Redd-I, Inc. *and* Sheet Metal Workers International Association. Case 10–CA–21436

September 16, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On November 10, 1986, Administrative Law Judge J Pargen Robertson issued the attached decision The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs

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, to modify the remedy,[1] and to adopt the recommended Order as modified [2]

The General Counsel excepts to the judge's refusal to allow the complaint to be amended to include an additional 8(a)(1) and (3) allegation concerning employee Don Kelley's discharge on August 19, 1985 Kelley was named as an alleged discriminatee, along with eight other employees,[3] in a charge filed September 30, 1985 (Case 10–CA–21246) This charge was withdrawn November 14, 1985 On January 6, 1986, the charge in the instant case was filed alleging that the Respondent violated Section 8(a)(1) and (3) by terminating the employment of all the employees named in the September charge with the exception of Kelley This charge was amended March 3, 1986, to include seven additional employees who were also laid off August 15, 1985 Kelley's name was not included in this amended charge On May 6, 1986, the Charging Party, by telegram, requested that the charge be amended further to include Kelley's name

The General Counsel moved at the hearing to amend the complaint to include an allegation concerning Kelley's discharge [4] The judge first granted the General Counsel's motion to amend but then denied it after reviewing the parties' arguments during a recess in the hearing The judge relied on *Winer Motors*,[5] prohibiting the revival of withdrawn charges outside the 6-month limitations period, to find the allegation concerning Kelley's discharge barred by Section 10(b) Apparently the judge interpreted *Winer Motors* as prohibiting the revival outside the 10(b) period of any allegation contained in a withdrawn charge, no matter how closely related it is to another timely filed charge that is still pending Thus, he refused to take any evidence on the circumstances surrounding Kelley's discharge to determine whether that allegation was closely related to the allegations in the pending timely charge, stating that Kelley's "separate discharge" was not sufficient "to trigger the 'relate back' doctrine" In his decision, the judge denied the General Counsel's posthearing request that he reconsider this ruling on the motion to amend

In her exceptions, the General Counsel argues that the motion to amend the complaint should have been granted because Kelley's discharge is closely related to the allegations in the timely filed January charge The General Counsel contends that this is not an attempt to resurrect the dead allegations of the withdrawn September charge outside the 10(b) period, but rather an attempt to add closely related allegations to the January charge which has been pending and viable at all times since it was filed

Contrary to the judge, we would allow the General Counsel to litigate the allegation that employee Kelley's discharge violated Section 8(a)(3) and (1) Even though Kelley's discharge occurred more than 6 months before the General Counsel's motion to amend the complaint, we would not find the amendment barred under Section 10(b) as the judge did, because the discharge occurred within 6 months of a timely filed charge and the alleged violation appears to be closely related to the allegations of that charge Furthermore, unlike the judge, we do not find the withdrawal of an earlier timely charge concerning Kelley's discharge relevant in

[1] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U S C § 6621 Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U S C § 6621), shall be computed in accordance with *Florida Steel Corp*, 231 NLRB 651 (1977)

[2] The Respondent's exceptions state, and we agree, that the figure representing the Respondent's weekly sales bookings for the week ending August 2, 1985, should read $92,157 and not $95,157 as it appears in the table of weekly sales bookings in the judge's decision It follows, therefore, that the total figure should read $235,548 and not $238,548 for the 3-week period covering August 2, 1985 However, this error does not affect the validity of judge's ultimate conclusion regarding the August 15 layoffs

The General Counsel has requested that the Order include a visitatorial clause We find no need for such remedial provision in the circumstances of this case See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988)

Finally, we have modified the judge's recommended Order to include a notification paragraph and have attached a new notice to our Decision and Order because the judge failed to include an expunction provision in the recommended notice attached to his decision

[3] Seven of the other alleged discriminatees were laid off August 15, 1985 They are Robert Plemons, Bobby McFalls, Brenda F Harte, Fred W Harte, Marguerite Price, Diana Lowe, and Michael C Parris The eighth, Diane Hartman, was discharged September 20, 1985

[4] The record does not indicate whether the General Counsel took any other action in response to the Charging Party's attempt to amend the charge

[5] 265 NLRB 1457 (1982)

deciding whether the discharge allegation is closely related to the charge in this case. Neither *Winer Motors* nor *Ducane Heating Corp.*[6] applies here, because neither case involved an attempt to add closely related allegations to a pending charge. Rather, each involved an attempt to reinstate the dead allegations themselves without reference to any other pending timely charge.[7] Instead, we would apply the traditional Board test to determine if the untimely allegation is factually and legally related to the allegations of the timely charge, without regard to whether another charge encompassing the untimely allegation has been withdrawn or dismissed.

On the record here, it *appears* that Kelley's discharge *may be* sufficiently intertwined with the other layoff and discharge allegations of this charge to be considered closely related under the traditional Board test. Because the judge did not permit the General Counsel to present any evidence about the circumstances surrounding Kelley's discharge, however, it is not possible to be sure. Therefore, we will remand that allegation to the judge for further evidence and findings both on the merits and on whether all the 8(a)(3) allegations are closely related.

Traditionally, the Board and the courts have allowed the General Counsel to add complaint allegations outside the 6-month 10(b) period if they are closely related to the allegations of the timely filed charge. The most frequently cited test for finding allegations closely related is set forth in *Dinion Coil*:[8]

> (1) A complaint, as distinguished from a charge, need not be filed and served within the six months, and may therefore be amended after the six months. (2) If a charge was filed and served within six months after the violations alleged in the charge, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge, and (b) occurred within six months before the filing of the charge.

In deciding whether complaint amendments are closely related to allegations in the charge, the Board and the courts have looked at whether the amendments are factually and legally related to the charge. In *National Licorice*[9] the Supreme Court held that various complaint allegations were related to the charge when the violations alleged in the complaint were "of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects." The Second Circuit has said that "the complaint issued by the Board must deal with the same subject matter and sequence of events . . . although the specific events stated in the complaint may precede or follow those stated in the 'charge."[10] Finally, the Board has found complaint allegations closely related when they "arise from the same factual situation, are of the same class as, and clearly related to, the [allegations] . . . set forth in the charge."[11]

When applying this "closely related" test, neither the Board nor the courts have mentioned the existence of another withdrawn or dismissed charge as a factor considered determinative or even relevant. They have only looked at whether there is a timely charge now pending that would support the new untimely allegation. We see no reason to depart from these well-established precedents.

In his dissent, Chairman Stephens relies on procedural due process and fairness concerns to find that the charge here did not put the Respondent on notice that it would have to defend against an allegation concerning Kelley's discharge. He finds the allegation concerning Kelley's discharge is barred by Section 10(b) because the withdrawal of an earlier charge alleging the unlawfulness of this discharge misled the Respondent into thinking it would not be held accountable for any illegality concerning the discharge after the 6-month 10(b) period expired. Even though he finds that Kelley's discharge is closely related to the allegations of a timely charge that was still pending after the 10(b) period ended, he concludes this second charge did not put the Respondent on notice that it would have to defend against an allegation that Kelley's discharge was unlawful. It is not the function of the *charge*, however, to give notice to a respondent of the specific claims made against him. Rather,

[6] 273 NLRB 1389 (1985)

[7] In *Ducane*, Member Dennis specifically noted that the Board had no reason to pass on the question of whether another pending timely charge might have supported the dismissed allegations under a "closely related" theory, because of the way that case was litigated and briefed Id at 1391 fn 9.

[8] *NLRB v Dinion Coil Co*, 201 F 2d 484, 491 (2d Cir 1982), cited with approval in *NLRB v Complas Industries*, 714 F 2d 729, 732–733 (7th Cir 1983), *NLRB v. El Cortez Hotel*, 390 F 2d 127, 129–130 (9th Cir 1968), *Gocat, Inc*, 257 NLRB 270, 271 (1981), *Red Food Store*, 252 NLRB 116, 119 (1980), and *Fern Laboratories*, 240 NLRB 487, 488 fn 2 (1979)

[9] *National Licorice Co. v NLRB*, 309 U S 350, 369 (1940)

[10] *Douds v Longshoremen*, 241 F 2d 278, 284 (2d Cir 1957)

[11] *Jack LaLanne Management Corp*, 218 NLRB 900, 913 (1975), enfd 539 F 2d 292, 295 (2d Cir 1976) In enforcing the Board's decision on this point, the Second Circuit stated that the additional complaint allegations "are all concerned with similar unfair labor practices designed to further the Company's common objective . represent 'closely related' parallel conduct toward other employees and constitute 'the same class of violations as those set up in the charge'" (Citing *NLRB v Fant Milling Co*, 360 U S 301 (1959), and *National Licorice*, supra.)

that is the function of the complaint [12] Denial of due process is usually claimed in cases when the complaint has *never* been amended to include allegations that have been litigated and found to be violations [13] Here, although the initial complaint did not allege that Kelley's discharge was unlawful, the General Counsel moved to amend the complaint on the first day of the hearing to add an allegation concerning Kelley's discharge In *Dinion Coil*,[14] the Second Circuit specifically rejected an argument that making a complaint amendment during the hearing was a denial of due process, absent some showing of surprise that would have hampered presentation of the respondent's defense at the hearing [15] There is no such showing in this case

The First Circuit has stated that the test for allowing allegations that have *never* been alleged in a complaint to be litigated and decided is "one of fairness under the circumstances of each case—whether the employer knew what conduct was in issue and had a fair opportunity to present his defense"[16] The Respondent here cannot claim surprise because it knew on the first day of the trial that Kelley's discharge was in issue and this was well before it would have had to present its defense on this issue Furthermore, the Respondent here cannot claim it had insufficient time to prepare its defense or was denied an opportunity to present its case, as the judge refused to allow the General Counsel to amend the complaint or present evidence concerning Kelley's discharge, so no defense was necessary By allowing the complaint amendment, we are remanding the case to the judge Thus, both parties will now have the time to prepare and the opportunity to present their cases That is all that is required to establish procedural due process [17]

Chairman Stephens also finds that the Respondent here would be prejudiced if we allowed the complaint amendment because it was misled into believing it would not have to defend against this allegation by the withdrawal of the first charge and by the failure to allege Kelley's discharge in the second charge He notes that these events might have induced the Respondent not to preserve evidence relevant to Kelley's discharge If an untimely complaint amendment is indeed factually and legally related to the allegations of a timely charge, however, a reasonable respondent would necessarily have preserved evidence relevant to all of these interrelated events Thus, a decision whether or not the complaint amendment here is closely related to the second charge would also resolve the question of prejudice without any independent inquiry whether this particular Respondent was actually prejudiced

Furthermore, when there is a timely charge pending giving us the authority to proceed on closely related events, we cannot be concerned solely with a respondent's right to rest easy when 6 months have passed about what claims it might have to defend, because we also have a duty to protect certain public rights As the Supreme Court stated in *Fant Milling*[18]

> The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstructions to interstate commerce
>
> Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it There can be no justification for confining

[12] It is well settled that it is the complaint, not the charge, that is supposed to give notice to a respondent of the specific claims made against it The Second Circuit stated in *Douds v Longshoremen*, 241 F 2d 278, 283–284 (2d Cir 1957)

> The complaint, much like a pleading in a proceeding before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing

The "charge" has a lesser function It is not designed to give notice to the person complained of or to limit the hearing or to restrict the scope of the final order It serves in the function of drawing the Board's attention to a cause for economic disturbance

The Supreme Court agreed with this view in *NLRB v Fant Milling Co*, 360 U S 301, 307–308 (1959), when Justice Stewart stated

> A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit Its purpose is merely to set in motion the machinery of an inquiry The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights This would be alien to the basic purpose of the Act

See also *Texas Industries v NLRB*, 336 F 2d 128, 132 (5th Cir 1964), "[T]he charge is not a formal pleading, and its function is not to give notice to the respondent of the exact nature of the charges against him This is the function of the complaint"

[13] See, e g, *Soule Glass Co v NLRB*, 652 F 2d 1055, 1073–1074 (1st Cir 1981), and *NLRB v Atlas Linen Supply*, 322 F 2d 216, 219 (6th Cir 1963), cert denied 376 U S 951 (1964)

[14] Supra, 201 F 2d at 491

[15] Moreover, in *NLRB v Atlas Linen Supply*, supra, 322 F 2d at 220, the Sixth Circuit stated that if the complaint was never amended, but the issue had been fully litigated, the respondent could not "be heard to complain of lack of opportunity to meet the charges against it, even though the complaint be found lacking, for a complaint may be amended to conform to proof adduced on the hearing"

[16] *Soule Glass v NLRB*, supra, 652 F 2d at 1074

[17] See, e g, *NLRB v Complas Industries*, supra, 714 F 2d at 734, when the Seventh Circuit found a denial of due process because *no adjournment* was provided to allow the respondent a meaningful opportunity to meet the amended claim and the amendment occurred during a 1-day trial The court, however, stated that if the General Counsel's evidence on the amendment had made out a prima facie case it would have remanded to provide the respondent with an opportunity to offer a valid explanation of its actions Id at 735

[18] Supra, 360 U S at 307–308

such an inquiry to the precise particularizations of a charge.

Previous cases have generally not considered the existence of an earlier withdrawn or dismissed charge concerning the untimely allegation to have any bearing on the application of the "closely related" test.[19] Perhaps this is because before *Ducane* issued, the Board had interpreted the Act as allowing the General Counsel "virtually unlimited" discretion to reinstate dismissed charges outside the 10(b) period,[20] so there was no reason for the General Counsel to use the "closely related" test when the dismissed charge itself could be reinstated. Regarding withdrawn charges, the Board and the courts have traditionally found that they ceased to exist on withdrawal,[21] so there was no reason even to acknowledge a withdrawn charge when applying the "closely related" test to a later timely charge covering the same matters. Although *Winer Motors* and *Ducane* provide little guidance here, *Koppers Co.*,[22] which is cited in both *Winer Motors* and *Ducane*, is instructive. In *Koppers*, 163 NLRB at 517, the Board stated

> The practical effect of the proviso to Section 10(b) is that, *absent the existence of a properly served charge on file*, a party is assured that on any given day his liability under the Act is extinguished for any activities occurring more than 6 months prior thereto. [Emphasis added.]

When there is a pending timely charge on file, however, a respondent has no such right to assume his liability is extinguished; nor can he claim a lack of notice, at least about closely related allegations.

In deciding whether allegations are closely related, we will apply the traditional Board test described above to determine if the untimely allegation is factually and legally related to the allegations of the timely charge without regard to whether another charge encompassing the untimely allegation has been withdrawn or dismissed. A decision whether certain untimely allegations can be added to a complaint as closely related to a pending timely charge should be entirely separate from a decision whether a withdrawn or dismissed charge containing these untimely allegations can be reinstated outside the 10(b) period. Under the "closely related" test, there is no reason why a person who has never filed a timely charge concerning a particular allegation should be in a better position than a person who has attempted to preserve his rights by filing a timely charge that is later withdrawn or dismissed.

In applying the traditional "closely related" test in this case, we will look at the following factors. First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act (e.g., 8(a)(3) reprisals against union activity). Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object (e.g., terminations during the same few months directed at stopping the same union organizing campaign). Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

Here, the facts show that Kelley's discharge occurred within 6 months before the filing of the timely charge in this case. Further, the untimely allegation concerning Kelley's discharge is of the same class as the other layoff and discharge allegations in the timely charge because they all involve retaliation against union activities in violation of Section 8(a)(3). The record does not establish, however, whether Kelley's discharge arose from the same factual situation or sequence of events as the other layoffs and discharge alleged in the timely charge or whether the Respondent would have preserved similar evidence and prepared a similar case in defending against that allegation.

All we know about Kelley's termination is the date it occurred (3 days after the layoffs and about 1 month before the other discharge) and that it was called a discharge. Although it appears that Kel-

[19] See, e.g., *Soule Glass v. NLRB*, supra, 652 F.2d at 1083. There, the First Circuit dismissed a unilateral change violation on due process grounds because there was no complaint allegation specifically stating such a claim and the other unilateral change allegation in the complaint could not fairly be read to give notice of this different type of unilateral change being unlawful. The court noted in passing that this additional 8(a)(5) violation had previously been specifically alleged in a charge, but the Regional Director had refused to issue complaint on it, however, the court apparently did not consider the earlier dismissal of this particular allegation relevant in deciding whether to allow the Board's finding of a violation to stand, as it did not rely on this point, but rather went on to discuss due process and rule on the merits. See also *Southern Florida Hotel Assn.*, 245 NLRB 561, 600 (1979), enfd. in relevant part 751 F.2d 1571 (11th Cir. 1985).

[20] See *Ducane*, supra, 273 NLRB at 1391, citing *California Pacific Signs*, 233 NLRB 450 (1977).

[21] See Member Zimmerman's concurring opinion in *Winer Motors*, supra, 265 NLRB at 1460, quoting *NLRB v. Central Power Co.*, 425 F.2d 1318, 1321 (5th Cir. 1970), for the proposition that a withdrawn charge "is no charge at all."

[22] 163 NLRB 517 (1967).

ley's discharge involves similar conduct during the same time period as the other discharge and layoffs, it is difficult to tell from this record if Kelley's discharge had the same object as the other discharge and layoffs or if the Respondent would have preserved similar evidence and prepared a similar case in defending against that allegation Thus, there is no evidence about the circumstances surrounding Kelley's discharge, such as the reason given, what supervisor made the decision, the factual basis for the decision, and any statements made about him or his discharge by the Respondent Further, although the record reveals that Kelley was one of two employees who initially contacted the Union, there is no evidence whether the Respondent knew of his union activities or expressed any animus toward them Finally, there is no evidence about any asserted justification for Kelley's discharge, whether the Respondent would have asserted similar defenses to all the allegations, or whether a reasonable respondent would have preserved evidence necessary to these defenses

On this record, we cannot determine whether the allegation concerning Kelley's discharge is closely related to the discharge and layoff allegations of the timely charge Because there is no evidence about the circumstances surrounding Kelley's discharge or about any asserted justification for the discharge on which to base such a determination, we will allow litigation on the merits of that allegation to decide whether it is closely related to the other allegations Only if we find that the allegations are closely related will we proceed to a decision on the merits of the otherwise untimely allegation

This does not mean that we would always allow litigation on the merits of an untimely allegation that the General Counsel claims is closely related to the allegations of a timely filed charge In some cases there may be enough information in the pleadings and the parties' position statements to determine whether the allegations are closely related In other cases, the General Counsel may make an offer of proof that provides more evidence on which to base a decision However, we have no such information here

Accordingly, we will remand the allegation concerning Kelley's discharge to the judge for the purpose of hearing evidence and making findings both on the merits and on whether all the discharge and layoff allegations are closely related

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Redd-I, Inc , Chattanooga, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified

1 Insert the following as paragraph 2(e)

"(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply "

2 Substitute the attached notice for that of the administrative law judge

IT IS FURTHER ORDERED that the allegation in this proceeding concerning the discharge of Don Kelley be remanded to Administrative Law Judge J Pargen Robertson for the purpose of holding a hearing to obtain evidence and make findings both on the merits and on whether all of the discharge and layoff allegations are closely related

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing findings of fact and conclusions of law in light of the Board's remand Following service of the supplemental decision on the parties, the provisions of Section 102 46 of the Board's Rules and Regulations shall be applicable

CHAIRMAN STEPHENS, dissenting in part

I disagree with the majority that under the circumstances of this case the "relation back" doctrine may warrant adding employee Kelley's discharge more than 6 months after the discharge occurred [1] I would affirm the dismissal of the allegations regarding Kelley's discharge because, under the circumstances here, I do not believe that the Respondent was given timely notice during the 10(b) period that it might be called on to defend that discharge as part of an overall scheme to defeat the Union's campaign by a strategy of laying-off all suspected of being union supporters

At the outset, I need to make clear my view of the latitude we possess in applying the 10(b) bar Section 10(b) is a statute of limitations that must be applied to achieve its intended objectives, but it is not strictly "jurisdictional " Were it an inflexible limitation on jurisdiction, it would not be waivable, yet it is settled that this is a defense that will be deemed waived if not timely asserted [2] Further, I

[1] I agree that *Winer Motors*, 265 NLRB 1457 (1982), and *Ducane Heating Corp*, 273 NLRB 1389 (1985), do not bar any application on the relation back doctrine Indeed, it is noteworthy in this regard that Member Dennis, a member of the three-member panel in *Ducane*, expressly noted that, because of the way in which that case was litigated and briefed, the Board had no occasion to pass on the question whether proceeding on the allegations that the Board there dismissed might have been justified on a theory that they were "closely related" to a timely filed charge 273 NLRB at 1391 fn 9

[2] *Zipes v Trans World Airlines*, 455 U S 385, 395 fn 11 (1982), *Flex Plastics*, 262 NLRB 651, 656 fn 26 (1982), enfd on other grounds 726 F 2d 272 (6th Cir 1984), *NLRB v Penn Corp*, 630 F 2d 561, 563 (8th Cir 1979), *Shumate v NLRB*, 452 F 2d 717, 721 (4th Cir 1971), *Chicago Roll Forming Corp*, 167 NLRB 961, 971 (1967), enfd on other grounds 418 F 2d 346 (7th Cir 1969)

agree that it is subject to equitable tolling on grounds such as fraudulent concealment.[3] Thus, in applying the 10(b) limitation, we must determine simply whether it is essential to bar litigation of a particular allegation in order to effectuate the basic policy of protecting respondents with clean hands from being forced to defend against a claim of which they had not been given even the most general notice within a period of 6 months after the charging party knew or should have known of the claim.

The relation back doctrine, which is well established in Board law and accepted by the courts,[4] is one way of balancing the interest in permitting litigation of alleged violations of our statute that have been called to our attention against the interest in avoiding the sort of prejudice to a respondent that the 10(b) limitation is intended to prevent. Under that doctrine, we permit a belatedly raised allegation to be litigated so long as it relates to a charge that was timely filed. This doctrine, which has a partial counterpart in Rule 15(c) of the Rules of Civil Procedure,[5] also has support in the common understanding of the function of a "charge" in our proceedings because the 10(b) bar applies to the filing of an unfair labor practice charge rather than to the General Counsel's subsequent issuance of a complaint. As the Supreme Court made clear long ago in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959), unfair labor practice charges may be read broadly and are "not to be measured by the standards applicable to pleading in a private lawsuit." Thus, a respondent cannot reasonably expect that all the particulars of the complaint that might ultimately issue against it will necessarily be included in the charge that starts up the Board's investigative machinery. Hence, if a respondent is charged with violating Section 8(a)(3) and (1) of the Act by discriminatorily laying off employees to defeat a union and by interfering with the employees' Section 7 rights by those "and other acts," it can reasonably assume that contemporaneous unfair labor practices related to the employees' union activities might also be included in a subsequent complaint if the General Counsel decided to issue one. *Clark Equipment Co.*, 278 NLRB 498 (1986); *NLRB v. Complas Industries*, supra, 714 F.2d at 733.

Although I recognize this significant difference between a charge and a complaint in our statutory scheme, I cannot agree with my colleagues that a charge has no notice function whatsoever. If it had no such function, there would be no reason for us to place the limitations of the relation back doctrine on subsequent amendments to a charge. It would be enough that a charge had started up our machinery against a particular respondent, and a respondent's protest against facing a totally new type of charge could be answered by saying that this was all part of the same proceeding against it and that the complaint would adequately apprise it of the particulars of this totally new charge. Of course, the relation back restriction means that the public interest in adjudicating and remedying unfair labor practices may be frustrated in some instances. But as the Supreme Court explained in *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 428 (1960), Congress saw fit to balance the interest in protecting respondents from stale charges against the interest in vindicating employee rights protected by the Act, and the resulting adjustment in Section 10(b) does not give absolute ascendancy to either interest.

In balancing the interest at issue here, I do not assume that simply because a particular charge was dismissed or withdrawn and not refiled within the 10(b) period, its allegations can never be included in an unfair labor practice complaint, no matter how closely it relates to another, timely filed charge. Rather, I would make two inquiries. First, I would consider whether the "relation back" doctrine would permit belated addition of that particular allegation if it had never been filed in the first place during the 10(b) period. If the answer to that is in the affirmative, then I would consider whether the original filing and withdrawal of the charge would necessarily have misled the respondent into believing that it would not be faced with that allegation in a Board proceeding and therefore might have induced the respondent not to preserve evidence generally relevant to the events concerned in that charge. In short, as in the administration of F.R.Civ. P. 15(c), it is a question of fairness. *Williams v. U.S.*, 405 F.2d 234, 236–238 (5th Cir. 1968).

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[3] *Ducane Heating Corp*, supra, 273 NLRB at 1391.

[4] See, e g, *Algreco Sportswear Co*, 271 NLRB 499, 514–515 (1984), *NLRB v. Complas Industries*, 714 F 2d 729, 732–733 (7th Cir 1983), *Gocat, Inc*, 257 NLRB 270, 271 (1981), *NLRB v Dinion Coil Co*, 201 F 2d 484, 491 (2d Cir 1952)

[5] In applying Fed R Civ.P 15(c) to determine whether a new plaintiff may be added to a civil action after the statute of limitations has run, the courts have applied a two-pronged test under which they consider whether the new plaintiff's claim arises out of the same transaction as the one sued on and whether the defendant had fair notice from the original complaint of the existence of the belatedly added claim *Leachman v Beech Aircraft Corp*, 694 F 2d 1301 (D.C Cir 1983), *Williams v U.S*, 405 F.2d 234 (5th Cir. 1968), *Paskuly v Marshall Field & Co*, 494 F Supp 687 (N D Ill 1980), affd 646 F 2d 1210 (7th Cir 1981) The parallel is not exact, however There is greater room for relation back in Board proceedings because, as noted above, our limitations period relates to charges, which have traditionally been given a broader reading than would be given formal court pleadings Although the Board clearly lacks "carte blanche authority to expand the charge as it might please, or to ignore the charge altogether," it is free to add, as related claims, whatever allegations of violations might reasonably be found in an investigation of the events referenced in the unfair labor practice charge *NLRB v Complas Industries*, supra, 714 F 2d at 733 fn 3

In the present case, I would find that if the charge concerning Kelley's discharge had not been filed within the 10(b) period and then withdrawn, it might have been fairly added later on as a charge "related to" the 8(a)(3) charge that was filed on January 6, 1986 But given the particular circumstances here, I believe that the withdrawal of the charge relating to Kelley would reasonably have led the Respondent to believe, at the end of the 10(b) period, that there was no possibility that it would be called on to defend against an allegation that Kelley's discharge violated the Act

Several facts in the course of events here are significant to me Although the General Counsel may be correct in alleging that the Respondent was engaged in an overall scheme to rid itself of the Union's supporters, the fact remains that Kelley's discharge occurred as a separate event between the August 15 mass layoff of 14 employees and the September discharge of another employee Hence, when the charging party withdrew its September unfair labor practice charge, which had named nine employees—i e, Kelley, seven of the employees laid off August 15, and another who was discharged in September—and when that withdrawal was followed by the filing of a new charge on January 6 naming all those employees except Kelley, the clear implications were (1) that none of these specific discharges had escaped the notice of the charging party, (2) that the August 15 layoffs and the discharge occurring in September were regarded as unlawful, and (3) that Kelley's was not regarded as unlawful The Respondent would have no reason, therefore, to seek to preserve evidence for future litigation concerning Kelley's discharge, and forcing it to litigate that discharge by virtue of the belated attempt to amend would contravene the policies underlying Section 10(b)

Had Kelley been one among those terminated on August 15, however, his omission in the January charge might have appeared to be simply a clerical error In any event, the Respondent would, as a result of the charge, have been induced to preserve evidence relating to events of that day Indeed, that is why we do not regard as barred the March amendment of the charge to include the eight employees (not named in earlier charges), laid off on August 15 Even if Kelley's discharge had not been part of that mass layoff, but was arguably related as part of an overall discriminatory scheme, the January charge might have placed the Respondent on notice to defend against that discharge as a related allegation if it had not been misled by the specific withdrawal of the earlier charge regarding Kelley Our relation back rule properly operates to allow for the litigation of matters related to a timely filed charge, because a prudent respondent will collect and preserve evidence about such matters Under the circumstances here, however, the January charge simply did not constitute timely notice concerning Kelley

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

WE WILL NOT interrogate our employees about their activities on behalf of Sheet Metal Workers International Association, or any other labor organization, or because of any other concerted protected activities

WE WILL NOT threaten our employees with discharge because they engaged in union or protected activities

WE WILL NOT solicit our employees to engage in surveillance of other employees' union activities and report those activities back to management

WE WILL NOT threaten our employees with layoff because they engage in union or protected concerted activities

WE WILL NOT threaten our employees that we will close our plant because of our employees' union or other protected activities

WE WILL NOT discharge our employees because they engage in union activities

WE WILL NOT lay off our employees because of our employees' union activities

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

WE WILL offer immediate and full reinstatement to Diane Hartman, Marguerite Price, Diana Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie Crabtree, Theresa Pursley, Brenda Harte, Jim Harvey, Wendell Whitley, Bobby McFalls, Boyd Webb, Donna Lambert, and Donnie Keahey to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to the employees' seniority or other rights and privileges

WE WILL make Diane Hartman, Marguerite Price, Diana Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie Crabtree, Theresa Pursley, Brenda Harte, Jim Harvey, Wendell Whitley, Bobby McFalls, Boyd Webb, Donna Lambert, and

Donnie Keahey whole for any loss of earnings they may have suffered by reason of our discrimination against them with interest.

WE WILL remove from our files any references to the discharge of Diane Hartman on September 20, 1985, or the layoff of employees Marguerite Price, Diana Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie Crabtree, Theresa Pursley, Brenda Harte, Jim Harvey, Wendell Whitley, Bobby McFalls, Boyd Webb, Donna Lambert, and Donnie Keahey on August 15, 1985, and notify each of them in writing that this has been done and that evidence of their unlawful discharge or layoff will not be used against them in any way.

REDD-I, INC.

Richard P. Prowell, for the General Counsel.
William G. Trumpeter, for the Respondent.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Chattanooga, Tennessee, on 8 and 9 May 1986. The complaint alleges that Respondent engaged in several actions in violation of Section 8(a)(1) and that Respondent laid off 14 employees and discharged an employee in violation of Section 8(a)(1) and (3). The charge was filed on 6 January 1986 and was amended on 3 March and 6 May 1986. The complaint issued on 21 February and was amended on 8 May 1986. Respondent admitted the commerce allegations, the jurisdictional allegation, that the Charging Party is a labor organization, and the supervisory allegations of the complaint. However, Respondent denied that the alleged supervisors acted on behalf of Respondent or as agents of Respondent in all cases and under all circumstances. Because of the above, and the entire record, I find that at material times Respondent is and has been an employer engaged in commerce within the meaning of Section 2(6) and (7) and that Sheet Metal Workers International Association is a labor organization within the meaning of Section 2(5) of the Act. I also find that the supervisors alleged in the complaint were agents of Respondent at times material to these proceedings. To the extent the issues involved the alleged supervisors, their actions were shown to have been conducted during the existence of employer-employee relationship.

At the hearing, Respondent objected on the basis of Section 10(b) of the Act to the General Counsel's motion to amend the complaint to allege three additional violations of Section 8(a)(1) through interrogations of employees and a threat to discharge employees, and an additional 8(a)(1) and (3) allegation regarding employee Don Kelley's discharge on 19 August 1985. I agree with Respondent and denied the General Counsel's motion to amend regarding the alleged discharge of Don Kelley. The General Counsel has requested that I reconsider and reverse my ruling in that regard. Jurisprudence supports Respondent's position. I deny the General Counsel's request for reconsideration. *Winer Motors*, 265 NLRB 1457 (1982); *Howard Mfg. Co.*, 231 NLRB 731 (1977), *NLRB v. Gaynor News Co.*, 197 F.2d 719 (2d Cir. 1952)

However, Respondent's motion that I should deny the General Counsel's motion to amend the complaint to allege additional 8(a)(1) violations was not granted during the hearing. The 21 February 1986 complaint was based on a 6 January 1986 charge that generally alleged actions violative of Section 8(a)(1). That charge and its amendments involved activities during a union organizing campaign during the late summer of 1985. The complaint amendments of additional 8(a)(1) allegations were allegedly part and parcel of that same campaign. The record evidence supports the General Counsel in that regard Therefore, I deny Respondent's motion to exclude the additional 8(a)(1) allegations as amended during the hearing. That amendment does not violate the provisions of Section 10(b) of the Act.

FINDINGS OF FACT

I. ALLEGED UNFAIR LABOR PRACTICES

The complaint allegations involve a union organizing campaign at Respondent's facility in the summer of 1985. Diane Hartman testified that she and some other employees were contacted by Organizer Jack Gregg of the Sheet Metal Workers International Association (Union) in late July 1985.

On 9 August the employees held the first union organizing meeting with Organizer Gregg Hartman testified that one-third of Respondent's employees signed authorization cards within 3 days after the 9 August meeting.

A. *13 or 14 August 1985*

According to employee Diane Hartman, a day or two before a 15 August 1985 layoff Supervisor Jimmy Dover talked to employee Buddy Fuller about the upcoming layoff. Hartman testified that she overheard Fuller ask Dover if Dover thought Fuller would be one of the people that would be laid off. Dover replied "We have a list of people that had signed union cards and they would be the first ones to go."

Conclusions

Fuller testified that he did not recall talking to Dover about the 15 August layoff, or that he talked to Dover before 15 August about the Union. Fuller said that he did not know about the Union until after 15 August.

However, on cross Fuller demonstrated difficulty in recalling events before 15 August. For example, Fuller testified that he was not sure which supervisor he worked under on 15 August

Jimmy Dover denied talking to Fuller on 14 August. Dover testified that he first learned of the employees' union activity during a 15 August supervisors' meeting In that regard Dover's testimony does not square with that of former Supervisor Charles Songer. Songer, who was called by the General Counsel in rebuttal, testified that during the 15 August supervisors' meeting all the supervisors said they had heard about the Union Songer

recalled that it was well known on 15 August that the employees were involved in a union organizing campaign

I am convinced that Buddy Fuller did not truthfully recall that he did not talk to Jimmy Dover about the Union before 15 August Fuller, by specifying on two occasions that he did not talk to Dover about the Union before the 15 August layoff, left the impression that he and Dover discussed the Union after that date Fuller admitted that he and Dover talked about "everything" including "hunting, football, baseball, and softball" Fuller's testimony on cross illustrated that his recollection was not so precise as to permit him to pinpoint that he did not discuss the Union on the day before the 15 August layoff Moreover, I am convinced that the union activity was discussed among employees before 15 August Former Supervisor Songer testified that all the supervisors knew about the union activities before 15 August and former employee Greg Floyd testified that the union organization was a routine topic of discussions among the employees Floyd recalled that union organization was generally discussed as early as June 1985 Floyd said he did not know of talk of the Sheet Metal Workers Union in June, but there was talk of "just union" and "if we could get a union in "

As shown below, I do not credit the testimony of Jimmy Dover I do credit the testimony of Diane Hartman regarding the Dover-Fuller conversation Hartman appeared to testify candidly regarding that conversation The usual nature of her testimony and inclusion in Hartman's testimony of two other witnesses, tends to buttress its validity The timing of the Dover-Fuller conversation is consistent with affidavit testimony of President Kenneth Redd Redd testified, "I believe that the plant manager spread the work on 8-13-85 that there was going to be a layoff"

I find in agreement with the General Counsel that Dover's comments constituted a threat to discharge employees because of their union activities in violation of Section 8(a)(1)

B *14 August 1985*

Respondent's president and part owner, Kenneth Redd, admitted that he was told about the union organizing activity on 14 August Redd's bookkeeper, Joyce Davis, told Redd of the union activity Davis told Redd that employees Diane Hartman, Diana Lowe, and Mickie Sewell were involved in the union campaign

C *15 August 1986*

On 15 August, around noon, Kenneth Redd told Plant Manager Charles Campbell of the employees' union organizing activities According to both Redd and Campbell, Campbell expressed surprise Redd testified that Campbell asked who was involved in the union activity Although Redd admitted though that employees Hartman, Lowe, and Sewell were involved, he testified that he told Campbell that he did not know who was involved

At the end of the shift on 15 August, Respondent notified 14 unit employees that they were being laid off due to slack work

Kenneth Redd testified that he returned to work on 13 August from a 3-week vacation According to Redd, he immediately reviewed the production figures, the "payables and receivables" from July and the first week of August (a partial week including 2 August), and sales bookings that had come into the plant since he left on vacation on 22 July Redd testified that the records showed him that during his vacation, "(1) Our production was tremendously low, (2) we really were not picking up orders from backlog into the plant, (3) I knew immediately, just looking at these figures we had lost a lot of money in July" Redd asked Plant Manager Campbell about production being down Campbell replied there were insufficient orders to keep each department busy Redd and Campbell walked through the plant and confirmed, according to their testimony that there were not enough orders to keep everyone busy

After checking with his accountant, Redd told Plant Manager Campbell that he felt they needed to "lay off approximately 15 employees to get the payroll to the level that we needed to be at"[1] The General Counsel alleges that Respondent laid off the employees on 15 August in violation of Section 8(a)(1) and (3)

Conclusions

Record evidence substantially supports the General Counsel's allegation that Respondent's 15 August layoff was conducted because of the employees' union activities That support regards the timing of the layoffs, coming 2 days after Kenneth Redd learned of the employees' organizing efforts, the threat by Supervisor Dover that the union card signers would be the "first ones to go", and the 16 August comments of Plant Manager Campbell to employees Alder and Floyd that he had laid off employees who were trying to get a union in (see below)

The General Counsel also argues that by 12 August one-third of Respondent's employees had signed union authorization cards and on 15 August all but four of those employees had been laid off As to that point the record is unclear What the record does show is found in the testimony of Diane Hartman under cross-examination Hartman's testimony in that regard refers to her affidavit, which was not introduced An examination of Hartman's testimony shows that it could reflect, as the General Counsel argues, that all but three or four of all the employeees that signed union cards were laid off However, the testimony shows that Hartman could have been talking about those employees that signed authorization cards at the "second" union meeting If so, the record evidence does not show how many employees signed cards at that meeting There is no other evidence

[1] The record shows 14 unit employees were laid off on 15 August 1985 Of those 14, 7 have since been recalled Three were recalled on 16 September, one on 23 September, one on 29 October, one on 19 Novermber, and one on 9 December 1985

The total work force included 73 employees immediately before the 15 August layoff

that shows that all but three or four card signers were laid off on 15 August.

In fact, the figures show otherwise Hartman's testimony that one-third of the employee work force signed cards would place the total number of card signers at approximately 24 or 25. Since Respondent laid off some 14 unit employees on 15 August, there would be a minimum balance of 10 or 11 card signers that were not laid off.

Nevertheless, the proven elements of timing and actual threats from the plant manager and a supervisor illustrate that the layoff was called by Respondent because of the employees' union activities. Regarding that allegation, I find a prima facie case has been established.

Additionally, the threats by Campbell and Dover established that Respondent was under the impression that it was laying off some of the employees who were involved in union organizing efforts. It is not necessary for the General Counsel to show that Respondent was correct in that impression. *Crucible*, 228 NLRB 723 (1977); *Birch Run Welding & Fabricating v. NLRB*, 761 F.2d 1174 (6th Cir. 1985). In that regard, I am mindful of evidence showing that Diane Hartman was one of two leading union advocates and that Hartman was not laid off on 15 August. However, jurisprudence has clearly established that it is not necessary in order to establish a case of illegal termination to show that an employer terminated all or even the leading union advocate. *Birch Run Welding & Fabricating v. NLRB*, supra. In fact, as shown below, Respondent illegally discharged Diane Hartman on 20 December.

Therefore, I must now consider whether the record evidence proved that Respondent would have laid off 14 unit employees on 15 August in the absence of the employees' union activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

The decision to conduct the 15 August layoff was admittedly made by Kenneth Redd. Redd testified that he made that decision on 13 August, the day he returned from a 3-week vacation. According to Redd, he made the decision on the basis of records he had that extended through the week of 2 August (i.e., 2 weeks before the week of 13 August), Redd testified that those records included the production figures, the "payables and receivables," and sales bookings that came into the plant since he left for vacation on 22 July. Redd testified that on checking with Plant Manager Campbell on 13 August, he learned that "there was very little in orders . . . out in the plant to keep each department busy."

The issue presented by Redd's testimony is a difficult one from Respondent's standpoint. According to Kenneth Redd, the situation on 22 July 1985 was not one that prevented him from leaving on a 3-week vacation. In fact, the record failed to show that Redd felt it was necessary for him to either personally monitor the financial situation or to have someone else, such as his accountant or the plant manager, keep a close watch on the financial figures during his absence. There was no indication that Redd felt a layoff was under consideration when he left on 22 July. Nevertheless, according to Redd, Respondent's financial condition changed so drastically between 22 July and 13 August that Redd decided to hold the largest layoff in Respondent's history immediatley on his return from vacation. The records relied on by Redd, and the record evidence as a whole, must be considered in light of the context of Redd's decisions

The record evidence regarding payables and receivables, production and income, fails to show a drastically changed situation during the period of Redd's vacation. The record is blank concerning specific production figures. As to income, the record shows income (rounded to the nearest thousand) of $372,000, in June, down to $188,000 in July, but back up to $358,000 in August. However, the record also shows that Respondent had a 2-week shutdown in July.[2]

Regarding payables and receivables, the figures show (rounded to the nearest thousand):

Week	*Weekly Sales Bookings*
8/02/85	$95,157
7/26/85	35,777
7/19/85	107,614
Total, 3 weeks sales bookings	$238,548
7/12/85	$55,657
7/05/85	42,278
6/28/85	48,999
Total, 3 weeks sales bookings	$146,934

However, Redd's testimony shows that he was most directly influenced and on 13 and 14 August by orders received during his vacation.

In consideration of that testimony by Redd, the critical question must involve what records existed, vis-a-vis sales bookings orders, when Redd left on vacation on 22 July as opposed to sales booking orders on hand when he returned on 13 August. Redd had sales bookings records available that extended 2 weeks before each critical date (i.e , 2 weeks before 22 July and 2 weeks before 13 August).

Those respective records show that during the week of 2 August Respondent's weekly sales bookings totaled $92,157. On 22 July when Redd left for vacation, the records for the week of 2 weeks before (i e , the week of 12 July), show weekly sales bookings of $57,157. Regarding the 3 weeks of records that surfaced during Redd's vacation, the record evidence shows the following.

Week	*Acct. Receivable*	*Acct. Payable*	*Cash Debit*
7/12/85	$715,000	$260,000	$80,000
8/02/85	627,000	238,000	45,000

A comparison for the last 3 weekly records available for Redd's examination on 22 July shows:

[2] Normally Respondent shuts down for 1 week around 4 July During 1985 that shutdown was extended to 2 weeks

Because of the above, it is apparent that Respondent experienced a comparative sales bookings increase in excess of $90,000 during the 3 weeks of Redd's vacation The comparison shows that a greater need for a layoff existed on 22 July than on 13 August The record showed that no critical factors intervened during Redd's 22 July to 13 August vacation other then the employees' union organizing activities

In making a determination regarding how Respondent would have reacted in the absence of union activities, it is not sufficient to question whether Respondent's business conditions justified a layoff Respondent's accountant testified that Respondent was in poor financial condition and that a layoff was justified The accountant testified that he recommended a layoff in June 1985 [3] In fact, Respondent did lay off eight employees on 20 June 1985 Previously Respondent had two earlier layoffs—one involving five employees in March 1983 and one of six employees in October 1984 During those periods the total work force was at least as large as the work force of 15 August 1985

The record shows that Kenneth Redd made the decision to lay off 14 employees on 13 August, despite records showing improved sales during the time he was on vacation According to Redd's testimony, sales bookings records were the last factors he considered before directing the layoff Redd testified that he checked with Plant Manager Campbell and was told that orders were too low to keep the departments busy Redd then directed Campbell to lay off approximately 15 employees The record shows that on 22 July when Respondent was faced with a recommendation from its accountant to cut costs, and with decreasing sales bookings, Redd did not elect to conduct a layoff Indeed, Redd left the situation without personal attention for a 3-week vacation On 13 August, when faced with increased sales bookings, and an employee union organizing campaign, Redd decided to conduct the largest employee layoff in the history of the Company See *Purolator Armored, Inc v NLRB*, 765 F 2d 1423 (11th Cir 1985), *Birch Run Welding & Fabricating v NLRB*, supra, *Lemon Drop Inn*, 752 F 2d 323 (8th Cir 1985), *Soil Engineering Co*, 269 NLRB 55 (1984), *Jenkins Index Co*, 273 NLRB 736 (1984)

Several other factors are noteworthy in considering the layoff allegation Respondent called several employees who testified that work was slow before the 15 August layoff However, two of Respondent's supervisors, Will Overall and Jimmy Dover, and alleged discriminatee Diane Hartman, contradicted Respondent's contention that work was slack in all departments on 15 August Overall testified that employee Sewell was assigned to work with Hartman immediately following the layoff because the department was behind in its work Dover testified in a pretrial affidavit that his department had a good bit of work on 15 August 1985 Hartman testified that there was an increase in orders between the 4 July shutdown and the 15 August layoff

Respondent also argued that Kenneth Redd did not learn of the employees' union activities until the morning after he directed the August layoff However, that testimony was contradicted by credited evidence that Plant Manager Campbell and Supervisor Dover told employees that the layoff was called to get the union supporters

Respondent also argued that the employees were selected for layoff by their respective supervisors rather than by Redd or Campbell Although that testimony was supported by several current supervisors, it was rebutted in part by the testimony of former Supervisor Charles Songer Songer testified that he was told that on the occasion of the 15 August layoff, his employees would be selected by Campbell and Redd rather than through the normal method of having the supervisors select employees for layoff Songer testified that he was directed to prepare a list in order to permit Campbell and Redd to compare the supervisors' recommendations with their own Songer's testimony was corroborated by Charles Campbell's handwritten layoff list According to Songer, he recommended that employees Sims, Harte, and Dotson be laid off According to Songer, however, Campbell rejected Songer's recommendations and instead laid off employees Parris (Paris), Plemmons, and Harte Campbell's handwritten list shows all five employees mentioned in Songer's testimony, i e, the three recommended by Songer included the two not laid off, Sims and Dotson, plus the three selected by Campbell, i e, one of which had been recommended by Songer Respondent's other records also support Songer by showing that Parris, Plemmons, and Fred Harte were laid off on 15 August, but that Dotson and Sims were not laid off Therefore, it is apparent that although Campbell listed all the employees recommended by Songer by writing them on his list, he chose instead one employee recommended by Songer, Fred Harte, and two that were not recommended by Songer Plemmons and Parris

After Songer testified, Charles Campbell was recalled At that time Campbell testified for the first time that he told the supervisors during their meeting of 15 August that unless they actually selected for layoff those employees that were contributing the least, he, Campbell, would select employees for layoff in the future It is noteworthy that other than Campbell, none of the current supervisors that testified about the 15 August supervisors' meeting recalled the above mentioned comments by Campbell All those supervisors testified before Charles Songer None, other than Campbell, was recalled after Songer testified

In view of the above, and on the basis of my observation of their demeanor, I credit the testimony of Charles Songer over that of Charles Campbell regarding what Songer was told concerning how his employees would be selected for the 15 August layoff

Respondent also pointed to a comparison of the weekly sales bookings records during the layoffs of 20 June and 15 August On both those occasions Respondent experienced a large volume of sales booking around the time of the layoffs However, Kenneth Redd was admittedly unaware of those sales bookings when the layoffs occurred It is noteworthy, however, that the figures

[3] Respondent's accountant also testified that he talked with Redd shortly before Redd left for vacation in July, but that he did not talk to Redd while Redd was on vacation The accountant was not sure whether he talked to Redd on 13, 14, or 15 August 1985

available before those two layoffs showed sales bookings down 2 weeks before the decision to lay off on 20 June (i e., those last available figures showed total sales bookings of only $47,532 if the last available figures were those for the week ending 31 May, or $58,771 if the last avaiable figures were those for the week ending 7 June),[4] as opposed to the last figures available before the decision was made to hold a layoff on 15 August. A comparison shows a substantially higher weekly sales bookings figure for the week ending 2 August—$92,157. Nevertheless, the layoff was called on 15 August and that layoff involved almost twice the number of employees laid off on 20 June.[5]

I am convinced because of the entire record that Respondent would not have conducted the 15 August layoff in the absence of its employees' union activities.

D. *15 August 1985*

Former employees Paul Alder and Greg Floyd testified to a conversation with Plant Mananger Charles Campbell at Alder's home on the morning of 16 August. At that time both Alder and Floyd were working for Respondent P. Alder asked Campbell about a 15 August supervisors' meeting.[6] According to P. Alder and Floyd, Campbell replied that the employees were trying to get a union in, and he had laid them off Campbell asked P. Alder and Floyd to find out who else was supporting the Union. Campbell identified Diane Hartman as a union supporter.

Campbell admitted that he talked with Alder and Floyd at P. Alder's home on 16 August. According to Campbell, it was Alder who brought up the Union, saying that he heard that someone was trying to organize a union. Campbell testified that he denied knowing who was trying to organize Respondent, but admitted to P. Alder and Floyd that Kenneth "Redd did tell us that someone out there in the plant was trying to organize a Union."

Both P. Alder and Floyd admitted that they resigned from Respondent's employment in November because they felt Alder's wife, who is also Floyd's mother-in-law and was an employee of Respondent, was being harassed at her work by Supervisor Jimmy Dover and because Plant Manager Campbell did nothing regarding harassment.

Conclusion

Despite their actions in resigning under circumstances that generated hard feelings, I am convinced that P. Alder and Floyd testified truthfully regarding their conversation with Campbell. In many respects their testimony was confirmed by Campbell. Campbell admitted that he was at Alder's home, that Alder and Floyd were present, that they talked about the supervisors' meeting on 15 August, and that that meeting included discussion of the employees' union activities. Other testimony, including Campbell's and Redd's testimony that Redd first told Campbell on 15 August that Redd had learned of the employees' union activities and that Campbell asked Redd who was involved, casts doubt on Campbell's version of his conversation with Alder and Floyd. Campbell allegedly had not heard which employees were involved with the Union when he talked with P. Alder and Floyd. Nevertheless, according to Campbell he initially expressed no interest in learning of employees' union involvement from Alder and Floyd. However, Campbell admitted that when Alder told him that he would let Campbell know anything he learned about the Union, Campbell replied, "I'll sure appreciate that."

Campbell admitted that he P. Adler, and Floyd were good friends. In the context of Campbell's first learning of the employees' union activities on 15 August and his admitted interest in which employees were involved, I find that his version of the 16 August conversation is not believable. Campbell's version reflects that he expressed little interest in P. Alder's comments about the Union. Campbell responded that he knew nothing about which employees were involved although he admitted that Kenneth Redd had said someone in the plant was trying to organize a union. According to Campbell, P. Alder told Campbell that he was surprised that anyone would work for a union "because of the way Mr. Redd treated everyone." Because of the context of their conversation and their close friendship, I find it more believable that Campbell would pursue the conversation in the manner alleged by P. Alder and Floyd.

Moreover, I was impressed by the demeanor of P. Alder and Floyd. Both responded forthrightly to questions regarding their resignation from Respondent and their feelings regarding the alleged harassment of Alder. Finally, I am convinced that Campbell mentioned that Diane Hartman was involved in the Union. Campbell did not deny that part of the conversation and, as shown above, Kenneth Redd admittedly learned of Hartman's involvement 2 days before the Campbell-Alder-Floyd conversation.

E. *5 September 1985*

Diane Hartman testified that President Kenneth Redd held a meeting of all employees on 5 September. Hartman testified regarding Redd's comments to the employees:

> Mr. Redd discussed the Union. He said he had heard rumors of a Union. He had heard about Union cards being signed. He said he had discussed this with his lawyer, he had been going to the library studying on the matter. He was concerned about the uneasiness of the people. He told us, you know, before he would let someone come into his plant and tell him how to run his business, he would

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[4] The record does not show when Respondent made the decision to hold a layoff on 20 June If the decision was made during the week of 20 June, the last sales bookings records would be those for the week of 7 June If the decision was make during the week before 20 June, the last sales bookings records would be for the week ending 31 May

[5] Eight employees were laid off on 20 June 1985 One was recalled before the 15 August layoff—on 5 August 1985 Another was recalled shortly after the 15 August layoff—on 16 September 1985

The total work force included 84 employees on 20 June and 73 employees on 15 August

[6] Respondent's president, Kenneth Redd, did hold a supervisors' meeting on 15 August. During that meeting Redd discussed the union organizing campaign

close the door, go back to Miami where there would be no problem and find him a job

The General Counsel also cited affidavit testimony by Kenneth Redd regarding his 5 December speech to employees Redd testified in that affidavit as follows, inter alia

> I urged whoever was involved in the Union to contact someone regarding the number of jobs that had been lost due to Union activities elsewhere I said that the Union, by law, could promise them anything and I could promise them nothing As I concluded the meeting I told them that with the business problems that I had with this added on top of them that I didn't need the aggravation I said I could just as easily go back to Miami, that I could get a job anywhere and I didn't need this job

In his testimony at the hearing Kenneth Redd denied that he threatened to close the plant However, Redd admitted saying that if the people did not stop fighting each other "there will be not company here," because the "bank will shut us down "

Conclusion

Redd's testimony revealed that his recollection of his 5 September speech was not complete His testimony both at the hearing and in his affidavit is somewhat similar to that of Diane Hartman I am convinced that Hartman testified accurately concerning Redd saying he would close the doors, go back to Miami where there would be no problem, and find a job I also credit Redd's affidavit testimony that he urged the employees to contact someone "regarding the number of jobs that had been lost due to union activities elsewhere "

Redd's threat to close the doors and go back to Miami was directed against the employees' union activities and constitutes a clear violation of Section 8(a)(1) Redd's comments regarding lost jobs also constitutes a clear threat Redd offered no further explanation other than the implication that many employees have lost their jobs because of their union activities Both the above comments tend to coerce employees in their protected activities

F *11 September 1985*

During September 1985, William (Will) Overall was made foreman of the Assembly and Wiring Department Prior to Overall, the supervisor over Assembly was Janice Varner As assembly and wiring foreman, overall was over some 14 employees Of those 14, approximately 8 or 9, including alleged discriminatee Diane Hartman, were under Overall in Assembly Shortly after becoming foreman, Overall held a meeting of the Assembly and Wiring employees Diane Hartman testified about that meeting

> Mr Overall brought us into the meeting He talked about him taking over the supervising job in our department He said there would be changes made in the department on how order were run He talked to us about rules that were to apply to us We could not leave the department without his permission He told us that the talking would be stopped He told us that we would be given verbal warnings on our talking, that we would be given pink slips the second warning The third warning we would be sent to the office and sent home

Will Overall testified as follows regarding his meeting with the Assembly and Wiring employees

> Q Do you remember what you told them in that meeting?
> A Yes
> Q What was that?
> A About staying in their department We're allowed to have coffee, go to the Coke machine, but I didn't want them cluttering up, abusive talking
> Q Abusive talking? What is abusive talking?
> A Well, talking and you know, just stop working and just standing or talking, but if you can work and talk, this is okay
> Q Why did you hold this meeting?
> A Well, I was new to some but not new to the department because I had had it before

Former Assembly Foreman Janice Varner attended Overall's meeting Varner testified

> Q Do you remember what he said?
> A Well, he told them that he was going to be our supervisor, to cut down on the talking and not to go to other departments In general, what I always told them

Conclusions

On the basis of the entire record, I am convinced that Will Overall used strong expression in an effort to discourage work disruptions in the assembly and wiring departments However, I am not convinced that Overall was actually forbidding all talking Testimony of several employees indicated that Overall actually cautioned the employees against talking, which interfered with work Diane Hartman's testimony that Overall threatened to progressively discipline continuous offenders was unrebutted

Although I generally found Diane Hartman to be a credible witness, I am not convinced that she was correct in her testimony regarding the scope of Overall's no-talking rule On the basis of the entire record, I am convinced that he prohibited talking that interfered with work and that he threatened to progressively discipline employees who violated that prohibition There is no showing that Overall's prohibition in that regard differed from Respondent's previous policy

I find that Respondent did not violate Section 8(a)(1) by forbidding the assembly and wiring employees to talk because of the Union

G *16 September 1985*

Former employee Theresa Pursley testified that after she was laid off on 15 August, she was recalled in Sep-

tember 1985. Pursley worked in the FHP department under Supervisor Jimmy Dover. On the day she recalled following the layoff, Pursley met with Supervisor Dover. According to Pursley

> [Dover] asked me if I really needed the job and I told him, yes. He asked me if I had heard anything about the Union before I was laid off or if I knew anything about it. I told him that I had heard bits and pieces but nothing serious, you know, just that the Union was trying to come in. He said, well, we really need you to work for us and if you would please let me know of anything that's going on about the Union, your job may depend on this. So I agreed to it, but I never let him know anything because I never heard anything else about it.

Pursley testified that on several occasions after she returned to work, Dover asked her if she knew anybody that was involved with the Union.

Jimmy Dover denied that he had any discussion with Theresa Pursley regarding the Union and that he asked her to spy on others.

Conclusion

The testimony of Jimmy Dover conflicts with the testimony of three others—Diane Hartman, Brenda Harte, and Theresa Pursley. Additionally, on cross-examination Dover was shown his pretrial affidavit in which he testified that at the time of the 15 August layoff his department had a "good bit of work." Dover never explained the apprent conflict between his affidavit testimony and his testimony during the hearing that work was slow. Dover's testimony conflicted with that of Diane Hartman regarding a 14 August conversation with Buddy Fuller (see above), and with the testimony of Brenda Harte whether Harte volunteered to be laid off on 15 August. Harte testified contrary to Dover that she did not volunteer. Another witness for Respondent, Vickie Riness, testified that Harte actually said that if it came down between her and her husband, who also worked for Respondent, that Harte would rather it be her. At best, Riness' testimony shows that there was some ambiguity whether Harte would volunteer only to keep Harte's husband from being laid off. Dover, in his testimony, drew no such distinction and was, therefore, giving another version than that of Riness. In fact, both Brenda Harte and her husband, Fred Harte, were laid off on 15 August

Because of the above, and my observation of Jimmy Dover, I am unable to credit his testimony. I credit the testimony of Pursley. Pursley impressed me as a candid witness. Pursley's testimony revealed that she was interrogated and threatened with discharge during her conversation with Dover. Pursley was not known as a union advocate. Therefore, I find that she was interrogated and threatened in violation of Section 8(a)(1).

H. *20 September 1985*

On 20 September Diane Hartman was summarily discharged. Will Overall told Hartman that she was discharged because of talking.

Will Overall testified that it was his decision to discharge Diane Hartman According to Overall, Hartman "wouldn't stop her talking, she left her department (on a number of times)."

Conclusions

Diane Hartman was, according to her testimony which I credit, one of two employees that first contacted the Union. Respondent's president admitted learning that Diane Hartman was one of three primary union pushers

In view of the timing of her discharge, coming just over a month after Respondent first learned that Hartman was a union pusher; the animus Respondent illustrated against its employees' union activities as shown above; the credited evidence showing a comment by Plant Manager Campbell to effect that Hartman was a prime union pusher; and the summary manner of her discharge, I am convinced that the General Counsel proved, prima facie, that Respondent discharged Hartman becasue of her union activities.

Moreover, the record fails to show that Hartman would have been discharged in the absence of union activities. Will Overall testified that he had never discharged anyone other than Diane Hartman. Obviously, in light of that evidence, discharging an employee was a serious matter for Overall. Nevertheless, Overall did not point to a single specific event that precipitated Hartman's discharge. Overall did testify that Hartman told him that he was not going to run over the department. However, that comment was allegedly made 2 weeks before Hartman's discharge. Additionally, nothing was done or said on that occasion to indicate that Hartman was being cautioned or otherwise disciplined.

Simiarly, tesitmony that Hartman was noticed to have been absent from her duty station on the day of Overall's meeting drew no words of caution Additionally, as in the case above, that incident occurred 2 weeks before Hartman was discharged.

Overall said that he was displeased with Hartman's conduct on several occasions during the 2 weeks he supervised her. Nevertheless, Overall said nothing to Hartman. Hartman was never disciplined by Overall until she was discharged.

When asked why he did not give Hartman a warning for any of her shortcomings, Overall replied, "I just didn't."

Credited evidence proved that it was Respondent's policy to progressively discipline its employees if they engaged in excessive talking Hartman was treated differently. She received no prior disciplinary action for talking.

Respondent's attorney asked Will Overall about Respondent's policy for disobeying a supervisor and was told that an employee could be discharged for that infraction. Respondent's "policy" which was received in evidence, supports Overall's testimony in that regard. However, there was no showing of specifics whether and when Hartman disobeyed Overall. At no time was Hartman told that an act by her constituted disobedience.

I credit Hartman's testimony that she was told she was discharged for talking Overall never denied making that comment On the basis of that evidence, and on the record as a whole, I find that Hartman would not have been discharged absent her union activities Other employees in Hartman's department were shown to have engaged in excessive talking None of those other employees was discharged

I find that Hartman was treated differently from other employees and in a manner that was uncharacteristic of Respondent's policy and practice Hartman, unlike all others, was discharged for talking and, although Respondent's practice was to progressively discipline employees for talking Hartman did not receive the benefit of Respondent's progressive disciplinary policy *Lemon Drop Inn*, 752 F 2d 323 (8th Cir 1985), *Soil Engineering Co*, 269 NLRB 55 (1984)

Conclusions of Law

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

2 Sheet Metal Workers International Association is a labor organization as defined in Section 2(5) of the Act

3 Respondent, by interrogating its employees regarding their union activities, by soliciting employees to engage in surveillance of other employees' union activities, by threatening its employees with discharge, by threatening its employees with layoffs, and by threatening its employees that it would close its plant because of its employees' union activities, has engaged in conduct violative of Section 8(a)(1) of the Act

4 Respondent, by laying off employees Marguerite Price, Diane Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie Crabtree, Theresa Pursley, Brenday Harte, Jim Harvey, Wendell Whitley, Bobby McFalla, Boyd Webb, Donna Lambert, and Donnie Keahey on 15 August 1985 because of its employees' union activities, has engaged in unfair labor practices in violation of Section 8(a)(1) and (3)

5 Respondent, by discharging its employees Diane Hartman on 20 September 1985 because of her union activities, has engaged in conduct violative of Section 8(a)(1) and (3) of the Act

6 The unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act

The Remedy

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act

Having found that the Respondent has illegally laid off employees Marguerite Price, Diana Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie Crabtree, Theresa Pursley, Brenda Harte, Jim Harvey, Wendell Whitley, Bobby McFalls, Boyd Webb, Donna Lambert, and Donnie Keahey and has illegally discharged Diane Hartman in violation of Section 8(a)(1) and (3) of the Act, I shall order Respondent to offer Marguerite Price, Diana Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie Crabtree, Theresa Pursley, Brenda Harte, Jim Harvey, Wendell Whitley, Bobby McFalls, Boyd Webb, Donna Lambert, Donnie Keahey, and Diane Hartman immediate and full reinstatment to their former positions, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and to make the abovenamed employees whole for any loss of earnings they may have suffered as a result of the discrimination against them Backpay and interest shall be computed in the manner described in *F W Woolworth Co*, 90 NLRB 289 (1950), and *Florida Steel Corp*, 231 NLRB 651 (1977) [7]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [8]

ORDER

The Respondent, Redd-I, Inc, Chattanoga, Tennessee its officers, agents, successors, and assigns, shall

1 Cease and desist from

(a) Discharging, laying off, or otherwise discriminating against employees because of their union and other protected concerted activity

(b) Coercively interrogating employees about the employees' union activities

(c) Soliciting its employees to engage in surveillance of other employees' union activities

(d) Threatening its employees with discharge because of their union activities

(e) Threatening its employees with layoff because of their union activities

(f) Threatening its employees that it will close its plant because of the employees' union activities

(g) 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) Offer to employees Diane Hartman, Marquerite Price, Diana Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie Crabtree, Theresa Pursley, Brenda Harte, Jim Harvey, Wendell Whitley, Bobby McFalls, Boyd Webb, Donna Lambert, and Donnie Keahey immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make each of them whole for any loss of earnings plus interest he or she may have suffered by reason of Respondent's discriminatory actions

(b) Remove from its files any references to the discharge of Diane Hartman on 20 September 1985 or the layoff of employees Margueritte Price, Diana Lowe, Mike Parris, Fred Harte, Robert Plemmons, Debbie

[7] See generally *Isis Plumbing Co*, 138 NLRB 716 (1962)

[8] 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

Crabtree, Theresa Pursley, Brenda Harte, Jim Harvey, Wendell Whitley, Bobby McFalls, Boyd Webb, Donna Lambert, and Donnie Keahey on 15 August 1985, and notify each of them in writing that this has been done and that evidence of their unlawful discharge or layoff will not be used against them in any way.

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

(d) Post at its facilities in Chattanoga, Tennessee, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 10, 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.

[9] 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 "