

Noland Company¹ and Sharon S. Wilkins. Case 11-CA-10194

19 April 1984

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

On 16 November 1982 Administrative Law Judge Leonard N. Cohen issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a brief in support of its cross-exceptions and in opposition to the exceptions of the General Counsel.

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,² and conclusions³ and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Noland Company, Spartanburg, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The record indicates that Noland Company is the correct spelling of the Respondent, not Nolan Company as set forth in the judge's decision. We therefore correct this inadvertent error.

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

³ Although Chairman Dotson adopts the conclusions of the judge, he does not necessarily agree with the rationale of the decision nor the judge's discussion of concerted activity.

Member Hunter considers it unnecessary to determine whether the Charging Party engaged in protected concerted activity. Even assuming she did, he would not find her discharge unlawful because, in his view, the evidence shows she was discharged for deficiencies in her work performance.

DECISION**STATEMENT OF THE CASE**

LEONARD N. COHEN, Administrative Law Judge. This matter was tried before me in Spartanburg, South Carolina, on July 6, 1982. On January 5, 1982, the Acting Regional Director for Region 11 of the National Labor Relations Board issued a complaint and notice of hearing based on unfair labor practice charges filed on Novem-

ber 16, 1981.¹ The complaint alleges that Nolan Company, herein called Respondent, violated Section 8(a)(1) of the Act when it discharged its employee Sharon S. Wilkins on or about October 29. Respondent filed a timely answer in which it denies the commission of any unfair labor practice.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

On the entire record and from my observation of the witnesses and after due consideration of the briefs of both the General Counsel and Respondent, I make the following

FINDINGS OF FACT**I. JURISDICTION**

Respondent is a Virginia corporation with a facility located in Spartanburg, South Carolina, where it is engaged in the business of wholesale distribution of plumbing, electrical, air conditioning, and industrial supplies. During the past 12 months Respondent, in the course and conduct of its business operations, purchased and received at its Spartanburg, South Carolina facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of South Carolina. Accordingly, the complaint alleges, Respondent admits, and I find and conclude that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES**A. Facts²**

From October 1978 until her discharge on October 29, 1981, Sharon Wilkins was employed by Respondent as a cashier at its Spartanburg, South Carolina wholesale facility. At all times Wilkins worked under the supervision of Gordon Cockill, the credit manager, who in turn reported directly to Henry Spratlin, the branch manager. Wilkins' duties included posting customers' accounts, making daily bank deposits, maintaining custody and control of the cash boxes, and receipting c.o.d. sales, of which much will be said later. Additionally, Wilkins, on occasion, substituted for the switchboard operator. In performing her primary functions as the cashier for the facility, Wilkins physically worked in the same office or room with Cockill.

Two separate incidents occurred during September and October 1981, which played significant parts in the events leading up to Wilkins' discharge.³ The first of these was Wilkins' suspected involvement with postresignation letter submitted to the company headquarters by a former employee. The second matter was the September-October yearly internal audit of the Spartanburg branch which showed certain deficiencies in the cashier's oper-

¹ Unless otherwise indicated all dates hereinafter are 1981.

² Unless otherwise specified the material facts are not in dispute.

³ This is not to imply that no other issue, such as Wilkins' attendance, was not also involved. Those other matters will be discussed infra.

ation. Counsels' contentions aside, I find that these two incidents or occurrences are not unrelated and they cannot, therefore, be treated without some reference to the other.

Turning first to the matter of the letter, the facts surrounding its preparation, sending, and promulgation at the branch are not in dispute. In mid-August Ann Brigman, a clerical employee in the date processing department and Wilkins' best friend, voluntarily resigned. She subsequently received a questionnaire from corporate headquarters in Newport News, Virginia, requesting her views on certain aspects of the job. In response to the questionnaire Brigman prepared a lengthy handwritten letter. On either September 1 or 2 Brigman lunched with Wilkins and Barry Lowe, the branch inventory manager. During the course of the lunch Brigman showed them the letter she had prepared and asked for their reactions. After reading the letter both Wilkins and Lowe indicated that it looked all right to them. Upon her return to the branch, Wilkins told several of her coworkers about the letter Brigman had prepared. Later that same day Brigman typed and sent the letter to Newport News. A few days later Brigman gave Wilkins a copy of the letter which Wilkins subsequently showed at work to both Cockill and several of the branch employees.

In view of the significance of this 2-1/2-page single-spaced letter, it is necessary to quote at some length from it.

I left because of the branch manager Henry Spratlin He is not consistent in his dealings with employees, letting some get by with things that others would be reprimanded for. He shows favoritism toward his two daughters, who most employees felt shouldn't be working there in the first place

His younger daughter, Robin does the garden maintenance, i.e., cuts the grass and picks up trash. She makes \$4.00 an hour. His oldest daughter Leslie is filling in on the switchboard while Sheila, our regular receptionist, is on maternity leave. Leslie also makes \$4.00 as well as Shelia. However, Leslie doesn't type so I or the cashier has to do all the typing as well as our other duties. Leslie is making as much as the regular receptionist and is doing less work. And it isn't like at all except of course by Leslie.

On top of this, Beth Hawkins who formerly was batch comptroller and who is now in order control since my leaving is only making \$4.10 and she has been with the company over 8 years! . . . Several of our warehouse workers only make around \$4.00, and one truck driver is only making \$3.90. This particular driver has been to Spratlin and asked for a raise, which he is due because he has been with the company for over a year and Spratlin said he couldn't pay him any more and if he didn't like it he could find himself another job. This is the attitude that *your* employees are faced with in the Spartanburg branch. There is more.

One of the inside salesmen was going to resign a few months back and was given a large enough

raise to keep him on. He did wonder why he was worth so much more only after he decided to leave. A counter salesman also was going to leave and was given a raise and taken off wage and hour and placed on salary. Even I was informed of a coming raise when I said I was leaving.

. . . I wanted someone to know why I really quit my job. Top management may think that Henry Spratlin is doing a terrific job and maybe he is. So be it. But he is doing nothing for morale in Spartanburg. In my two years at Nolan I didn't hear one person say they respected him as person or as a manager

I do not think Henry Spratlin is a fair man to work for. He allow some employees to do as they please while others are reprimanded for doing the same thing. It is not my intention to try to damage Spratlin's career and I certainly couldn't do any more damage to his reputation, not with the Spartanburg employees anyway I do feel that Spratlin could take better care of his employees if he really wanted to. He gives me the impression that all he is concerned with is good ole' number one.

Question 19 asked if satisfactory arrangements could have been made would I have stayed. Yes, but only if there had been a change in Spratlin or a change in branch managers altogether.

A few days after the letter was received at corporate headquarters, Donald Dickinson, vice president of personnel, paid Spratlin a visit. According to both Spratlin and Dickinson the purpose of the visit or investigation was to determine why a former employee would write such a letter.⁴ During the course of his stay in Spartanburg, Dickinson stated that he determined that wage information on Spratlin's daughters was correct but that the wage information on other employees was essentially incorrect.

Within a week or so of Dickinson's visit, Spratlin spoke to Cockill about the letter. Cockill testified that Spratlin asked him if he knew about the letter. When Cockill answered that he did, Spratlin commented that he was upset because of it and that it was a "personal matter." Spratlin further said that he did not understand why "they" would do that, that the information was erroneous and it hurt his feelings as much as anything. Towards the end of the conversation, Spratlin asked Cockill if Wilkins had supplied Brigman with the information on his daughters' wages.⁵ Cockill answered that it looked like it since Spratlin's daughters were paid out of the local manager's fund which was handled by the credit department.⁶ Spratlin agreed with Cockill's version but

⁴ Dickinson testified that Brigman's letter was the first of its kind that Respondent had ever received.

⁵ Spratlin testified that he had heard through rumor that Wilkins was showing the letter to employees.

⁶ Both Wilkins and Brigman testified that Brigman knew the wage paid to Robin Spratlin and correctly assumed that Leslie Spratlin, the other daughter, received the same wage rate. With regard to Robin, Brigman testified that one day while Cockill and Wilkins were both out

Continued

added that during this conversation he also stated that he was disappointed that the letter had been written and that he took being called a "jerk" personally. Spratlin further testified that he also told Cockill that he was just going to let it go by the boards as one of those little thorns in the side of management that eventually passed.

According to Cockill at some point during early September Cockill told Wilkins that the letter was "not good" and that she could "get into trouble" over it. Sometime later in September Spratlin spoke to Wilkins herself about the letter. According to Wilkins' account, Spratlin called her into his office and asked if she knew about the letter. She answered that she did. Spratlin asked if she thought he was paying his children too much money. Wilkins merely answered that she did not think it was any of her business.

In Spratlin's version, after he first asked her if she knew of the letter, Wilkins stated that she had but that she did not understand why the letter was written since Brigman was happy with the Company at the time she left. Spratlin then told Wilkins that the letter did not mean that much to him, because it was full of inaccuracies. While Spratlin testified that he then and now believed that Wilkins had passed on the information about his daughters' wages to Brigman he, nonetheless, told Wilkins during this conversation that he did not believe she had any role in the writing of the letter.

In attempting to explain this apparent inconsistency, Spratlin's testimony becomes utterly and thoroughly confused. Spratlin first noted that, because of Wilkins' position in the credit department, Wilkins had special access to the information regarding his daughters' wages. Yet, just four pages later in the transcript, Spratlin volunteered that he was at all times aware that Brigman also had access to that same information. Additionally, Spratlin testified that, some months before, Wilkins had approached him and told him that she felt that his daughters needed an increase in pay since they were working too hard. While still maintaining that he believed that Wilkins had divulged or passed on the information, Spratlin, in nearly the same breath, also indicated that, since he had given his daughters a raise on Wilkins' prompting, he did not feel that she would have then divulged information. Spratlin still further complicates the matter by testifying just a few moments later that the raises his daughters subsequently received were not the result of Wilkins' suggestion.

This recitation takes us chronologically on this issue up to the day before her discharge. Now, it is time to turn on the second main issue; the audit.

In late September Douglas Curtis and J. T. Meyer, internal auditors employed by Respondent at its corporate headquarters, arrived unannounced at the Spartanburg

Robin Spratlin, after finishing mowing the lawn, handed her a note to be given to Cockill which read she was owed \$8 for 2 hours' work. Spratlin himself testified that Brigman on at least one occasion paid his daughters' wages and, therefore, was privy to that information.

With the exception of Spratlin's daughters, all the other employees were paid directly from the payroll department at corporate headquarters. Therefore, neither Wilkins nor Brigman was, by virtue of their position in the Company, privy to the information regarding the wages of other employees.

branch to conduct a yearly full audit on the branch's operations. These branch audits take approximately 2 weeks to complete and involve a review of the branch's cash flow, bank accounts, shipping and receiving procedures, and security. This audit was to cover the period of October 1980 through September 1981.

Prior to performing each yearly the auditors review the past two audit reports to determine if any problems uncovered in previous audits had been corrected. In this case Curtis and Meyer reviewed an audit report dated February 1980, covering an audit that was performed during November and December 1979 and an audit report dated late January 1981 covering an audit of October 1980.⁷ The two audit reports reviewed by Curtis and Meyer covered virtually the entire time Wilkins had been employed by Respondent.

For an understanding of the comments contained in the three audit reports relating to the cashier's job, it is necessary to explain the method by which Respondent handles sales. Basically, there are two types of sales, cash and c.o.d. On cash sales, a customer will buy a nonserial-numbered or warrantied item from one of the counter salesmen who will receive the cash, write a receipt for the customer, and place the cash and a copy of the receipt in his own cash drawer or cash box which he maintains. At the end of the day the salesman turns in the cash box to the cashier for a deposit. The c.o.d. sales⁸ involve a customer making a purchase of an item which has a serial number and/or carries a warranty.⁹ In this case the counter salesman writes up the sale on a shipping form and takes the cash or check to the cashier. According to the procedures outlined in the cashier's manual, the cashier should then receive the payment and write a receipt from the receipt book acknowledging payment. There are four copies of the receipt; one for the salesman, one for the customer, one for the accounts receivable cash box maintained by the cashier, and one to remain attached in the receipt book itself.

The February 1980 audit report indicates that the cashier had several deficiencies in the area of cash receipts which were caused by her not making reference to the cashier's manual and an attempt on her part to save time by taking shortcuts. Specifically, the report criticizes the cashier for not writing a cash receipt for all cash received.¹⁰

⁷ Although it may take a week to several months for the auditors to prepare the detailed written reports of the audit, the branch manager, at the very least, is verbally informed by the auditors at the completion of the audit of the general results.

⁸ Both cash sales and c.o.d. sales may actually involve the payment by either cash or check and in both cases the item sold may be picked up by the customer at the time of purchase.

⁹ The difference in procedure is somehow required by the need for Respondent to find the documents necessary for future warranty-related problems.

¹⁰ Curtis testified that the purpose of requiring written receipts by the cashier on c.o.d. sales is to provide a means to trace or audit each sale. Curtis stated that in situations where the money is missing for a sale in which a customer can prove he paid, in the absence of a receipt from a cashier, the Company has no way to determine whether the counterman, the cashier, or someone else has the money. Curtis further stated that having the cashier simply stamp the c.o.d. shipping document "paid" does not suffice since it does not protect the counterman.

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Wilkins testified that during the November 1979 audit¹¹ an auditor was standing by her desk when one of the counter salesmen came up and threw a cash payment and shipping document on her desk, and simply turned and left immediately. Wilkins turned to the auditor and pointed out the problem she had with the salesmen not waiting for the receipts. When the auditor acknowledged the problem, Wilkins asked why she could not simply stamp the shipping document "paid." According to Wilkins, the unidentified auditor indicated that he would check on it but that he thought it would cover her.

Wilkins' testimony with regard to her knowledge of the procedures regarding the cash receipts as set forth in the cashier's manual is confusing at best. Initially, Wilkins testified that she never read that portion of the cashier's manual relating to the writing of cash receipts for c.o.d. sales and that she was unaware that the procedures in the manual required her to give a written receipt when she received cash. Later in her testimony Wilkins conceded that she did in fact know that the manual required the preparation of written receipts for c.o.d. sales. Wilkins testified that neither Cockill nor Spratlin spoke to her about the need to write cash receipts as a result of the February 1980 audit report.

Cockill testified that during the 1979 audit he personally observed the incident when the counter salesman, in the presence of auditor Ron Binger,¹² threw money and documents on Wilkins' desk and left immediately without waiting for a receipt. According to Cockill's recollection, Binger, while acknowledging Wilkins' problem, told her that she nonetheless had to write written receipts.

Cockill further testified that after this audit report Spratlin discussed the problem with him and that he subsequently talked to Wilkins about it. Cockill testified that he told Wilkins that they had to follow the company procedure in writing cash receipts. Wilkins responded that she would do it, although she did not feel that it was that important.

In his testimony Cockill admitted that he did not understand until the next audit, one year later, the importance of writing cash receipts. In fact, it was only after the January 1981 audit report that Cockill himself started writing cash receipts for c.o.d. sales that he received while Wilkins was out of the office.¹³

On September 25, 1979, before the first audit was conducted, Wilkins was given an appraisal signed by both Cockill and Spratlin which indicated that she was doing a "very good" job. In April 1980 following the first audit report, her appraisal signed by Spratlin only showed that her performance had dropped to a "satisfac-

In this same vein, Dickinson observed that it has been his experience that unless people dealing with the money follow the proper procedure theft almost invariably occurs either on the part of the person not following the procedure or on the part of someone who is aware that the procedures are not being followed and takes advantage of the security gap that was thereby created.

¹¹ Wilkins in her testimony incorrectly refers to the first two audits by the date the reports issued rather than the date the audits took place.

¹² The audit report indicates that an R. K. Binger was one of the four auditors conducting that review.

¹³ Cockill did not explain why he waited until January 1981 to start writing his own receipts if a year earlier he had instructed Wilkins to do so.

tory" level. In late November 1980, she was again appraised. This took place after the second audit had been completed but prior to any written report being issued. Again, Spratlin appraised her performance as "satisfactory."

In late January 1981, Ron Binger issued his audit report covering the period of November 1979 to October 1980. In his report Binger indicated a serious problem still existed with the failure to write cash receipts for cash money received. Specifically, the report indicated that in the 4-week test period there were 41 entries totaling over \$3,200 for which cash receipts had not been written, and in a random selection over the year's time, there were 153 cash entries totaling almost \$22,000 for which cash receipts had not been written. Binger's report further recites that both Cockill and Wilkins indicated to him that the failure to write receipts was because salesmen would not wait for the receipts to be written.¹⁴

Wilkins, in a rather confused account, testified that subsequent to this report being issued Cockill approached her and told her that they had again been written up for failing to write cash receipts. Wilkins answered that she wished the Company would make up its mind since the year before she had been told that she could simply stamp documents as "paid." Wilkins further testified that Cockill simply responded that if that was what the auditor said, to go ahead and stamp the documents.

Both Spratlin and Cockill testified that, subsequent to the issuance of the audit report of January 1981, Spratlin discussed with Cockill the possibility that Wilkins should be let go for her failure to correct the problem of writing cash receipts.¹⁵ Cockill argued to Spratlin that in all other respects Wilkins was a good cashier and he believed that with proper counseling they could overcome her problem. Spratlin acceded to Cockill's argument and no action was taken against Wilkins at that time. In allowing Cockill to convince him to keep Wilkins on, Spratlin readily conceded that in all other respects he considered Wilkins to be a dependable employee when at work and that she was capable of accepting responsibility and taking the initiative.

Cockill testified that after his discussions with Spratlin, he once again spoke to Wilkins about the need for her to write cash receipts. He testified that in his mind there was no question at least as of this time, the first quarter of 1981, that Wilkins knew cash receipts had to be written.

In this regard, Cockill, following the second audit, obtained his own receipt book and commenced the writing of cash receipts on c.o.d. sales on those occasions when Wilkins was not in the office. As will be noted below, Wilkins, during the remainder of 1981 up until the last

¹⁴ Binger did not testify. His statement in the report regarding the explanation offered by Cockill and Wilkins sounds remarkably like their testimony regarding the previous year's audit. This apparent conflict was not explored.

¹⁵ Spratlin, at this time, even consulted with Dickinson about the situation. Dickinson, in an agreement with Spratlin, recommended her immediate discharge.

audit in late September nonetheless, continued her prior practice of not writing receipt in most cases.¹⁶

In late September Curtis and Meyer commenced the final audit. At the completion thereof around October 10 to 12, Curtis met with Spratlin and informed him of the results. Curtis told Spratlin that there were several serious problems with the cashier's function. Among these problems was his finding that the cashier had not been writing cash receipts in the overwhelming percentage of the cases in which receipts were required. The total amount of the missing receipts for c.o.d. purchases was in excess of \$3,300. Curtis further stated that in the one case in which the cashier had written a receipt, the money shown on the receipt, \$91 been credited.¹⁷ Additionally, Curtis noted two separate incidents where he found that the cashier had not secured the accounts receivable and manager's account cash boxes. In one instance, Curtis stated that he visited the credit office one day when no one was present and he found both cash boxes and their keys in the unlocked cashier's desk. On the second occasion Curtis again entered an empty credit office. On this occasion the cashier had already left for the day, and Curtis observed that both cash boxes had been left unattended on Wilkins' desk.¹⁸

On October 13, Cockill prepared another appraisal form on Wilkins.¹⁹ For the first time Wilkins' performance was no longer rated as satisfactory. Cockill checked the box that indicated that Wilkins' present performance was "not satisfactory." However, Cockill further indicated that he felt that her performance could be corrected within the 3 months by counseling and training. In the comment section Cockill stated:

1. Sharon misses a lot of work because of personal reasons, sickness,²⁰ family situations and asks to leave early in the evening. She usually works

¹⁶ While the matter was not pursued or clarified at trial, it is quite puzzling that Cockill, at no time during the next 6 months, apparently observed that Wilkins was not writing cash receipts for the many c.o.d. sales reported to her each day. This is especially so in view of the close proximity of their desks.

¹⁷ At some point during or shortly after the audit was conducted, Wilkins was informed of the \$91 shortage and she voluntarily agreed to make it up. As of the time of her discharge, she had paid back approximately half of the missing money. There is no claim whatsoever that there was any dishonesty in the shortage on the part of Wilkins.

¹⁸ With regard to the latter incident, Cockill, in excusing Wilkins for the day, specifically assumed responsibility for the custody of the cash boxes.

With regard to the first incident, Wilkins, at the time Curtis paid his visit to the credit office, was substituting for the switchboard operator in another part of the facility. Wilkins stated that at the time she had never been told that she was suppose to keep the keys to the cash boxes with her.

It does not appear that Spratlin was aware of the circumstances described in the preceding paragraphs at the time he made his decision to discharge Wilkins.

¹⁹ Although it is not entirely clear it would appear that Wilkins was given an appraisal each year on or near her anniversary date.

²⁰ The record indicates that, during calendar year 1981, Wilkins was off work for approximately 133 hours for excused sick leave. In addition, during, July she complained of severe migraine headaches and was given 2 weeks' leave without pay by Spratlin.

through her lunch hour when she does this however.²¹

2. She spends too much time on the phone for personal reasons.²²

3. She tries to work independently of Nolan's policies.

I feel however, that with close supervision and counseling the above mentioned discrepancies may be eliminated.²³

After receiving Cockill's October 13 appraisal of Wilkins, Spratlin testified that he made the decision to terminate her.²⁴ Spratlin called Dickinson and asked for and was granted the necessary permission.²⁵

Spratlin then revised the appraisal and on the comment section wrote:

Wilkins has continued work against the system. The Spartanburg branch was written up from a due to her failure to write receipts for C.O.D. cash received, on the last four audits, November 1978, November 1979, October 1980, and September 1981. She has been counseled ont [sic] this short coming. She has had considerable time off for illness and personal problems. She was granted a two week leave of absence in July of this year of 1981, to get her personal problems corrected because they were interrupting with the performance of her duties at Nolan Company. This did not help. She continues to receive phone calls that upset her and the Credit Department. *She has passed on confidential information to other employees which causes a decrease in moral [sic].* She will be terminated.²⁶ [Emphasis added.]

Spratlin testified that, since Wilkins would be working on several reports during the end of October, he decided to wait until after the first of November to effectuate her discharge.

²¹ Wilkins' final responsibility each day was to make the bank deposits. According to Cockill, Wilkins would frequently ask to leave one-half hour early in order to make the stop at the bank.

²² The record is totally silent with regard to her telephone usage.

²³ Point three refers to her failure to write cash receipts. Both Wilkins and Cockill agree that following this final audit Wilkins was told that she must write receipts on all cash received and that, for the final several weeks of her employment, she followed this practice.

²⁴ Spratlin testified that, about the same time, he was told by Neal Nelson, Cockill's credit assistant in the Charlotte facility, that at some time during the summer Nelson had called Wilkins to give her a necessary financial report. According to Nelson, Wilkins told him that she "didn't have time for all that bulls—t." Nelson did not testify. Spratlin testified that by the time he heard this report he had already made up his mind to discharge her.

²⁵ Dickinson testified that when asked for permission he responded, "It's about time. The girl's been written up for three audit now, and just had a horrible attendance record." Dickinson further testified that, at the time Wilkins was discharged, he was not aware that she may have had any connection with Brigman's letter.

²⁶ Although the record is unclear it appears that Cockill and Spratlin discussed Wilkins' future about this time. Cockill at that time, as well as at a later point, argued that Wilkins could be "saved" with counseling. Spratlin apparently did not tell Cockill of the final decision since Cockill, by his actions on October 28 and 29, seemed genuinely taken by surprise when told of Wilkins' discharge.

On October 28 Wilkins and Cockill had a conversation which indirectly led to her being discharge on the following day. According to Wilkins' version, she informed Cockill that she felt there was something wrong and asked him if her job was in jeopardy. Cockill answered that it was that he thought the Brigman letter had something to do with it. Cockill further stated that Spratlin thought that she was involved in giving the wage information that was cited in Brigman's letter.

In Cockill's version of the same conversation he discussed with Wilkins the problems that she was having with cash receipts. He also discussed several of the other items that were mentioned in Curtis' audit and said that she had a serious problem. At the time of this conversation Cockill testified that he was unaware that Spratlin had already determined that she was to be discharged. Therefore, he could not and did not tell her that her job was in jeopardy. Cockill categorically denied telling Wilkins during this conversation or at any other time that Spratlin thought that she had released confidential information or that he thought the reason she would be discharged was because of the Brigman letter.

On the following day, October 29,²⁷ Wilkins went to Spratlin's office to discuss a problem she was having with the budget. After that matter had been disposed of the conversation turned to her future. Wilkins told Spratlin that she felt her job was in jeopardy since she had heard through the grapevine that she was going to be fired. Spratlin answered that there had been a problem with the audit, but that he was not prepared to talk to her about it at that time. Wilkins said she did not feel that it was fair to keep her hanging on like that and she wanted an answer. Spratlin answered that he did not know what the outcome would be, that he was waiting on word from corporate headquarters on whether or not to terminate her, but that the audit report did show serious problems with her not writing receipts for the c.o.d. money. Wilkins told Spratlin that she thought she was going to be terminated because of the Brigman letter. Spratlin answered that that was not correct, that the letter did not mean "that much to him." He admitted to her that it was irritating but noted that that had been several weeks before. Spratlin added that he did not appreciate her showing the letter to other employees, but he considered it a minor problem what was irritating but forgotten. Wilkins persisted in insisting that she thought she was going to be terminated because of the letter. At that point Spratlin responded that it was apparent that they could no longer work together effectively as a team and that she should seek employment elsewhere.²⁸ By

²⁷ Wilkins, Spratlin, and Cockill all testified to a series of conversations between and among themselves and/or Richard McRee, corporate vice president of credit in Newport News. Each of the three principal's testimony regarding the proper sequence of these conversations is confused and at various times inconsistent. The recitation set forth above is based on all of their testimony and appears to be in the most logical sequence. Where no significant differences in their versions exist, the account is based on a composite of their testimony. Where serious difference or conflicts do occur, they will be noted. McRee, unfortunately, did not testify.

²⁸ In Wilkins' brief account there was no mention whatsoever of the Brigman letter or Spratlin's reaction to her accusations.

way of an afterthought, Spratlin also testified that he mentioned her excessive absenteeism as a cause of her termination.

Wilkins immediately went back to the credit office and informed Cockill of Spratlin's decision. Cockill, in her presence, then called McRee on the telephone. According to Wilkins' account, Cockill told McRee that he did not think it was fair for the Company to fire her and that he thought that the letter Brigman had written was the main reason Wilkins was being discharged. Cockill then stated to McRee that he knew Wilkins had not been writing receipts but that she was under the mistaken impression that she could simply stamp the documents as "paid" and that he, Cockill, was sure that they could work out the problem in the future.

According to Cockill's version, he merely explained to McRee the situation generally and expressed the opinion that the reasons were not sufficient for Wilkins to be released. McRee answered that now that he had heard Cockill's side he was going to speak directly to Spratlin. Cockill categorically denied making any reference in this phone conversation or any other phone conversation with McRee to the Brigman letter. Subsequently, Spratlin and Cockill had a conversation in which Cockill argued that Wilkins' performance could be corrected with counseling. Spratlin answered that it was at that time too late, that the decision had already been made.²⁹

Spratlin testified at some point after he discharged Wilkins on October 29 he received a phone call from McRee. McRee indicated to him that Cockill had called him and was upset over the Wilkins' termination. Spratlin testified that he explained to McRee the situation regarding the problem she was having with the audits. This explanation seemed to satisfy McRee for either that day or the next day McRee called Cockill back and informed him that he was going along with Spratlin's decision because of the importance of the area in which Wilkins was deficient.

According to Wilkins, the final conversation she had with Cockill occurred on November 16 the day she came into the facility to pick up her letter of recommendation signed by Spratlin. On this occasion, she asked Cockill if he had heard anything else regarding her job and that Cockill responded that he had talked to McRee again and that McRee told Cockill that the main reason for her discharge was the letter Brigman had written. Cockill added that, according to McRee, that information was between him, Cockill, and the gatepost.

Spratlin was questioned on cross-examination regarding his October 13 written appraisal of Wilkins and the termination report which both state, inter alia, that Wilkins "passed on confidential information to employees which caused a decrease in moral [sic]." Spratlin's answer, while simple, was not particularly satisfying. Spratlin explained simply that he thought Wilkins had passed the information about his daughter's wages on to Brigman and that he, therefore, added the sentence merely as an "afterthought." As previously noted, Sprat-

²⁹ Cockill denied that Spratlin during this or any other conversation indicated to him that one of the reasons for Wilkins' discharge was that he believed she had given out wage information.

lin also knew that Brigman was aware of the same wage information by virtue of her having paid his daughters directly on at least one earlier occasion.

On December 1 a hearing on an appeal by Wilkins to an adverse determination by the South Carolina Employment Security Commission was conducted. Present at the hearing were Wilkins, Spratlin, and Cockill. In an extremely informal proceeding, each party was requested to give his or her position on the cause of Wilkins' discharge. Spratlin testified that the reason she was discharged was her failure to comply with company policies as related to the writing of cash receipts and excessive time off due to illness and personal reasons. Cockill, in his testimony, also discussed the problems with the custody with the cash boxes. Wilkins, in her sworn testimony, informed the referee that she had been given permission to merely stamp the documents as "paid." She further explained that the cash box problems were not her fault. Despite being given several opportunities to mention any other factors that she believed may have caused her discharge, Wilkins made no note whatsoever about the Brigman letter. Perhaps even more significantly Wilkins made no reference to Cockill's or McRee's alleged statements that Brigman's letter or Wilkins' alleged giving of confidential information was the cause of her discharge.

Finally, Respondent introduced evidence that several cashiers at other facilities had been first counseled and subsequently discharged for their failure to handle cash transactions properly.

Conclusions

The threshold question presented here is whether the actions engaged in by Wilkins prior to her discharge are the type of activities which are protected by the Act.

In this regard Wilkins' conduct basically falls into two separate categories: (1) discussions with employee Brigman regarding the wages of other employees, including those of Spratlin's daughters and (2) Wilkins' involvement in the preparation and circulation of Brigman's letter. For, if it is concluded that Wilkins' conduct in either regard is both protected and concerted, the complaint allegation relating to her discharge must fall even under the most favorable view of facts possible.

With regard to the first category, the record clearly establishes exactly what Spratlin expected; that Wilkins and Brigman, while the latter was still employed, did indeed discuss the wages received by other employees, including Spratlin's daughters. Wilkins credibly testified that she and other employees also had similar discussions. These took place in the context of the employees airing their dissatisfaction with their own and others working conditions. These discussions, which go to the very heart of employees' traditional concerns, are the type of preliminary discussions that frequently result in organized activity or in the taking of positive steps towards presenting demands. That they do not eventually

lead to such group action does not, somehow, subsequently render them unprotected.³⁰

Respondent, however, argues that Wilkins' conduct in disclosing confidential wage information to her fellow employees so breached the trust placed in her that she was disqualified from the protection of the Act. The difficulty with this argument is simply that it runs contrary to Respondent's own admitted facts. In this regard, Spratlin testified that he was aware for some time prior to early September that Brigman, by virtue of her substituting for Wilkins, knew the wages that his daughters received. Thus, Wilkins cannot be said to have passed on to Brigman any wage information, confidential or otherwise, regarding Spratlin's daughters. Accordingly, it is concluded that Wilkins, in discussing the wages of other employees with employee Brigman, was engaged in protected concerted activity within the meaning of the Act.

I next turn to the subject of Wilkins' involvement of the preparation and circulation among the work force of Brigman's letter. As a starting point I note that the Board has consistently held that employee complaints about their supervisor's treatment of them constitutes protected concerted activity.³¹ This is so irrespective of whether the protest takes the form of a direct confrontation with management during meeting,³² a newsletter directed to fellow employees,³³ or an anonymous letter sent to the employer's corporate headquarters.³⁴ Respondent, nonetheless, contends that the letter is rendered unprotected since it impugns the integrity of the supervisor. I reject this contention. That the subject matter of a complaint may be sharply critical of the performance and the attitude of a supervisor does not remove it from the protection of the Act.³⁵ The letter, though controversial, was neither atypical of what one might expect as an expression of employee discontent nor so offensive as to render it unprotected.

Finally, Brigman's letter was not confined to a personal pique against Spratlin, but appeared to represent the views of other employees regarding what they viewed as his mistreatment of them. It in effect calls for an investigation by Respondent of Spratlin's management. While it is true that Brigman alone, apparently conceived and prepared the document, it is equally clear that Wilkins, in her luncheon meeting with Brigman on September 1 and by her subsequent action in showing the letter to her coworkers, fully endorsed its content. In these circumstances this was sufficient to bring this form of protestation concerning conditions of employment within the realm of concerted activity protected by Section 7 of the Act.³⁶

³⁰ *Jeannette Corp.*, 217 NLRB 653 (1975), *enfd.* 532 F.2d 916 (3d Cir. 1976). *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), *setting aside* 142 NLRB 1150 (1963).

³¹ *Calvin D. Johnson Nursing Home*, 261 NLRB 289 *fn.* 2 (1982).

³² *Pacific Coast Meat Co.*, 248 NLRB 1376 (1980).

³³ *Postal Service*, 241 NLRB 389 (1979).

³⁴ *Chrysler Credit Corp.*, 241 NLRB 1079 (1979).

³⁵ *Avalon-Carver Community Center*, 255 NLRB 1064, 1070 (1981).

³⁶ *See Hitchiner Mfg. Co.*, 238 NLRB 1253, 1257 (1978); *Diagnostic Center Hospital Corp.*, 228 NLRB 1215, 1217 (1977).

The Board in *Wright Line*, 241 NLRB 1083 (1980), set forth the applicable test in all disciplinary cases alleging violations of Section 8(a)(1) which turned upon the employer's motivation. First, the General Counsel is required to make out a prima facie showing sufficient to support the inference that the protected conduct was a "motivating factor" in the employer's decision. Once that is established, the burden then shifts to the employer to demonstrate that the same actions would have taken place even in the absence of protected conduct.

In finding that the General Counsel has met its initial burden under *Wright Line*, one need look no further than Spratlin's own words to determine that Wilkins' involvement with the Brigman letter was a "motivating factor" in her discharge. In separate conversations with both Cockill and Wilkins during September and October, Spratlin indicated just how deeply he resented the letter's personal attack on his integrity. While he was apparently offended to some extent by what he viewed as misstatements of fact concerning other employees' wages, his real resentment was directed towards the letter's attack on how he treated his daughters. For this, Spratlin clearly, although perhaps mistakenly, laid the blame at least partially on Wilkins. Spratlin's October 13 statement in Wilkins' appraisal that she "passed on confidential information other employees which caused a decrease in moral [sic]" belies his later statements that by mid-October, he had put behind him the accusations raised in the letter. Further, the accusations raised in the letter and the subsequent investigation by his immediate superior Dickinson did not, as Spratlin clearly recognized, enhance his standing with Respondent. Accordingly, I find that the General Counsel has established its prima facie case.

I now turn to the question of whether Respondent has met its burden of demonstrating that it would have taken the same disciplinary action against Wilkins even in the absence of her protected concerted activities. In order to resolve this ultimate question it is necessary to resolve certain credibility conflicts in the testimony of Wilkins, Cockill, and Spratlin.

Unfortunately, I was not impressed with either the demeanor or the content of the testimony of any of the three key witnesses. As was set forth in great detail, supra, each testified in an extremely confused and disorganized fashion. Moreover, each contradicted their own testimony on significant points. In all, each, at varying times, testified in a manner more calculated to enhance their positions in the instant litigation than in an attempt to accurately relate exactly what transpired. I am convinced that the truth of what really transpired lies somewhere between the versions proffered by each side.

Based on a careful review of the entire record, I am unable to credit that portion of Wilkins' testimony in which she stated that Cockill, on October 29 in her presence, phoned McRee and told him that he (Cockill) thought the Brigman letter was the reason Wilkins was being let go. Similarly, I do not credit Wilkins' testimony that in mid-November Cockill told her that, according to a subsequent phone conversation with McRee, he was informed by McRee that Wilkins' involvement with the letter was *the reason* for her discharge. Even though

Cockill was admittedly sympathetic to Wilkins I find it somewhat improbable that he, in the circumstances here, would have made such damaging admission to Wilkins about his employer. While Cockill may well have believed that the letter played a part in Spratlin's decision, I do not believe he would have been foolish enough to repeat McRee's alleged admission which was given to him in the strictest confidence. Even more persuasive than mere reliance on the inherent probabilities is the complete silence on the subject by Wilkins at the unemployment compensation hearing. This hearing was held just 2 weeks after her last and most damaging conversation with Cockill allegedly took place. Despite being given an adequate opportunity to express her views there Wilkins simply did not mention *anything* about the Brigman letter. Wilkins was not at all reluctant during that hearing to defend herself against the charges of not writing receipts or leaving the cash boxes unattended. Yet when asked by the referee if there were any other reasons or causes for her discharge, she did not mention this matter. I find it unbelievable that she would not have raised these statements if they had in fact been made. Therefore, in these circumstances, I credit Cockill's denial over Wilkins' accusations.

That issue aside, I find that Respondent has presented a convincing case that Wilkins' continued failure to write cash receipts was such a serious breach of company policy as to justify Spratlin's decision to discharge her. The record evidence indicates that Wilkins, up to January 1981, may well have believed that by merely stamping the c.o.d. documents as paid relieved her of the responsibility of writing receipts. However, from the time of the second audit report in January 1981 until the final audit the credible evidence establishes that Wilkins could no longer have reasonably held such a belief. In this regard, I credit Cockill's testimony that early in 1981 he was specifically instructed by Spratlin to have Wilkins write receipts and that Cockill passed on this instruction to Wilkins shortly thereafter. Two factors persuade me to credit Cockill's account in this regard over Wilkins'. First, about this same time Cockill himself started writing receipts for c.o.d. sales on those occasions when Wilkins was not in the office. Second, within 2 months of the January 1981 audit report an additional appraisal was given to Wilkins in which her job rating was lowered from "very good" to merely "satisfactory." It is reasonable to infer that this lower rating was done as a result of the most recent audit report.

Despite receiving specific instructions that she should write cash receipts Wilkins throughout the first 8 months of 1981 continued in the overwhelming majority of the cases to ignore the procedures outlined to her by Cockill and as set forth in the cashier's manual. These continued problems, as Spratlin himself recognized, reflected adversely on his ability to manage the branch. Spratlin in early 1981 had rejected Dickinson's advice and allowed Cockill to talk him into retaining Wilkins. Despite this extra 6 months, Wilkins' performance did not improve.

In addition to this serious problem, Respondent presented convincing evidence that her attendance record during 1981 also justified Respondent's taking action

against Wilkins. While Spratlin may not have mentioned the excessive absenteeism to Wilkins during the October 29 conversation, it was no doubt a factor in his decision. Although all her absences were excused, the time she was off had a substantial adverse impact on the function of the credit department. This is especially so since, on those occasions when Wilkins was out on sick leave, Cockill himself was forced for the most part to assume her duties. Therefore, I find and conclude that Respondent has established legitimate and substantial business considerations to justify its actions in discharging Sharon Wilkins. Accordingly, I recommend that the complaint allegation relating to her discharge be dismissed.³⁷

II. THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain remedial actions to effectuate the policies of the Act, including posting of a remedial notice to employees in compliance with its provisions.

CONCLUSIONS OF LAW

1. Respondent 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) of the Act by threatening an employee with reprisals for engaging in protected concerted activities.
3. Respondent did not violate Section 8(a)(1) of the Act by discharging Sharon Wilkins.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On the foregoing findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended³⁸

ORDER

The Respondent, Nolan Company, Spartanburg, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

³⁷ In her posthearing brief the General Counsel moved to amend the complaint to allege that Cockill's admitted statement to Wilkins in mid-September to the effect that she "could get into trouble" for circulating Brigman's letter to other employees (see above) constituted an unlawful threat of reprisal in violation of Sec. 8(a)(1). In view of my previous conclusions that Wilkins was engaged in protected concerted activity in circulating the letter, I find that Cockill's statement does constitute an unlawful threat. This incident was fully litigated at hearing and is sufficiently related to the subject matter of the complaint to justify a specific finding of a violation of Sec. 8(a)(1). *Alexander's Restaurant*, 228 NLRB 165 (1977).

³⁸ 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.

(a) Threatening employees with reprisals if they engaged in protected concerted activities.

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

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

(a) Post at its Spartanburg, South Carolina facility copies of the attached notice marked "Appendix."³⁹ Copies of the notice on forms provided by the Regional Director for Region 11 after being duly signed by Respondent's authorized representative shall be posted by Respondent immediately upon receipt thereof and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

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

³⁹ 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."

APPENDIX

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

After a hearing at which 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.

- 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 our employees with reprisals for engaging in protected concerted activities.

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

NOLAN COMPANY