

Wayne W. Sell Corporation and Walter James Stickney. Cases 6-CA-17428, 6-CA-18063, 6-CA-18355, and 6-CA-18503

22 September 1986

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 18 March 1986 Administrative Law Judge Burton S. Kolko issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting 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, and conclusions as modified and to adopt the recommended Order.

The judge found and we agree that the Respondent's actions in changing Stickney's work assignments¹ and suspending him from 22 to 25 March 1985 violated Section 8(a)(3) and (1) of the Act because they were taken in retaliation for Stickney's filing grievances on behalf of himself and other employees. The judge found, however, that the General Counsel did not establish that these actions were taken in response to Stickney's filing unfair labor practice charges with the Board and therefore did not prove a violation of Section 8(a)(4) of the Act. For the following reasons, we find merit in the General Counsel's exception to the judge's latter finding.

The record reveals that on 13 March 1985² Stickney filed an unfair labor practice charge with regard to letters of reprimand sent him by the Respondent on 4 and 7 March.³ The first flatbed assignment was made on 21 March, and Stickney was suspended on 22 March.⁴ Stickney filed an amended charge 25 March and on 27 March he filed a grievance over the suspension. On 19 April a consolidated complaint issued alleging certain violations of the Act. Pursuant to a settlement agreement executed by the parties on 10 May, Respondent was obligated to post a notice for 60 days, until

on or about 10 July.⁵ Shortly after expiration of the posting period, the second flatbed assignment was made on 13 July. Additional unfair labor practice charges were filed by Stickney on 15 July, and these charges resulted in the Regional Director's revocation of the settlement agreement on 30 August and the issuance on 4 September of a consolidated complaint. Less than a week later, on 10 September, the Respondent made its third flatbed assignment to Stickney.

Contrary to the judge, we find that the timing of these events gives rise to a strong inference that the Respondent's actions were motivated by Stickney's filing of charges with the Board as well as his grievance filing. The Respondent's knowledge of the charges is not in dispute and, indeed, in a letter dated 27 March from the Respondent's vice president, Beechey, to Stickney, Beechey made reference to the charges and questioned Stickney's motive in filing them. With regard to animus, we note that after unlawfully threatening Stickney with physical harm at a grievance meeting on 4 April, the Respondent's president, Sell, directed Stickney to "go tell that to the Labor Board too." This statement, in addition to the references in the letter noted above, demonstrates the Respondent's displeasure with Stickney's invocation of Board processes. These factors taken together are sufficient to constitute a prima facie case of a violation of Section 8(a)(4).

Having found that the General Counsel has established a prima facie case of discrimination under Section 8(a)(4), we further find, for the reasons set forth by the judge, that the Respondent has not met its burden of proving that it would have changed Stickney's work assignments and suspended him even absent any unlawful motive.⁶ In view of the foregoing, we conclude that the record establishes a pattern of retaliation against Stickney for filing charges with the Board and filing grievances under the collective-bargaining agreement and that by engaging in such conduct, the Respondent has violated Section 8(a)(3), (4), and (1) of the Act.⁷

⁵ Stickney was out of work from 1 April to 27 May due to an injury. On 9 July he filed a grievance over the Respondent's alleged failure to pay his health insurance premiums.

⁶ In agreeing with the judge that the changes in the Respondent's operations between 1982 and 1985 do not support the Respondent's alleged business justification for changing Stickney's truck assignments, we note that during that period the Respondent not only increased its use of flatbed trucks but also increased its use of tank trucks, permitting it to continue its practice of more than 2 years standing of assigning Stickney to drive tank trucks.

⁷ *Town & Country LP Gas Service*, 255 NLRB 1149 (1981).

¹ In agreeing with the judge that the Respondent's assignment of flatbed loads to Stickney was unlawful, we find it unnecessary to rely on his finding that tank truck loads were more lucrative than flatbed or dump loads and therefore the change in work assignments resulted in lower paying assignments for Stickney.

² All dates are 1985 unless otherwise indicated.

³ The judge found that the letters of reprimand violated Sec. 8(a)(3) and (1) and no exceptions were taken to this finding.

⁴ The judge found that the suspension violated Sec. 8(a)(3) and (1) and no exceptions were made to this finding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below⁸ and orders that the Respondent, Wayne W. Sell Corporation, Sarver, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

“(b) Unlawfully making discriminatory assignments to employees for engaging in union activity by filing grievances and for filing unfair labor practice charges under the Act.”

2. Substitute the following for paragraph 1(d).

“(d) Unlawfully suspending employees for engaging in union activity by filing grievances and for filing unfair labor practice charges under the Act.”

3. Delete the last paragraph of the recommended Order.

4. Substitute the attached notice for that of the administrative law judge.

⁸ The judge included in his recommended Order a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Board's Order. In the circumstances of this case, we find it unnecessary to include such a clause. We shall modify the judge's recommended Order accordingly.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice. Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees for filing grievances.

WE WILL NOT discriminate against employees by issuing letters of reprimand, making more onerous assignments, or suspending them for engaging in union activity by filing grievances.

WE WILL NOT discriminate against employees by making more onerous assignments or suspending them for filing unfair labor practice charges.

WE WILL make Walter James Stickney whole by paying him the amount he lost as a result of our unlawful discrimination, with interest.

WE WILL remove from the personnel file of Walter James Stickney Jr. any reference to the unlawful written reprimands issued to him.

WAYNE W. SELL CORPORATION

Kim Siegert and Stanley Zawatski, Esqs., for the General Counsel.

Ralph T. DeStefano and Kurt Miller, Esqs., of Pittsburgh, Pennsylvania, for the Respondent.

Walter James Stickney Jr., of Cabot, Pennsylvania, pro se.

DECISION

STATEMENT OF THE CASE

BURTON S. KOLKO, Administrative Law Judge. In this case I find proven the General Counsel's allegations that Wayne W. Sell, owner of the Wayne Sell Corporation (Respondent), threatened and coerced employee Walter James Stickney in violation of Section 8(a)(1) of the Act, and that Respondent discriminated against Stickney in violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(1), (3).¹ I dismiss the complaint on the allegation of a violation of Section 8(a)(4), 29 U.S.C. § 158(a)(4).

I. BACKGROUND

Respondent, a Pennsylvania corporation engaged in the trucking business near Sarver, Pennsylvania, admits that it is an employer engaged in commerce within the meaning of the Act. Respondent has recognized Teamsters Local 538 (Union) as the collective-bargaining agent for its employees since 1973.

Respondent operates a trucking business consisting of 55 vehicles it owns and 35 owner/operator vehicles it leases on a daily basis. Respondent employs 51 drivers. This case involves the operation by Respondent's employees of its owned vehicles.

Respondent uses three different kinds of trucks in its operations: dump trucks, flatbed trucks, and tank trucks. The drivers are dispatched on a seniority basis for the first round out each day, and on a first-in, first-out basis

¹ The charge in Case 6-CA-17428 was filed on 18 June 1984 and amended on 18 April 1985. The charge in Case 6-CA-18063 was filed on 13 March 1985 and amended on 25 March 1985 and 18 April 1985. The consolidated complaint issued on 19 April 1985 and Respondent timely answered. The parties entered into a settlement for these cases that was approved by the Regional Director on 10 May 1985 (Jt. Exh. 1). The settlement agreement was vacated after Stickney filed a charge in Case 6-CA-18355 on 15 July 1985, and a consolidated amended complaint in the three cases issued on 4 September 1985. Respondent timely filed an answer. A final charge, complaint, and order consolidating the cases issued on 16 October 1985, that was timely answered by Respondent. This case was heard before me on 30 and 31 October 1985, in Pittsburgh, Pennsylvania. Briefs were filed on 3 December 1985. The General Counsel's motion to correct the transcript is granted.

for the remainder of the day. Drivers are paid according to the type of truck they drive and length of the trip. It is undisputed that the most lucrative loads are those delivered in tank-type trucks.

Stickney has been employed by Respondent since June 1982. He is 15 on the seniority list, and was the seventh top wage earner in 1982.

For several months after his date of hire, Stickney drove all three kinds of trucks owned by Respondent. After Stickney requested to be assigned to drive only tank-type trucks, Respondent honored Stickney's request for a substantial period of time.

Stickney served as shop steward from January to December 1984. As steward, Stickney filed many grievances and met repeatedly with Sell and Respondent's vice president, and it is Sell's conduct during these meetings that gives rise to the 8(a)(1) allegations at issue in this case. Stickney continued to file grievances until his resignation as shop steward. Three months after Stickney resigned as shop steward he was issued two letters of reprimand, he was suspended for several days, and he received his first flatbed assignment, all within a 1-month period. The next two flatbed assignments occurred some months later. Stickney continued to communicate with the NLRB and file grievances during this entire time.

II. UNFAIR LABOR PRACTICES

A. *The 8(a)(1) Allegations*

Stickney filed his first grievance with the Employer in November 1983. In January 1984 he was elected shop steward for the Union. As steward he filed numerous grievances on behalf of himself and his fellow employees.² He resigned as steward in December 1984 because of a disagreement with Raymond Baker, secretary-treasurer of Teamsters Local 538. He continued to cause grievances to be filed after his resignation.

During the process of resolving the various grievances he filed, Stickney met repeatedly with Sell and James Beechey, the Company's vice president. The General Counsel argues that the abusive language and threats used by Sell at these meetings violate Section 8(a)(1).

One such meeting occurred on 14 March 1984 concerning two grievances filed by Stickney. Stickney testified that at this meeting Sell told him he never should have hired him, told him that he was a troublemaker, and used vulgar language. Sell admitted that he has lost his temper at grievance meetings. I credit Stickney's testimony and find that Sell used abusive and profane language at this meeting.

Stickney further testified that Sell used a variety of obscenities at the grievance meeting of 27 April 1984, that Sell threatened to "blackball" him, and that Sell stated that Stickney "had filed more grievances in the past 3 months than they had in 11 years, and they had better stop." Lawrence Davis, the employee on whose behalf the grievance was filed, substantially corroborated this

testimony, although he only remembered that the term "blackball" was used when he was reminded of it.

Sell admitted that he used profanity, that he expressed his anger to Stickney about the number of grievances filed, and that he often loses his temper. He denied that he threatened Stickney. When asked whether he threatened to blackball Stickney, Sell stated he was "baited into that," but denied that he ever used the term "blackball." He testified that he told Stickney that he would give him "the best [recommendation] in the country." This remark could possibly have been interpreted by Stickney as a veiled threat to blackball him, but I credit Sell's denial that he threatened to blackball Stickney. However, I find that Sell's statement that the grievances "had better stop" was a threat of unspecified reprisals for engaging in protected conduct.

Stickney testified that at the next grievance meeting, 15 June 1984, Sell threatened to get him in a dark alley somewhere, used other vulgar and abusive language, and made threatening physical gestures. The verbal threats were confirmed by John Becker, the employee on whose behalf the grievance was filed. Respondent's witnesses denied that threatening gestures were used. I credit Respondent's denial that Sell used physical intimidation to threaten Stickney; but even if these gestures did occur, it strikes me that they were not sufficiently intimidating to constitute a violation of Section 8(a)(1). Stickney did not fear physical harm, and this behavior seems to be typical of Sell's personality. I credit the employees' testimony about Sell's statements, and find that Sell did verbally threaten Stickney.

The last meeting at which violations were alleged took place on 4 April 1985. Sell admitted saying to Stickney at this meeting that if he kept "sticking [his] nose in everybody's business, sooner or later somebody's going to put it all over [his] face." This statement, referring to Stickney's grievance filing, is a thinly veiled threat of physical harm for participating in that activity. Grievance filing is a protected activity, and threatening an employee with harm for participating in this protected activity is a violation of Section 8(a)(1). *Danish Creamery Assn.*, 265 NLRB 652, 654 (1982).

Respondent argues that the alleged threats were actually "shop talk" and a sign of Sell's explosive personality. It is undisputed that Sell loses his temper regularly and uses profane and vulgar language often. Stickney's successor as steward stated that he has filed several grievances as steward and Sell has never threatened him for filing grievances. This shows that, although Sell may use profanities regularly, threats of discharge and unspecified reprisals are not routinely used in grievance meetings, but were only used against Stickney. Sell used threats because of his animosity toward the increased grievance activity of Stickney, and not because of his explosive personality. In addition, Sell's remarks went farther than the kind of foul language commonly accepted in the industrial sphere. See *Kay Fries, Inc.*, 265 NLRB 1077, 1089 (1982). He actually threatened Stickney on 14 March that he would "have his job" and that the grievances "had better stop." The statement that someone would "put his nose all over his face" on 4 April is a

² It is irrelevant whether a grievant files on behalf of himself or other employees—filing grievances is protected activity. *Vanport Sand & Gravel*, 270 NLRB 1358, 1361 (1984); *Interboro Contractors*, 157 NLRB 1295 (1966), *enfd.* 388 F.2d 495 (2d Cir. 1967).

threat of physical harm and unlawful. These kinds of statements interfere with the Section 7 rights of employees, and are violative of the Act. See *Bardcor Corp.*, 270 NLRB 1083 (1984).

Finally, Respondent's argument that Stickney's grievances were motivated by his litigious nature, and are therefore unprotected, is meritless. There is no evidence that Stickney's grievances were so numerous and so frivolous that they lost the protection of the Act. The fact that most grievances were resolved in Respondent's favor or dropped is irrelevant. The merit of a grievance does not determine whether the filing is protected. *Jersey Power & Light Co.*, 269 NLRB 886 (1984). In addition, the fact that Stickney filed many grievances does not render the behavior unprotected. *Ad Art, Inc.*, 238 NLRB 1124 (1978), *enfd.* 645 F.2d 669 (9th Cir. 1980). It is only extreme behavior on the part of an employee that removes his actions from the protection of the Act. See *Caterpillar Tractor Co.*, 276 NLRB 1323 (1985).

B. The 8(a)(3) and (1) Allegations

1. The change in assignments and the suspension

Stickney had his larynx and the surrounding tendons removed in May 1980. He breathes and speaks through a tube he inserts in his throat that is held into place by straps. He was hired by Respondent in June 1982 as a truckdriver. He was assigned to drive all three kinds of trucks operated by Respondent during his first month of employment. Respondent contends that these assignments continued until the beginning of 1983. The General Counsel asserts that these assignments continued only a few months. It is undisputed that commencing at some point after his date of hire, but before March 1985, Stickney was assigned to drive only tank-type trucks. This arrangement accommodated Stickney because his tube caused him to have difficulty with the tarping required for driving flatbed trucks and with the dust that drivers are forced to inhale when driving dump trucks.

Respondent admitted that it ceased accommodating Stickney on 21 March 1985 when he was assigned to drive a flatbed truck. He was subsequently assigned to drive flatbed trucks on 13 July 1985 and 10 September 1985. This change in procedure is not consistent with Respondent's past practice. The only other flatbed assignments Stickney received since Respondent began to accommodate him were both under special circumstances. The first, in November 1982 was performed as a "favor" to Respondent because of a special need. For the other, in November 1983, Wayne Barkley was dispatched to accompany Stickney to assist with the tarp required for the load. Because the flatbed assignments beginning 21 March 1985 were a deviation from Respondent's past practices, the General Counsel has demonstrated that there was a change in Stickney's working conditions beginning 21 March 1985.

Respondent argues that driving flatbed and dump trucks is no more onerous than driving tank trucks. Several witnesses testified to this effect. However, Stickney credibly testified that he experiences pain and other physical problems when he does the tarping necessary for flatbed assignments or breathes the dust accompany-

ing dump truck assignments. I find that the physical pain and difficulty described by Stickney rendered flatbed truck and dump truck assignments more onerous than driving tank trucks. The imposition of more onerous working conditions is unlawful if it is motivated by union animus, even if the condition is more onerous because of the special physical condition of the employee. *Gayston Corp.*, 265 NLRB 1, 18 (1982). In addition, it is undisputed that tank truck assignments are more lucrative than dump and flatbed truck assignments. Therefore, even if the difficulty of his assignments did not change, Stickney received several lower paying assignments after 21 March 1985. Such a change in work assignments is unlawful if it was motivated by union animus. *Danny's Foods*, 260 NLRB 1445 (1982). Moreover, Respondent admittedly removed Stickney's name from the dispatch roster 22-25 March 1985. Stickney did not receive any assignments for those days, although some were available. This suspension is unlawful if it was motivated by union animus. *Beverly Enterprise*, 272 NLRB 83 (1984).³

The timing of the flatbed assignments and the suspension is important in determining whether they were unlawfully motivated. Because proving unlawful motivation is difficult, the Board relies on circumstantial evidence to establish motivation. *NLRB v. Instrument Corp.*, 714 F.2d 324 (4th Cir. 1983). The first flatbed assignment occurred just after Respondent issued a second letter of reprimand to Stickney (discussed below). Respondent had consistently assigned Stickney to tanks for at least 2 years, then suddenly issued two letters of reprimand and assigned him to a flatbed load without any explanation. The sequence of the actions raises the inference that they were based on union animus. The 8(a)(1) violations also provide evidence of union animus on Respondent's part. *Lemon Drop Inn*, 269 NLRB 1007 (1984), *enfd.* 752 F.2d 323 (8th Cir. 1985). To rebut the General Counsel's case, Respondent is required to show that the same employment actions would have taken place even without the protected conduct on the part of the employee. *Wright Line*, 251 NLRB 1083, 1089 (1980).

Respondent presented substantial evidence to show that the operation of its business required the change in Stickney's assignments. The amount of cement hauled on flatbed trucks had increased substantially since Stickney was hired. In addition, Respondent in 1985 operated about twice the equipment it did in 1982. I find that even with the changes described by Respondent, the assignments at issue would not have happened but for Stickney's union activity. The absence of any attempt to inform Stickney of the Respondent's desire to change his assignments coupled with the timing of the assignments convince me that the justification offered by Respondent was not the true motivating factor.

Respondent also argues that it had to remain flexible in its ability to assign drivers. However, the flatbed assign-

³ The instant case is distinguishable from *Ducane Heating Corp.*, 273 NLRB 1389 (1985), in which the Board stated that the employer was under no duty to accommodate his employees. There, Respondent's failure to accommodate was consistent with past practices. In the instant case, the General Counsel has shown that Respondent's actions were inconsistent with its past practice.

ments in question were not to customers who required immediate delivery, and there were other drivers available to deliver cement at the time. In light of these facts, I find this reason to be pretextual and not the motivating factor in Respondent's decision.

Finally, Respondent argues that the resentment of the other drivers caused him to cease accommodating Stickney. I find this argument to be without merit. No grievance was filed on the matter until directly before the hearing, and no explanation was offered to Stickney at the time of the assignment. If this were truly the reason for the change Respondent would surely have informed Stickney, given Sell's lack of reticence.

In sum, the business justifications offered by Respondent do not overcome the inference of improper motivation. I find the assignments to flatbed and dump trucks would not have happened if Stickney had not engaged in the filing of grievances, a protected activity; and I conclude that changing Stickney's conditions of employment violated the Act. *Wright Line*, supra.

Respondent further justifies Stickney's suspension by arguing that Stickney threatened to sue the Company, and this was the only reasonable action it could have taken in response. It is undisputed that Stickney informed dispatcher Dollman that he would "hold him legally responsible for any injuries" that resulted from his driving a flatbed truck. I have not found, nor does Respondent cite, any case in which the Board has found the threat of a legal proceeding sufficient cause to suspend an employee. On the contrary, precedent shows that warnings by employees to resort to legal procedures are protected activity. *Kay Fries*, supra, 265 NLRB at 1090. Respondent does not allege that Stickney threatened anyone with harm. The reasons given by Respondent for Stickney's suspension are clearly pretextual. Respondent failed to show that it had a lawful motivation for suspending Stickney. The suspension was based on protected activity and it violates Section 8(a)(3) and (1) of the Act. *Algreco Sportswear Co.*, 271 NLRB 499, 516 (1984).

2. The letters of reprimand

On 4 March 1985 Stickney received a letter of reprimand from Respondent. The letter stated that Stickney had violated company policy by failing to call the dispatch office prior to his departure from Respondent's facility. Several witnesses confirmed the existence of this company policy and testified that they adhered to it. However, Beechey testified that no letter of reprimand has previously been issued for a violation of this policy. Respondent had issued only four letters of reprimand since 1980.

In addition, another employee, Wayne Barkley testified that he had violated this particular policy with Respondent's knowledge, but never received a letter of reprimand. Beechey himself stated that sometimes drivers fail to call before their departure. Beechey also stated that Stickney made his delivery on time, that Beechey did not call Stickney's home to ascertain whether he had left yet, that he did not check to see if there was a phone available for Stickney to use, and that there may have been no phone available for Stickney to use.

Respondent sent Stickney another letter of reprimand dated 7 March 1985, for his failure to inform the dispatch office of an overload he delivered on 25 February 1985 (incorrectly stated as 26 February in Beechey's letter). Beechey testified that he placed a notice regarding weight restrictions in the drivers' room in mid-February 1985. He also recalled informing Stickney of this change. Stickney testified that he believed his weight limitation was the same as it had been in September 1982—78,000 pounds. He also testified that he believed that if he violated this policy, the sole result would be that he would be responsible for any fine resulting from the overload. I neither credit nor discredit this testimony, for I find that even if Stickney was aware of the correct limit, Respondent's action was not justified.

Stickney stated that he observed Butch Darling sign for an overload and that he never received a letter of reprimand. Employee Davis testified that he had previously delivered overloads and that he had not been reprimanded. Barkley testified that he has pulled overloads on several occasions and was never sent a letter of reprimand. In addition, the parties stipulated to the number of overloads indicated on bills of lading entered into evidence. Far more than half of the loads were shown to be over 77,500 pounds. Although the record does not reveal how many of the drivers of the overloaded trucks called in to the dispatch office before delivering the overloads, the evidence does show that overloads have been and are very common and letters of reprimand are very rare. This, when considered along with the fact that Respondent sent two letters to Stickney within a few days of each other, after having sent only four letters in the past 5 years, raises an inference that the reprimands were motivated by Stickney's grievance activity rather than the violations of company policy. Union animus is also demonstrated by the 8(a)(1) violations on Sell's part. In addition, the timing of the letters, so close together and after a building of animosity, is an important circumstance indicating antiunion motivation. *Lemon Drop Inn*, supra.

In an attempt to challenge any inference that the letters were issued in response to Stickney's grievance activity, Beechey claimed that the circumstances surrounding Stickney's reprimands were unique and caused the reprimands. The unique circumstances arose from the fact that the Company had recently paid a \$340 fine for an overload driven by Stickney. However, this ticket involved a violation that was disputed, and the Company paid the fine rather than challenge the validity of the citation. This explanation does not convince me that Respondent issued the letters for neutral reasons. Given the rarity of such letters and the sequence of events, I find that the two letters of reprimand would not have been issued but for Stickney's union activity, and I conclude that Respondent violated the Act by issuing the two letters. See *Algreco Sportswear Co.*, supra.

C. The 8(a)(4) Allegations

The General Counsel argues that Respondent violated 8(a)(4) of the Act by removing Stickney from the dispatch roster and assigning him to drive flatbed loads. The General Counsel argues that Respondent's animus

and knowledge of Stickney's activities with the Board show that the assignments and suspension resulted from 8(a)(4) discrimination. The first flatbed assignment followed the filing of a charge by 1 week. Stickney filed amended charges on 25 March and 18 April, and the second flatbed assignment occurred on 13 July. The third assignment occurred on 10 September, less than a week after a consolidated complaint issued reflecting the change that was filed on 15 July.

To establish a violation of Section 8(a)(4) of the Act, the General Counsel must produce evidence that gives rise to the conclusion, whether directly or by inference, that Respondent's adverse employment actions were motivated by Stickney's filing of charges with the Board or participation in Board proceedings. *Ruehle's Paramedic Ambulance*, 270 NLRB 1322 (1984). The sequence of events in the instant case does not give rise to this inference. Stickney's first contact with the Board occurred by letter dated 27 April 1984. This letter discussed Sell's threatening and abusive conduct toward Stickney during a grievance meeting. Stickney filed another charge on 18 June 1984. No adverse employment actions resulted from either of these contacts with the Board. Stickney continued to file grievances over the next months, and received the first letter of reprimand dated 4 March 1985. In response to this letter, Stickney contacted the Board. The first flatbed assignment and removal from the dispatch roster occurred shortly thereafter. However, Stickney's grievance filing continued throughout this period. Stickney filed additional charges with the Board after his first flatbed assignment and removal from the dispatch roster. Finally, a few days after Stickney's next grievance, Respondent made the second flatbed assignment. This scenario indicates that Sell's animosity toward Stickney's grievance activity, which I found previously, continued to motivate Respondent's adverse treatment. In short, it was Stickney's repeated grievance filing, not the Board filing, that motivated Sell.

Nor did the General Counsel produce convincing direct evidence of illegal motivation. Sell's statement "to go tell that to the Labor Board too" was made in connection with Stickney's grievance filing, and could have referred to that rather than the Board activity. Without more, the General Counsel has failed to meet his burden of establishing a prima facie case of discrimination under Section 8(a)(4); this charge is therefore dismissed.

CONCLUSIONS OF LAW

1. Wayne W. Sell Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily issuing to Stickney two letters of reprimand; by making discriminatory truck assignments; and by suspending him from 22-25 March 1985.

3. Respondent violated Section 8(a)(1) of the Act by threatening Stickney and using other abusive language that interfered with Stickney's exercise of his Section 7 rights.

4. Respondent did not violate Section 8(a)(4), and that charge is therefore dismissed.

5. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Wayne W. Sell Corporation, Sarver, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully issuing reprimands to employees for exercising rights guaranteed them under Section 7 of the Act.

(b) Unlawfully making discriminatory assignments to employees for exercising rights guaranteed them under Section 7 of the Act.

(c) Threatening employees for filing grievances.

(d) Unlawfully suspending employees and issuing letters of reprimand for exercising rights guaranteed them under Section 7.

(e) 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) Make James Stickney whole for any loss of pay and benefits he may have suffered by reason of the above-described unlawful actions, with backpay and interest to be computed as in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

(b) Remove all documents and references in James Stickney's personnel file that relate to Respondent's actions that have been found in the attached decision to be unfair labor practices, and make whatever record changes necessary to negate the effect of these documents and Respondent's unlawful actions.

(c) Post at its facility in Sarver, Pennsylvania, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 6, 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.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Re-

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵ 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"

spondent has taken to comply. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the

manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States court of appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.