville warehouse in New Orleans, Louisiana, copies of the attached notice marked "Appendix."[31] 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 immediately upon receipt 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

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

[31] 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."

notice to all current employees and former employees employed by the Respondent at any time since October 25, 1994.

(g) 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.

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 retaliation against you because you file grievances.

WE WILL NOT assign more onerous job duties, warn, discharge, or otherwise discriminate against any of you because you exercise your rights under the collective-bargaining agreement or support International Brotherhood of Teamsters, Local Union No. 270 or any other union.

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

WE WILL, within 14 days from the date of the Board's Order, offer Nelson Pierre full reinstatement to the position of CLT performing the job duties of porter 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, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, 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 discharge of, and warnings issued to, Nelson Pierre and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge and warnings will not be used against him in any way.

NEW ORLEANS COLD STORAGE & WAREHOUSE CO., LTD.