

**Nabisco, Inc. and Millwrights Local Union 2232,
United Brotherhood of Carpenters and Joiners
of America, AFL-CIO. Cases 23-CA-8726 and
23-CA-8727**

15 September 1983

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 18 October 1982 Administrative Law Judge Richard J. Linton issued the attached Decision in this proceeding. Thereafter Respondent filed exceptions and a supporting brief; the General Counsel filed cross-exceptions and a supporting brief; and both filed answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Respondent operates a bakery in Houston, Texas, where the Charging Party Union represents the maintenance and repair employees. Respondent and the Union are parties to a collective-bargaining agreement which contains a grievance/arbitration provision which is applicable to "all grievances and disputes arising out of the application or interpretation of this Agreement" and to employee suspensions and discharges. This provision also provides for final and binding arbitration. The contract does not contain a "no-strike" clause.

The conduct alleged here as unfair labor practices arose in response to two events which occurred in September 1981.² First, the Union filed an unfair labor practice charge, unconnected with the instant case, based on Respondent's having warned several employees for leaving work early. In response to the charge, Respondent's plant manager, Cocco, summoned Kenneth Higgins, an employee and the Union's chief steward, to his office and asked him why the Union had filed a charge rather than a grievance. Higgins replied that they did not know how to bring it under the contract. Cocco then told Higgins that he should not go to

the Board in the future but should use the grievance procedure "whether it pertains to the contract or not." Cocco then said that he would discuss the underlying matter if the Union would withdraw the charge.

The General Counsel alleges that in this conversation Cocco had committed three separate violations of the Act. The Administrative Law Judge found that Respondent, through Cocco, had violated Section 8(a)(1) by (1) admonishing Higgins not to go to the Board, and (2) questioning Higgins as to why a charge had been filed. The Administrative Law Judge noted that such a question would not always be illegal, but found it to be so here because it occurred in a coercive context in that Higgins had been summoned to the plant manager's office and the question was followed by an illegal admonishment. The Administrative Law Judge also found that Cocco's offer to discuss the disciplinary warnings if the Union withdrew the charge did not violate the Act. While we agree with this dismissal, we find merit in Respondent's exception to the Administrative Law Judge's finding that Cocco's asking Higgins why a charge, rather than a grievance, had been filed was violative of Section 8(a)(1). In this regard, we note that Cocco's question was unaccompanied by any threat of reprisals. The question itself appears to have been simply a non-threatening manifestation of Cocco's curiosity as to why the Union would choose to file a charge over a matter which Cocco perceived to be at most a routinely grievable matter. Accordingly, under these circumstances, we find that Cocco's question was not coercive and we shall dismiss this allegation of the complaint. However, for reasons detailed later in this Decision, we agree with the Administrative Law Judge's further finding that Cocco's admonishing Higgins not to go to the Board in the future was violative of Section 8(a)(1).

The second event giving rise in this proceeding to allegations of unfair labor practices was an employee-staged sick-out. On 30 September, most of the first-shift maintenance and repair employees left work early, claiming illness. Several others earlier had phoned in sick and did not report to work. Cocco advised the Union of this and met with Higgins and the Union's business manager, Price, that same day in an attempt to contain the situation. Higgins told Cocco that employees were disgruntled over supervisory harassment and over a job assignment dispute, a matter then being processed through the grievance procedure. The sick-out lasted 1 day. Cocco agreed to meet with employees to listen to their complaints and did so on 7 October. The parties then met again 8 October to discuss the harassment allegation and the job assign-

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

² Hereafter, all dates refer to 1981.

ment dispute. The harassment charge appears to have been resolved at this meeting but the job assignment dispute was not.

Meanwhile, on 2 October Respondent's assistant plant manager, Muscarello, had asked Respondent's personnel manager, Michael, to verify the names of the sick-out participants and to draft a warning notice to be issued to them. On 14 October Michael and Muscarello met with Cocco and got his approval of the proposed warnings after advising Cocco that the former plant manager had issued warnings to participants in a similar sick-out in 1980. Thereafter, on 20 October Cocco met with the Union to discuss the job assignment dispute, but the parties were unable to resolve it. At the conclusion of the meeting, Price announced that the Union would proceed to arbitration on the matter. Cocco then announced that sick-out participants would be issued warnings for their sick-out activities. The warnings issued on 27 October to those who participated in "a protest to a job assignment." These warnings were alleged by the General Counsel to have violated Section 8(a)(3) of the Act.

Based on credited testimony, the Administrative Law Judge first found, contrary to the General Counsel's contention, that Cocco had not promised to grant amnesty to sick-out participants. Nevertheless, he still concluded that Respondent had violated Section 8(a)(3) by issuing warnings to the employees in retaliation for the Union's having chosen to pursue the job assignment grievance to arbitration. In so concluding, he found that Respondent's unlawful motivation was evidenced by the timing of Cocco's announcement of the warnings, just after the Union had announced its decision to proceed to arbitration. The Administrative Law Judge noted that Cocco had approved the warnings on 14 October and Respondent proffered no explanation for delaying until 20 October to advise the Union of this decision. The Administrative Law Judge concluded that Cocco withheld the warnings and waited to see if the Union would acquiesce in Respondent's position on the grievance. The Administrative Law Judge thus found that the warnings would not have issued had the Union not declared its intent to arbitrate the dispute. He further concluded that, regardless of Respondent's motive, its issuance of the warnings was also independently violative of Section 8(a)(1) because the sick-out was protected concerted activity. In reaching this conclusion, he noted that the parties' contract did not contain a no-strike clause, and he found that the employees had employed no unlawful means in the sick-out, and that the sick-out had no unlawful end. He also found that even though the Union had

not authorized the sick-out, the employees were not acting in derogation of their collective-bargaining representative.

We find merit in Respondent's exceptions to the Administrative Law Judge's unfair labor practice findings regarding the sick-out. In so doing, we note that the sole basis for the Administrative Law Judge's finding of an 8(a)(3) violation was the timing of the announcement of the warnings. From this, the Administrative Law Judge inferred an unlawful motivation. Absent other evidence, we find that timing alone does not provide sufficient basis from which to infer unlawful motivation in Respondent's issuance of the warnings, particularly where Respondent had a past practice of issuing warnings for this sort of infraction. Thus, we note that the record reveals that, when confronted with a similar employee sick-out in 1980, the Company responded by issuing warnings to those participating in it. Accordingly, Respondent's conduct with respect to the sick-out at issue here is consistent with its past practice. We note, moreover, that on 2 October Plant Manager Muscarello decided to recommend to Cocco that the sick-out participants be warned in accordance with this past practice. On that day, Muscarello asked Personnel Manager Michael to verify the names of the participants and to draft a warning for Cocco's approval. While some 6 days elapsed between Cocco's approving the warnings on 14 October and his advising the Union of his decision on 20 October we find no basis on which to conclude, as did the Administrative Law Judge, that Cocco was holding back, i.e., "desk drawing," the warnings to await the outcome of the grievance meeting. We note particularly that, at the 8 October meeting where employee complaints about supervisory harassment were discussed, Cocco himself instructed one of his supervisors to refrain from holding back warnings and to destroy any that the supervisor was then holding. We find it highly unlikely that only 12 days later Cocco would engage in the same activity that he had just counseled his supervisors against. In all the circumstances, we find that Respondent did not violate Section 8(a)(3) by issuing warnings to employees who participated in the sick-out, and we shall dismiss this allegation.

We also disagree with the Administrative Law Judge's finding that the sick-out was protected concerted activity and that the issuance of the warnings was an independent violation of Section 8(a)(1). Thus, we note that the contract's grievance/arbitration provision gives rise to an implied obligation not to strike over matters subject to final, binding arbitration. Cf. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Goya*

Foods, 238 NLRB 1465 (1978). In the instant case, the sick-out was, in large part, a protest of the job assignment dispute, a matter then being processed through the grievance/arbitration machinery. Under these circumstances, we reverse the Administrative Law Judge and find the sick-out to be unprotected and that Respondent's warning to its participants was not independently violative of Section 8(a)(1).

Following our disposition of all of the above, the sole violation remaining of those alleged is Cocco's admonition to Higgins to refrain from filing charges with the Board. We find the seriousness of this violation warrants a remedial order notwithstanding its being the sole violation found. Thus, a Board proceeding involves the effectuation of a public policy and it is not the mere adjudication of a private right. We cannot initiate our own proceedings but are dependent upon the initiation of charges by individuals. *NLRB v. Shipbuilders*, 391 U.S. 418 (1968); *Minnie E. Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967). Access to the Board is therefore critical to the fulfillment of our statutory duties and, accordingly, Cocco's attempt to limit Higgins' access to the Board was a serious violation which must be remedied. We note that Cocco's admonishment to Higgins not to file charges with the Board was not limited to matters arguably contractual in nature but was a blanket proscription covering all matters arising in the future. Since Higgins is an employee of Respondent, we find this admonishment no less serious by virtue of his also being a union steward. Accordingly, we shall order Respondent to refrain from this conduct in the future.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Nabisco, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees that they are not to seek assistance from the National Labor Relations Board but instead should proceed under the contractual grievance procedure on any complaint whether it pertains to the contract or not.

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

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Post at its Houston, Texas, bakery copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by an authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT tell you to refrain from seeking assistance from the National Labor Relations Board and that you should proceed instead under the contractual grievance procedure on any complaint whether it pertains to the contract or not.

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

NABISCO, INC.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge: This case was tried before me in Houston, Texas, on May 27 through 28, 1982, pursuant to the February 4, 1982, consolidated complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 23 of the Board. The consolidated complaint is based on a charge filed November 12, 1981, in Case 23-CA-8726 by the Millwrights Local Union 2232, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Union or Local 2232), against Nabisco, Inc. (the Respondent or Nabisco), and on a second charge filed November 12, 1981, in Case 23-CA-8727 by Local 2232 against Nabisco.¹

In the complaint, the General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by certain conduct, including interrogating and threatening employees with disciplinary action, Section 8(a)(4) of the Act by conditioning discussion of certain grievances on the Union's withdrawal of pending unfair labor practice charges relating to the Respondent's conduct leading to the grievances, and Section 8(a)(3) of the Act by issuing warning notices to named employees because they engaged in a work stoppage on September 30.

By its answer, the Respondent admits certain factual matters but denies that it has violated the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

A New Jersey corporation engaged in the bakery business, Nabisco operates a bakery in Houston, Texas. During the past 12 months, Nabisco purchased goods and materials valued in excess of \$50,000, and such goods and materials were shipped to the Respondent's Houston facility directly from points located outside the State of Texas. The Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that Millwrights Local Union 2232, United Brotherhood of Carpenters and Joiners of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates are for 1981 unless otherwise indicated.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Events Leading to the September 30 Strike

Beginning partly as a dispute over the supervisory methods of Third Shift Foreman Charles Youngblood, and partly as the outgrowth of a disputed understanding of a supplemental agreement between Local 2232 and Nabisco concerning the work to be performed on the fourth shift, the events herein have ripened into this litigated case.

During all relevant times the Respondent and the Union were parties to a collective-bargaining agreement covering the Respondent's maintenance and repair employees at Nabisco's Houston bakery. The Respondent's production employees apparently are represented by a different union in a separate bargaining unit. The bakery operates its production in four shifts around the clock 7 days a week except for the period from 11 p.m. on Sunday nights to 7 a.m. Monday mornings.² The basic purpose of the fourth shift on Sunday nights is to check the repair and maintenance of the production equipment in order to prepare for the production process to resume. On occasion, however, some production on the extruder line takes place.

During their bargaining negotiations concluding on March 30, 1978, the Respondent and the Union agreed to a specific number of mechanics, pipefitters, and oilers to work on the fourth shift depending on whether the extruder line is operating (a total of seven employees) or not (a total of five employees). In either event, one oiler would work. This agreement, apparently not specifically detailed in any overall collective-bargaining contract, is set forth in a May 1, 1978, letter from Nabisco's labor relations staff assistant to Local 2232. The parties refer to this letter as the preparatory shift agreement (PSA herein). The final two paragraphs of the PSA read:

Preparatory shift duties will be to check out and make ready all production lines scheduled to run. Normal maintenance will not be assigned to this shift.

But normal maintenance shall include work that could have been performed by scheduling as weekly or weekend work.

As we shall see, a dispute arose in September 1981 concerning the interpretation of the PSA. The disagreement centered on whether the oiler could be assigned certain types of greasing and even, apparently, whether the oiler was intended to be covered or excluded by the PSA. While the general nature of this agreement/dispute is relevant background, we need not explore it in detail.

² References in the record to the fourth shift are a bit confusing. While these references suggest that the fourth shift is confined only to Sunday nights, Art. 7 of the most recent contract described the fourth shift as being a full shift of 8 hours a day 7 days a week. What the parties and witnesses apparently have reference to in this case is the single 8-hour shift on Sunday nights. That 8-hour period falls within the fourth shift. Throughout this Decision, reference to the fourth shift means the 8-hour period on Sunday nights.

At a meeting on October 20,³ Local 2232 expressed a desire to proceed to arbitration on the matter. As of trial time herein, Nabisco and Local 2232 had not selected an arbitrator.

On August 20, an unspecified number of employees signed a petition complaining that Foreman Charles Youngblood was cursing employees, harassing them, and hiding behind columns watching them, among similar conduct. Chief Steward Kenneth Michael Higgins credibly testified that he was present when the petition was given to Charles Burke, the then superintendent of the maintenance and repair (M & R) department.⁴ Although Higgins attached a grievance form to the petition, Burke told Higgins that he considered the document a petition rather than a grievance, that he would not answer on the grievance form, but that he would meet with the employees individually. A couple of employees did meet with Burke, but the majority told Higgins they did not want to follow that course for fear of intimidation. Higgins did not attempt to carry the matter forward to the next grievance step because of a perceived procedural problem in not obtaining a written answer from Burke.

On Wednesday, September 16, the Union, through Business Manager Shelton D. Price, filed a charge in Case 23-CA-8669 alleging that on September 10 Respondent had violated Section 8(a)(1) and (3) of the Act by Supervisor M. A. Curb's singling out B. J. Albright and R. K. Williams by issuing written warnings to them because they clocked out early (thereby) coercing members of Local 2232.

When Anthony F. Cocco, plant manager since July 1, arrived at work on September 18 he found a registered letter enclosing the charge in Case 23-CA-8669. Cocco testified that he walked into the office of Richard R. Michael, personnel manager at the bakery, and learned that Michael was not aware of the matter. Cocco then went to Superintendent Burke's office and asked him about it. Burke replied that he and Higgins had discussed the matter, that he thought the issue had been resolved, and that he was unaware that a charge was going to be filed over it with the NLRB.

Several people were in Burke's office when Cocco entered.⁵ When Cocco turned from speaking with Burke, he noticed that Higgins was present. Cocco testified that he then asked Higgins if he were aware of the charge. Higgins answered affirmatively. Cocco asked why the grievance procedure was not utilized. Receiving no response, Cocco commented that he thought they should settle matters like this "within house" by going through the grievance procedure.⁶ Cocco testified that Higgins

reacted by dropping his head without saying anything. At that point Cocco left.

It is undisputed that on Wednesday, September 23, Cocco and Higgins had a conversation concerning the Curb-Albright-Williams matter. According to Higgins, Cocco summoned him to the office and asked why charges had been filed with the NLRB for Albright and Williams. Higgins replied that it was because they had been treated unfairly in the disciplinary warning over leaving their work stations 3 minutes early. Cocco inquired why the Union⁷ did not use the grievance procedure. Higgins replied that they did not know how to bring it under the contract and therefore went to the Board. Cocco admonished Higgins that in the future he should not go to the NLRB but should file under the grievance procedure "whether it pertains to the contract or not."

Higgins testified that Cocco then stated that, if the Union withdrew the NLRB charge, he would talk to them about the Albright-Williams situation. Higgins said that if Cocco were making a commitment to pull the disciplinary warnings then "we" would be more than happy to withdraw the charge. Cocco responded he was not making such a commitment, but that if the NLRB charge were withdrawn he would talk about the Curb-Albright-Williams matter. Higgins said they could not do that, and the meeting ended.⁸

Denying that he told Higgins not to go to the Labor Board, Cocco testified that on September 18 he telephoned Business Manager Price about the charge. During their conversation, Cocco stated that he would confer with Curb when the supervisor reported to work on Monday afternoon, September 21, to investigate the facts. Price told Cocco not to respond to the charge, that he would advise the NLRB's Regional Office, and for Cocco to call him on Tuesday.

On Tuesday, September 22, Cocco called Higgins in, showed him the (undescribed) notes he had taken in talking with Curb. Higgins, exhibiting a look of surprise, stated, "Gee, this is sure a different story than I got." In Higgins' presence Cocco telephoned Price and reported the (undescribed) facts of Cocco's investigation to Price. The latter told Cocco not to respond to the NLRB charge until Price had a chance to discuss the matter with Higgins.

On Wednesday, September 23, Cocco, in his version, "called" Higgins (they apparently conferred in person rather than by telephone) and asked him if he thought they could settle this issue without involving the NLRB. When Higgins responded affirmatively Cocco proposed that they get the lead people together to discuss such

³ While witnesses for the General Counsel placed the meeting date as October 20, the Respondent's witnesses testified that it was October 19. The difference is immaterial because it is clear that all parties described the same meeting. Although a representative of the Respondent took notes at the meeting, such notes were not identified or offered at trial. In its answer, the Respondent admitted the correctness of the October 20 date. Under all the circumstances, I shall use that date rather than October 19.

⁴ The parties stipulated that Burke died in February 1982.

⁵ Present were Burke, Assistant Plant Manager Anthony Muscarello, General Foreman Louis Hawthorne, and Higgins.

⁶ Although the transcript quotes Cocco as saying that "he," meaning Higgins, made the comment about settling matters in house, it is clear

from the context and Muscarello's account that the "he" should be "I" for Cocco.

⁷ Higgins testified with the pronoun "we." Cocco probably used the word "you" as a collective reference to Higgins and the Union.

⁸ Complaint par. 8 alleges that the Respondent violated Sec. 8(a)(1) and (4) in the foregoing conversation by Cocco's (a) asking Higgins why the NLRB charge had been filed rather than a grievance, (b) telling Higgins that in the future not to go to the NLRB but to use the grievance procedure for all problems regardless of whether contractual, and (c) conditioning discussions concerning the disciplinary action (against Albright and Williams) on withdrawal of the charge in Case 23-CA-8669.

matters and even hold meetings of small groups of mechanics to discuss issues. Higgins opined that it was a fine idea.

The following day, Thursday, September 24, Price called and told Cocco he was proceeding with the charge. Cocco repeated his discussion of the previous day with Higgins about meetings with lead people in small groups. Once again Price said he would hold up until he had conferred with Higgins. On Friday, September 25, Cocco called Price who advised that he was proceeding with the charge. That ended the series of their conversations on the matter. The charge was withdrawn on October 7, 1981 (Jt. Exh. 3).

Although Price was not called as a rebuttal witness to controvert any of the foregoing, Higgins, during the General Counsel's case-in-chief, expressly denied that Cocco suggested meeting with lead people or small groups on the Albright-Williams matter in their conference of September 23. Cocco, explained Higgins, did offer at the October 8 meeting to meet with the lead people relative to their assuming more responsibility, but that had nothing to do with the issue of some employees leaving work early. Higgins also testified that in the balance of the week after the September 23 meeting Cocco twice complained to him that Albright and Williams had been observed leaving their work stations early again. Higgins investigated and reported back to Cocco that leadman Travis Sanford had assigned the two, plus another employee, to take parts to the machine shop area and that is why they left early. Cocco admitted that Higgins did make such a report to him on one occasion.

Based on Higgins' superior demeanor on this topic, I credit his version. I therefore find that on September 23, 1981, the Respondent violated Section 8(a)(1) of the Act when Cocco, in a coercive context, asked Higgins why an NLRB charge had been filed rather than a grievance,⁹ and admonished him not to go to the NLRB in the future but to use the grievance procedure even for noncontractual grievances. Although Higgins, in his testimony, did not address the September 18 conversation about the NLRB charge with Cocco in Burke's office, Cocco's description of that conversation is not inconsistent with Higgins' version of the conversation they had about the matter on September 23. As no basis either appears or is advanced for finding such conduct also constitutes a violation of Section 8(a)(4) of the Act,¹⁰ I shall dismiss complaint paragraphs 8(a) and (b) to the extent they allege a violation of Section 8(a)(4).

Respecting the allegation of Cocco's attaching the precondition of withdrawal of the NLRB charge before he would discuss the underlying problem, I shall dismiss the allegation even though I credit Higgins. This is because his version shows that, in essence, Cocco merely offered to discuss the problem if the Union withdrew the charge. Higgins countered by suggesting that the Respondent should first commit to pulling the disciplinary warnings

before the Union withdrew the NLRB charge. Neither acceded to the position of the other, and the matter was dropped. I therefore shall dismiss complaint paragraph 8(c).

B. The September 30 Strike

1. Preliminary events

On September 21, Higgins, as chief steward, signed a grievance (G.C. Exh. 2) protesting the Respondent's failure to abide by the PSA by assigning excessive work on the fourth shift to Billy Yawn, Jr. Yawn also signed the grievance. General Foreman Louis Hawthorne, inscribing his undated answer on the grievance form, denied the grievance. Higgins testified that he attended a step 2 meeting regarding the grievance on September 28, presumably with Cocco, but that no resolution was obtained.¹¹

On either September 28 or 29 Higgins learned from employees that they were contemplating a work stoppage, or sickout, because of perceived harassment by certain foremen and because of the fourth-shift work assignment dispute resulting from the PSA disagreement. They asked Higgins if they could be fired. Not knowing the answer, Higgins telephoned Price and reported the situation to him. Price told him that under no circumstances could the Union condone a walkout or sickout or sanction it in any fashion, that he did not know whether they could be fired, but that there was no way Higgins (or anyone) could bodily stop the employees if they actually wished to walk out. Higgins relayed to several employees the answer Price had given him. He testified that he did not specifically tell them not to leave, nor did he alert management that a strike was brewing over the unresolved problems upsetting the employees.¹²

2. The sickout and meeting of September 30

There is no dispute that on Wednesday, September 30, most of the employees on the first shift of the M & R department engaged in a sickout. Some called in sick, while others left "sick" at different times that morning after reporting to work. As we shall see, on October 27, 1981, the Respondent issued written warnings to 48 employees for engaging in the sickout.

Around 9:30 a.m., Cocco, through Muscarello, summoned Higgins to the office where, in the presence of Muscarello, Burke, and Hawthorne, Cocco interrogated Higgins regarding whether Higgins had organized the sickout. Higgins, whom I credit, testified that he told Cocco that he was not at liberty to answer at that time. After several unsuccessful attempts on that tack, Cocco switched to the different question of what was the cause of the walkout. Higgins responded that it concerned the breach of the PSA and the (supervisory) harassment on

⁹ It would not appear that such a question would always be violative of the Act. But the circumstances here, Higgins summoned to the plant manager's office, with the question followed by an illegal admonishment not to go to the NLRB with such matters rather than using the grievance procedure, render the question coercive.

¹⁰ The remedy would be the same. *Zero Corp.*, 262 NLRB 495, 497 fn. 9 (1982).

¹¹ Under the contractual procedure, step 1 is with the foreman and step 2 is with the superintendent. Higgins testified, however, that in practice the foreman is bypassed and the grievance is presented to the superintendent (as step 1). Higgins described the presentation to the plant manager as step 2.

¹² The collective-bargaining agreement does not contain a no-strike clause.

the third and fourth shifts. About that point the group was informed that Shelton Price and Clarence Bean, assistant business representative, were at the guard shack.¹³ Higgins went to meet Price and Bean.

When Higgins returned to Cocco's office with Price and Bean the parties discussed the sickout. At the beginning of the plenary meeting Cocco asked Price about the cause of the sickout. Price stated that, while he did not know the nature of the problem, it appeared that some employees "had taken [it] on themselves to perform a concerted activity." Higgins remarked that the employees were disgruntled over violations of the PSA and upset over supervisory harassment at night. Cocco asked both Price and Higgins if they could intercede and keep the strike from carrying over into the second and third shifts. Price said he did not know what he could do other than talk with the employees, and that the strike possibly would extend to the other two shifts that day. Higgins said he thought that it would probably last through the other two shifts and that there was nothing he could do at this time to stop it.

From that point the evidence is critical and is highly disputed. According to Higgins, Cocco asked Higgins whether the strike was going to continue into other days, and Higgins answered that it would not "if we could work something out beneficial to both parties." Higgins then asked Cocco whether any disciplinary action would be imposed on the employees engaging in the activity. Cocco replied that there would be none because he just wanted to get the problem over with. Both Price and Higgins testified that Cocco did promise amnesty, although at one point Higgins expressed an inability to recall whether it was he or Price who asked Cocco whether there would be any retaliation. Bean did not testify. Muscarello and Cocco vigorously denied that Cocco said anything about amnesty.

As counsel for the General Counsel argues, in effect, Price's and Higgins' version is inherently probable in view of Cocco's concern that the strike might continue into succeeding days. To "get the problem over with," Cocco allegedly promised amnesty. Although the Respondent issued disciplinary warnings to certain employees who walked off the job in April 1980, Cocco testified that as late as the week of October 12, 1981, he was unaware that any warnings were issued for the 1980 walk-out. Unaware of the past precedent, Cocco clearly could have felt free to avoid an extension of the strike by promising amnesty.

The asserted promise of amnesty was followed by a discussion of the underlying problems of the perceived harassment by Foreman Youngblood and the alleged breach of the PSA. It was agreed that Cocco would meet personally with the affected employees on October 7, that no other management or supervisory employees would be present, that not even Higgins would be present, and that while the notes would be recorded about the employees' complaints, but not their names, there would be *no retaliation* against the employees who

¹³ Cocco had telephoned Business Manager Price earlier, advised him of the sickout, and requested Price to come to the plant.

expressed their dissatisfaction in that meeting.¹⁴ The sickout did not resume after September 30.

C. Cocco Meets with Employees on October 7

Beginning shortly after 7 a.m. on Wednesday, October 7, Cocco met with about 12 employees from the third shift in the bakery's conference room. It is undisputed that he told them that, while he would have to take notes about their complaints, he would not record their names, that no action would be taken against them for what they said, and that he would respond the next day.

The principal complaint expressed during the 2-hour meeting was that Foreman Charles Youngblood was harassing employees by "birddogging" them, summoning them from the cafeteria, and not going through the leadmen to issue work orders. Oiler Billy Yawn complained that he was being given excessive work on the fourth shift.

After the meeting Cocco organized his notes into categories and set a meeting with his supervision for the following day at 6 a.m. Cocco testified that he later tore up the notes he took at the meeting he held on October 7 with the employees.

D. The Followup Meeting on October 8

At his early morning meeting with the third-shift supervision, plus General Foreman Hawthorne and Superintendent Burke on October 8, Cocco reported on his conference the previous day with the third-shift employees. He gave instructions to the supervisors to work through the lead people and, apparently, not to harass employees.

Shortly after 7 a.m. Cocco and several management-supervisory representatives, including Foreman Youngblood, met with Price, Higgins, and several employees. The harassment allegation was discussed in detail, with Youngblood saying he thought the employees were possibly harassing him. An employee complained that supervisors were calling employees uncomplimentary nicknames. It also was developed that Superintendent Burke had a practice of preparing 1056s forms (disciplinary warning forms) and holding them inactive in his desk drawer to use at some later date. Oiler Yawn complained of being given work outside the PSA and wanted to know the status of his grievance on the matter. He was told the grievance was being processed. Cocco said, however, that the oiler was expected to do normal routine maintenance on the fourth shift.

Cocco resolved the complaints, other than the PSA matter, by instructing Superintendent Burke to destroy the 1056s he was holding and to cease the practice of holding back warnings, and by urging everyone to call each other by their given names and to cease calling others by nicknames or other uncomplimentary names. He also possibly said that the supervisors would work

¹⁴ The Respondent's witnesses agreed that Cocco promised no retaliation as to his October 7 meeting with employees. Indeed, Nabisco argues that this promise has been extended in bad faith by the General Counsel's witnesses to cover the sickout.

through the leadmen. Cocco stated that the parties were turning over a new leaf.

Although Higgins testified that he could not recall Cocco reiterating at this meeting that there would be no reprisals over the sickout, Price, oiler Billy Yawn, and pipefitter Thomas Lee Allen testified that Cocco did. Allen testified that, when Cocco made this remark of no retribution for the sickout because a "new era" was to begin, employee Louis Frey, Jr., asked him to repeat his statement and that Cocco complied, concluding with "Trust me." Frey did not testify, and Allen admitted that in his 11-page pretrial affidavit, in which he apparently covered the October 8 meeting, he did *not* mention the no retaliation statement of Cocco.¹⁵

Cocco, Hawthorne, and James Brown, currently a maintenance foreman but a leadman at the time, denied that Cocco stated that there would be no reprisals over the sickout. Indeed, Hawthorne asserted that the sickout was not even discussed. Hawthorne's assertion conflicts with the testimony of Allen who testified that the strike was brought up in order to ascertain the "effects" of the sickout.

Logic would support a finding that, if Cocco made a promise of amnesty on September 30, he would reiterate that amnesty promise at this meeting of October 8. It must be remembered that Cocco, by his own admission, was not told until the week of October 12 (apparently Wednesday, October 14) that warnings had issued for the April 1980 walkout. Clearly everything Cocco was doing was directed toward eliminating sources of friction and starting a "new era" of cooperation. We know that the employees had expressed concern of possible discharge even before they walked out on September 30, and proceeded with their job action even in the face of no reassurance on the issue. Higgins testified that he told some employees of Cocco's September 30 no discipline reassurance, but it seems only natural that the employees would want to hear it directly from Cocco and therefore asked him what effects the sickout would have.

Without attempting to resolve all credibility aspects here, I credit Brown's testimony that he never heard any employees reporting or discussing the promise of amnesty. Brown, it should be noted, participated in the sickout. One could expect that the no amnesty promise would be widely disseminated, yet at least one participant, Brown, did not hear of other employees telling each other about Cocco's no reprisal position. To a limited extent, this fact is inconsistent with any requested finding that amnesty was promised.

E. Cocco's October 14 Approval of Disciplinary Warnings

Anthony Muscarello, assistant plant manager, testified that on Friday, October 2, several supervisors, including Foreman Bill Curb and General Foreman Louis Hawthorne, asked him if the strikers were going to be given

¹⁵ Counsel for the General Counsel represented that Allen is not named in the complaint as receiving a warning because he did not participate in the sickout. Allen testified that his concern (attention) was with other matters when giving his affidavit.

written warnings as were the 1980 strikers.¹⁶ Hawthorne testimonially confirmed that he made such an inquiry on October 2.

Muscarello told the foremen that the 1980 precedent would be followed. That same day he went to Personnel Manager Michael and asked him to verify the names of the strike participants and to draft the warnings. He concedes that he said nothing to Cocco on the subject at that point. Michael's investigation included a review of the weekly timesheets to ascertain who had clocked out early that day. He compared and cross-checked this with a list received from the M & R department of the employees who had given their foremen reasons for leaving. Hawthorne testified that he compiled a list of the strikers at the request of Superintendent Burke.

On Wednesday, October 14, the investigation completed and the text of the sample 1056 (personnel action form) typed, Muscarello and Michael went to Cocco to let him know what they proposed. Cocco asked what had been done by the previous plant manager the last time and was told that warnings had issued. Asserting that the Respondent had to be consistent, Cocco gave approval for the warnings to issue to those who engaged in the sickout of September 30. The text of the drafted warning reads (Resp. Exh. 4):

On 9-30-81 46 M & R department employees reported to their department foreman that they had to leave work. Although most of the employees who left gave illness as the reason for having to leave (several other excuses were also used) investigation revealed the employees had left work in this manner as a *protest to a job assignment*. [Emphasis supplied.]

You were one of the employees who participated in this protest and left work prior to the end of your shift.

You are a member of a union that has a contractual agreement with the Company. The grievance procedure, as outlined in your contractual agreement with the Company should be followed. You should understand that further action of this nature by you could result in your being disciplined.

The phrase "as a protest to a job assignment" seems rather clearly to refer to the PSA dispute over the fourth shift job assignment of the oiler.

Digressing for a moment, we perhaps should note that there is a slight difference in numbers. The drafted warning asserts that 46 employees participated. Michael testified that one other name, that of J. Coffee, subsequently was discovered, making a total of 47. By trial amendment Coffee's name was added to the list of employees

¹⁶ Both Muscarello and Richard R. Michael, personnel manager, testified that a similar walkout by M & R Department employees occurred on April 29, 1980, and that the approximately 23 to 26 strikers were issued written warnings. Michael testified that the warnings actually issued on May 20, 1980. While no copy of any such warning was offered as an exhibit, both counsel for the General Counsel and the Charging Party represented that the Respondent had made the records available at trial for their inspection and that the documents did exist.

named in complaint paragraph 14 as having received the warnings on October 27. Coffee's name brought the paragraph 14 total to 49. The record contains warnings for 48 employees—for all those in complaint paragraph 14 with the exception of S. Wilson.

Returning now to the drafted notice, the record reflects that Michael testified that the drafted language was modified slightly for the four employees who did not come to work at all on September 30. The record exhibits show these employees to be D. Darnell, J. Farris, A. Gunter, and J. Wilson. Thus, the drafted language shown above actually issued on October 27 to 44 employees, and modified language went to four others.

F. *The October 20 Meeting*

On Tuesday, October 20, the parties again met in conference to resolve their differences over the PSA and the consequent fourth-shift problems.¹⁷ It is undisputed that after an unspecified time of discussion, but apparently following a substantial portion of the meeting, the union people left the conference room for a caucus. On returning, they offered to expand, to a limited extent, the duties of the oiler on the fourth shift. The Respondent would not agree to any restriction on the duties of the oiler. After another short caucus by the Union's side, Price announced that the Union would proceed to arbitration on the matter. At that point in the evidence, there is a significant dispute regarding what occurred thereafter.

According to Cocco, as Price was about to get up and leave, Cocco told him to wait because there were two more issues to discuss. First, Cocco complained that the Union's bulletin board contained a paper reporting wages of outside contractors and that it did not belong there because the Respondent had not given permission for the items to be posted. Price looked at Higgins and asked if that was correct. Higgins answered affirmatively, stating that it had been there for some time. Price told him to remove it.¹⁸

Second, Cocco testified that just prior to the meeting Muscarello and Michael had given him a copy of the sample warning, quoted above. Cocco handed the copy to Price saying:

Mr. Price, I have a 1056 here governing the walk-out of September 30. I would like you to read it. If you have any problems with it I would like to know.

¹⁷ Aside from the immaterial dispute, already noted, on whether the conference was held on October 19 or 20, the Respondent's witnesses placed certain portions of this October 20 meeting in another meeting supposedly held on October 16 to resolve the PSA differences and resulting fourth shift problems. The General Counsel's witnesses were unaware of any meeting on October 16. Once again the discrepancy seems immaterial, for it is clear that the General Counsel's witnesses placed the matters the Respondent ascribes to October 16 as having occurred at the meeting of October 20. Moreover, as Personnel Manager Michael took minutes of the October 20 meeting, and as these minutes were not produced, I draw the inference that such notes would show that these matters were covered on October 20.

¹⁸ Art. 24 of the most recent collective-bargaining contract provides that the Respondent will furnish a bulletin board for the exclusive use of the Union to post notices of specified union activities. "Other notices shall be subject to approval by Plant Manager."

As Price and Higgins read the Form-1056, Cocco stated that it was consistent with the action Nabisco had taken in the last walkout. Price asked Higgins if that was true, and the latter replied "yes." Price then handed the 1056 back to Cocco with the words, "Tony, I don't see anything wrong with it." The testimony of Michael, Muscarello, and Hawthorne is substantially the same as Cocco's, although Hawthorne tended to place some of the discussion of that meeting at the earlier conference of October 8. I also note that no two witnesses named the same people as attendees at this October 20 conference.

Higgins testified that when Price told Cocco that the Union had intended to take the PSA dispute to arbitration, Cocco then said:

Well, I have some bad news for you. We are going to write everybody up for [the] walkout.

Cocco then referred to the item on the bulletin board and said that it would have to be removed because it was antagonistic. Higgins said it had been up for 2 or 3 months and was not intended to be antagonistic. Cocco reiterated his request and Higgins said he would take it down.

On cross-examination, Higgins initially stated that Cocco did not show the union group the drafted 1056, but added, "Not to the best of my memory. No, sir." The first time he saw anything like the drafted 1056 was when the warnings were issued on October 27. Still later he expressed himself in a more positive vein, saying no warning notice was shown and, explaining the lack of response by the union side to Cocco's "bad news," testified:

When he told us that everybody was going to be written up, it is true that basically nothing was said. The three of us were quite stunned, to say the least.

Price testified essentially as did Higgins, but admitted that Cocco "possibly" handed him a proposed warning although he did not remember such an event. He stated that he could not recall one way or the other whether Cocco made reference to a prior walkout. He further admitted that he did not voice his objection to the "bad news" because "I didn't feel that that was the time to voice it, due to the prior commitments of Mr. Cocco on two previous occasions that there would be no write-ups." When asked why he did not remind Cocco of his commitment on the two previous occasions, Price testified rather vaguely that:

I figured the man being in the position that he was that his knowledge was as attainable as mine and that he had made those statements and not I, that he was going to—there would be no reprisals on those individuals, so I left it at that. I told Mr. Higgins later that we would file a grievance on it, which we did.

Higgins testified that he filed two grievances over the warning notices. They are phrased in terms that the Respondent violated the absentee program guidelines for leaving early. However, he included no reference to

Cocco's promise of amnesty. When asked why not, he explained that he "could not see any reason" to include it because he presumed that everyone understood that the statement had been made.

Called in the rebuttal stage by the General Counsel, millwright Charles Besselman, who attended the October 20 conference on the Union's side, testified to the same effect as did Higgins, but expressly denied that Cocco attempted to give a piece of paper to Price, and that he would have seen it had it happened. Like Higgins, Besselman testified that he was unaware of any walkout by M & R Department employees in 1980. Indeed, he testified that he had never heard of it even though he was working in the M & R Department in the period of April-May 1980.

G. Analysis and Concluding Findings

1. The amnesty issue

Chief Steward Higgins was a persuasive witness in many respects, yet on the critical amnesty issue he exhibited a strange lapse in the positive and confident nature of his testimony. For example, after initially omitting the topic, he testified that he was uncertain whether it was he or Price who raised the subject at the September 30 meeting. Although Higgins was positive that Cocco made the comments of amnesty at the meeting, he candidly admitted that he was unable to say, as did Price and Allen, that Cocco repeated his amnesty promise at the October 8 meeting. It is true that such candor can assist in persuading the trier of fact that overall, the witness is believable. Under all the circumstances of this case, however, including the evidence on subsequent events, I am persuaded to credit the Respondent's witnesses on the amnesty issue.

On the critical aspects of the October 20 meeting, Nabisco's witnesses simply were more convincing. Higgins and Price exhibited a lack of certainty on points one would expect clear recollection. And Price admitted that Cocco "possibly" tendered a copy of a warning notice. Then there is the strange absence of outrage, or at least a protest by the Union's side, when Cocco asked what would amount to his reneging on a promise of amnesty in the two grievances Higgins filed over the warning notices. The testimony of the other witnesses has been considered, but it does not call for a different result.

In short, I credit the Respondent's witnesses over the General Counsel's on the amnesty issue. I have not overlooked the fact that to some extent the Respondent's evidence was obtained by leading questions, particularly in eliciting negatives.¹⁹

2. The question of an 8(a)(3) violation

The complaint alleges that the October 27 warnings to the strikers violated Section 8(a)(3) of the Act as well as Section 8(a)(1). To support the motive allegation, the

General Counsel points to the fact that Cocco had admittedly given approval for the warning on Wednesday, October 14, yet delayed advising the Union until *after* Price announced at the October 20 meeting that the Union would have to proceed to arbitration on the PSA dispute. According to this argument, the Respondent condoned the strike, "deciding to impose discipline only when it became clear that Respondent would be unable to compel the Union to adhere to its interpretation of the Agreement." Coupled with this is evidence that Higgins was warned, even though he remained most of his shift to participate in the September 30 meeting, and despite knowledge by the Respondent that Higgins earlier had told his foreman that he needed to leave to be present at the hospital that morning when a biopsy report was due on whether his mother had cancer. Higgins' foreman had neither granted nor denied him permission to leave. While Michael admitted that he learned of this before Higgins was given his warning, he nevertheless included Higgins because several employees were giving similar excuses.

Although the circumstances are suspicious regarding the warning issued to Higgins, the overall record falls short of demonstrating that the action as to Higgins was improperly motivated.

On the issue of whether Nabisco would not have issued the warnings had the PSA dispute been resolved to its liking, Cocco testified that such an idea never entered his mind, and Michael testified that he and Cocco never discussed any such concept. Yet the Respondent's witnesses did not explain why they did not alert the Union between October 14 and 20 that warnings would be issued. Indeed, as counsel for the General Counsel observe in their brief, a readymade opportunity for such notice existed when, according to the Respondent's witnesses, the parties met on October 16 in an attempt to resolve the PSA dispute. Cocco failed to give such notice at that meeting.

I find that Cocco was engaging in the practice of "desk-drawering" a 1056 warning notice—the very same practice he admittedly instructed Superintendent Burke to cease doing at the October 8 meeting. I do not credit Cocco's denial that he never harbored the idea of not issuing the warnings if the PSA dispute were resolved favorably to Nabisco, and I find that Cocco's bad-faith purpose in "desk-drawering" the 1056 warnings to the strikers was to await the outcome of the grievance meetings on the PSA dispute. When that outcome resulted in Price's announced intention to proceed to arbitration, Cocco dispensed his own "bad news" announcement.

That Cocco may have well employed the phrase "bad news" does not require that I credit the Price-Higgins-Besselman version of the disputed portion of the October 20 meeting. Nor does this finding of Cocco's improper motivation in "desk-drawering" the 1056 warnings compel a finding that I credit the General Counsel's witnesses on the alleged promise of amnesty by Cocco. The two are separate concepts, Cocco could be free of the amnesty tag, yet possess an intent to impose the 1056 penalty if the Union did not come to terms on the PSA matter. Such an intent is not inconsistent with his view

¹⁹ While a party is entitled to elicit a negative, he aids the credibility resolution process by first approaching the subject using the normal step-by-step nonleading procedure. As the witness, by definition of a negative, has no knowledge of a nonexistent event, the attorney eventually must phrase the question in a point-blank leading fashion in order to elicit testimony that the event never occurred.

that the parties turn over a "new leaf." Had the parties resolved the PSA dispute, I find that Respondent would not have issued the 1056 warnings.

As I find that the Respondent would not have issued the warnings if the Union had not declared its intention to proceed to arbitration of the PSA dispute, it is clear that Nabisco punished its employees because they, through their bargaining representative, so elected to proceed.²⁰ By such action, Respondent violated Section 8(a)(3) and (1) of the Act.²¹

3. The assumption that the strike was unprotected

The Respondent seems to contend that all parties agree that the September 30 strike was unprotected and that they argue their respective positions from there. Although counsel for the General Counsel's position is not fully articulated, it seems clear from the citation of cases such as *Herbert E. Orr Co.*, 185 NLRB 1002, fn. 2 (1970), that they in fact contend that the strike was protected, and that they advance condonation as an argument in the alternative.

It is plain that the Union did not authorize the strike. But this is not to say that the Union opposed the strike. Price, I find, simply wanted to insulate the Union from any possible monetary liability (or even the threat of a damage suit) flowing from a strike the Union had not recommended.

At page 29 of its brief the Respondent argues:

The Union was in a very sensitive situation in which its own members had circumvented its process by engaging in an unauthorized walkout. The Union was no doubt conscious of the potential for discipline as well as the threat to its own status.

Such language hints at the *Emporium* concept.²² But that argument is misplaced. The strikers here were not acting in derogation of the Union. Indeed, Chief Steward Higgins had sought in August to channel the employees' concern over supervisory harassment through the grievance procedure, and on September 21 he filed a grievance over the PSA dispute. So far as the actual warnings indicated, the Respondent issued the 1056 notices because it considered the strike as a "job assignment" protest—an obvious reference to the PSA dispute over the fourth-shift job assignments to the oiler. At least in the Respondent's written estimation, the strike was in support of the grievance already being processed by the Union. Accordingly, I find the *Emporium* rule to be inapposite.

²⁰ In fn. 26, p. 39, of its brief, the Respondent asserts that the complaint contains no 8(a)(3) allegation. Although the complaint does not contain the traditional motivation allegation, par. 17 of the complaint does allege that the Respondent violated "Section 8(a)(3) and (1) . . . of the Act" by issuing the warnings of October 27, 1981.

²¹ Par. 15 of the complaint, in conjunction with par. 13, alleges that the Respondent violated Sec. 8(a)(1) of the Act by its October 20 announcement. The allegation, being cumulative, does not affect the remedy herein.

²² *The Emporium*, 192 NLRB 173 (1971), aff'd. 420 U.S. 50 (1975). There the actions of employees were held unprotected because they were acting in derogation of their collective-bargaining representative.

As the contract does *not* contain a no-strike clause,²³ the strike here cannot be deemed unprotected on that basis. Because the strike had no unlawful ends, it cannot be considered unprotected in that light.

Nor can it be said that the strikers utilized an unlawful means for their strike. That is, there was no sitdown and clearly there was no plan for the strike to be of the unprotected partial or intermittent variety. And Price testified that to his knowledge the strikers adhered to Nabisco's procedures that employees are to follow in leaving work early. The Respondent offered no evidence to contradict Price's testimony on the matter.

In light of the foregoing, I find that the strike, rather than being unprotected, was a protected concerted activity. It therefore follows that Nabisco, irrespective of its motivation, violated Section 8(a)(1) of the Act by issuing the disciplinary warnings to 48 employees on October 27, 1981, and that the Respondent must now rescind such warnings and expunge them from the personnel records of the affected employees.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) of the Act by interrogating an employee concerning his filing of a charge with the Board rather than proceeding under the contractual grievance procedure, and in coercing such employee by telling him not to go to the Board but to file all complaints under the contractual grievance procedure, and has violated Section 8(a)(1) and (3) of the Act by issuing warnings to employees on October 27, 1981.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not otherwise violate Section 8(a)(1) of the Act and did not violate Section 8(a)(4) of the Act.

THE REMEDY

Having found that the Respondent has engaged in the unfair labor practices set forth above, I shall recommend that it be ordered to cease and desist therefrom, to take affirmative action designed to effectuate the policies of the Act, and to post signed and dated copies of an appropriate notice to employees.

In view of the foregoing, I shall recommend that the Respondent be ordered to expunge the October 27, 1981, warning notices from the personnel records of the 48 employees, and to notify each in writing that it has done so. If it be determined in the compliance stage that S. Wilson, or others, received such warning notice also, he and they shall be deemed as included within the Order.

[Recommended Order omitted from publication.]

²³ Price so testified, and I find none in the contract.