

**The Burlington Times, Inc. and Teamsters Local 628,
a/w International Brotherhood of Teamsters,
AFL-CIO. Case 4-CA-25577**

June 18, 1999

DECISION AND ORDER

CHAIRMAN TRUESDALE AND MEMBERS FOX AND
LIEBMAN

On October 2, 1997, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief, to which the Respondent filed a reply brief.

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

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

1. We agree with the judge that the Respondent granted employees a benefit in violation of Section 8(a)(1) of the Act by rescinding its unpopular mileage reimbursement system in order to discourage them from engaging in union activity. In adopting the judge's unfair labor practice finding, we rely on his rationale and the additional reasons set forth below.

We particularly emphasize the timing and unprecedented nature of the Respondent's conduct. The Respondent's publisher, Stanley Ellis, learned as "lunch was concluding" on November 1, 1996,³ that the employees were complaining about the new mileage reimbursement form instituted by the Respondent's advertising director, David Renne, and that employees had accordingly contacted the Union. Ellis thereafter abruptly arranged an employee meeting at 4 p.m. that same day. The record establishes that in the previous 14 years, the employees had never been called for an impromptu meeting with Ellis. Ellis commenced the meeting by asserting that employee concerns "had gotten to the point where it was my understanding that some members of the staff had contacted an outside concern." Ellis testified that he was referring to the Union when he used the phrase "outside concern." There is no dispute that the employees at that meeting expressed extreme displeasure over the new

mileage reimbursement system, which required much more detailed travel information than the previous system. Indeed, the meeting continued for 2 hours, and the mileage reimbursement policy was one of the main topics of discussion. Ellis testified that, directly after the meeting concluded, he made the decision to rescind the new mileage form.⁴ This sequence of events supports the judge's finding that the Respondent called the November 1 meeting and rescinded the mileage reimbursement system "in order to dissuade [employees] from proceeding with their union activity."

In its exceptions, the Respondent argues that the rescission of the new mileage was motivated by the following legitimate business reasons: (1) Renne lacked authority to implement the new reimbursement form; and (2) the Respondent maintained a corporatewide policy that the same reimbursement form must be used at all of its seven locations. However, the Respondent's defense is based largely on the testimony of Ellis, which the judge found to be "self-serving and unpersuasive." As discussed below, the record supports the judge's discrediting of Ellis' testimony.

Ellis testified that he first saw the new mileage reimbursement form when he met with Renne on October 31. According to Ellis, Renne stated that the basis for the new form was that Renne "needed more information on what the staff was doing during the course of the day." Ellis further testified that Renne explained that he wanted "to track [employee activities] more closely than the old form had done."⁵ Ellis' testimony reveals that when specifically presented by Renne with a new mileage reimbursement form Ellis failed to advise Renne that he lacked the authority to effect such a change or that the Respondent's uniform corporatewide policy mandated that the same form be utilized at all seven locations. This omission is in stark contrast to Ellis' claim at the hearing that "it is *very important* in our organization . . . that we stay consistent." Indeed, there is no evidence that Ellis articulated these important corporatewide policies at the November 1 meeting with employees. These circumstances, along with the timing and unprecedented nature of the Respondent's conduct discussed above, support the judge's rejection of the Respondent's argument that the rescission was motivated by legitimate business reasons unrelated to the organizational campaign.

2. We further agree with the judge, for the reasons set forth by him, that the Respondent violated Section 8(a)(1) of the Act by terminating Renne, the very unpopular supervisor and author of the new mileage reimbursement system, in order to grant a benefit to discourage employee union activity. In its exceptions, the Respondent, again relying on Ellis' discredited testimony,

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall modify the judge's recommended Order to comport with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997).

³ All dates are in 1996.

⁴ The decision was implemented on November 4.

⁵ In light of this testimony, we reject the Respondent's exception that Ellis did not meaningfully understand prior to the November 1 meeting the nature of the new reimbursement system.

contends that it had decided to terminate Renne at its quarterly board of directors meeting on September 18, prior to the employees' union activity. The Respondent asserts that it delayed implementation and announcement of that decision, however, because Ellis was simply too busy with work related duties to carry it out until November 5, following commencement of the organizing activity. For the following reasons, we find no merit in the Respondent's contention.

First, Ellis repeatedly testified that he terminated Renne because the new mileage system was the "final straw that broke the camel's back" and that "the thing that was the *final decision* for me was the mileage form." As discussed above, Ellis testified that he first saw the new mileage form on October 31. Thus, Ellis' testimony is inconsistent with the Respondent's assertion that a final termination decision had been made on September 18 and suggests that subsequent conduct caused the termination of Renne.⁶ Second, Ellis testified that he contacted the Respondent's president, Grover Friend, and its comptroller, Ken Long, on November 4 because it was important to review the termination decision with them, and that they concurred in the decision to terminate Renne. Simply put, had a final decision been made on September 18, further "review" would have been unnecessary. Third, Renne had worked for the Respondent for 20 years, yet Ellis never mentioned or suggested to Renne after September 18—the date on which the final decision to terminate him was purportedly made—that his employment was in jeopardy. These circumstances support the judge's discrediting of Ellis' testimony and rejection of the Respondent's defense to the termination of Renne.⁷

3. For the reasons stated by the judge, we adopt his findings that the Respondent committed several violations of Section 8(a)(1) in meetings held with employees between November 1 and December 20.⁸ See section III,B,3 of the judge's decision entitled, "Other Complaint Allegations." In its exceptions, the Respondent renews its contention that these complaint allegations are barred by Section 10(b). Although we agree with the judge's rejection of this defense, we find that the issue warrants further explanation.

⁶ Indeed, the Respondent argues in its brief that Renne's "latest and most egregious act of mismanagement"—the mileage form—constituted the "impetus" to replace Renne.

⁷ Renne resigned to avoid termination. The judge found that the Respondent further violated the Act by informing employees that Renne had resigned. We do not pass on that issue. The finding of such an additional violation would be cumulative and would not materially affect the Order.

⁸ Because we agree with the judge that the Respondent promised to rectify employees' salary complaints at the November 5 meeting, it is unnecessary for us to pass on the judge's finding that the Respondent made other unlawful promises at that meeting. The finding of such additional violations would be cumulative and would not affect the Order.

The original charge, which was filed on December 27, alleged as follows:

On or about November 6, 1996 and thereafter, the Employer interfered with and violated the rights of its employees guaranteed by the Act and coerced and intimidated said employees in violation of the Act. The Employer also refused to recognize the Union and, despite its majority status, took steps designed to diminish said majority status, all in violation of the Act.

The amended charge, which was filed on April 8, 1997, alleged as follows:

Employer engaged in conduct with the objective and effect of interfering with its sales representative employees in the exercise of their Section 7 rights, and otherwise inducing these employees to abandon support of the Union, by discharging an unpopular supervisor and revoking a mileage voucher reimbursement system which had been objected to by employees.

Such conduct by the Employer has destroyed the laboratory conditions necessary for a free and fair election. Prior to the above noted unfair labor practices, the Union enjoyed majority status. Therefore, an order requiring the Employer to bargain with the Union is necessary as a remedy for the Employer's unfair labor practices.

The judge's unfair labor practice findings that are alleged to be time barred all involve conduct which occurred within 6 months of the dates on which the initial charge and the amended charge were filed. Specifically, the unfair labor practice findings in issue are the following:

- On November 1, in a meeting with employees, Ellis solicited grievances and implicitly promised to remedy them.
- On November 1, in the same meeting with employees, Ellis threatened that the plant could close if the employees pursued their union activity.
- On November 5, in another meeting with employees, Ellis promised to rectify employees' salary complaints.
- Between November 6 and December 20, in meetings with employees, the Respondent promised them a benefit (a new bonus plan).

In deciding whether a charge allegation provides a sufficient basis for a complaint allegation, the Board examines whether the allegations that are asserted to be barred by Section 10(b) are "closely related" to the allegations of a timely filed charge. In applying this test, the Board considers the following factors: (1) whether the allegations involve the same legal theory; (2) whether the allegations arise from the same factual circumstances or se-

quence of events; and (3) whether the respondent would raise similar defenses to both allegations. See *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); *Redd-I, Inc.*, 290 NLRB 1115 (1988).

We find that all of these factors are satisfied here. First, the amended charge and additional complaint allegations involve the same section of the Act (Sec. 8(a)(1)) and the same legal theory (interference with employees' Sec. 7 right to select the Union as their collective-bargaining representative). Second, both sets of allegations involve conduct occurring during the November and December preelection period. Further, the amended charge and additional complaint allegations (except the plant closure threat) involve similar conduct. (The amended charge alleges grants of benefit, while the complaint also alleges solicitation of grievances and promises of benefit.) And the plant closure threat was made at the same November 1 meeting at which Ellis solicited employee grievances about Renne and the mileage reimbursement policy, the two matters specifically referred to in the amended charge. Third, the amended charge and additional complaint allegations share common defenses. (The Respondent relied primarily on Ellis' testimony in defending against the two sets of allegations.) Thus, we find that under the Board's "closely related" test the allegations of the amended charge are sufficient to support the additional 8(a)(1) allegations of the complaint.

We also find that the two sets of allegations satisfy the requirements of the court's decision in *Drug Plastics & Glass Co. v. NLRB*, 44 F.3d 1017 (D.C. Cir. 1995), denying enf. 309 NLRB 1306 (1992). In that case, the court stated that the relatedness of the charge and the complaint is to be determined "at the time of the allegations." 44 F.3d at 1020. Viewed from that perspective, the charge and complaint allegations in *Drug Plastics* did not share a "significant factual affiliation." *Id.* at 1020-1021. The problem in *Drug Plastics* was that the complaint did not attempt to link its allegations with those of the charge: the charge referred solely to one employee's discharge and, while the complaint included that charge allegation, the complaint did not allege that its additional allegations were factually related to the discharge allegation.

In contrast, the factual connection between the charge and complaint allegations that was absent in *Drug Plastics* is present in the instant case. Here, as quoted above, the amended charge alleges specific grants of benefits to induce employees to abandon the Union. Both the charge and amended charge also allege that the Respondent "interfered with and violated the rights of its employees guaranteed by the Act," "took steps designed to dissipate [the Union's] majority status," and "destroyed the laboratory conditions necessary for a free and fair election." These references in the charge and amended charge to the Respondent's interference with the Union's organizational campaign are sufficient to support the

complaint allegations that the Respondent sought to discourage employee support for the Union by soliciting grievances and promising to remedy them, threatening plant closure, and promising employees increased wages and an improved bonus plan. In sum, because in this case we are able "to connect the allegations in [the] complaint with the charge allegation[s]," the two sets of allegations share a "significant factual affiliation" within the meaning of *Drug Plastics*.⁹ 44 F.3d at 1021-1022.

Accordingly, for all these reasons, we affirm the judge's finding that the additional complaint allegations are not barred by Section 10(b).

4. We find, contrary to the judge, that a bargaining order is not necessary to effectuate the purposes of the Act under the circumstances in this case. The Supreme Court held in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614-615 (1969), that "[i]f the Board finds that the possibility of erasing the effects of past [unfair labor] practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue[.]"¹⁰

Although the Respondent's unfair labor practices were serious, they are not of a nature or number likely to have so lasting an effect that traditional remedies would be inadequate to ensure a fair election. This case is distinguishable from *Skyline Distributors*, 319 NLRB 270 (1995), enf. in part and remanded 99 F.3d 403 (D.C. Cir. 1996); and *Holly Farms Corp.*, 311 NLRB 273 (1993), enf. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996), relied on by the judge. Those cases involved grants of economic benefits, specifically, wage increases. By contrast, the benefits granted in the instant case were noneconomic (rescinding the mileage reimbursement system and terminating Supervisor Renne).

⁹ The judge correctly identified the connection between the additional allegations of the complaint and the allegations of the charge and amended charge. He stated: "I conclude that the 8(a)(1) conduct alleged in the complaint was part of the Respondent's overall activity to resist the organizational activity, which was the essential allegation in both the original and amended charges. This conduct is therefore closely related to the charges." In addition to the authority cited by the judge, see *Fiber Products v. NLRB*, 64 F.3d 935, 941-942 fn. 5 (4th Cir. 1995) (distinguishing *Drug Plastics*); *Recycle America*, 308 NLRB 50 (1992); and *Nickles Bakery*, supra, 296 NLRB at 928 fn. 7.

In its brief, the Respondent contends that the judge should not have considered the original charge because it was "superseded" by the amended charge. We find no merit in this contention. The first two paragraphs of the complaint clearly indicate that it is based on both the charge and the amended charge.

Nippondenso Mfg. U.S.A., 299 NLRB 545 (1990), relied on by the Respondent, is distinguishable. In *Nippondenso*, neither the allegations of the charge nor the complaint placed at issue acts that were all part of an overall plan to resist union organization.

¹⁰ The General Counsel does not contend that this is a case in which a bargaining order is necessary because of unfair labor practices that are so outrageous that their effects cannot be eliminated by the application of traditional remedies. *Gissel* at 613-614.

“[W]age increases in particular have been recognized as having a potential long-lasting effect, not only because of their significance to employees, but also . . . because the increases regularly appear in paychecks [as] a continuing reminder.” *Holly Farms*, supra, 311 NLRB at 281–282. In our view, the benefits granted in the instant case are of less direct significance to employees and do not act as a continuing reminder, like a weekly paycheck. They are therefore unlikely to have such an enduring effect on election conditions.

Therefore, we conclude that the violations here do not render slight the possibility of a fair election and that the coercive effects of the Respondent’s conduct can be erased by the use of our traditional remedies.¹¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Burlington Times, Inc., Willingboro and Medford, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(a) and reletter the subsequent paragraphs.

2. Substitute the following for paragraph 2(b).

“(b) Within 14 days after service by the Region, post at its places of business in Willingboro and Medford, New Jersey, copies of the attached notice marked “Appendix.”¹² Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent 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 insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 1996.”

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

¹¹ Consistent with our finding that a *Gissel* bargaining order is not warranted, we reverse the judge’s finding that the Respondent violated Sec. 8(a)(5) of the Act by refusing to bargain with the Union.

¹² 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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
 To form, join, or assist any union
 To bargain collectively through representatives of their own choice
 To act together for other mutual aid or protection
 To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit employees’ complaints and grievances and promise to remedy them in order to discourage our employees from engaging in union or other protected concerted activity.

WE WILL NOT grant employees the benefit of improved working conditions by terminating an unpopular supervisor and by rescinding an unpopular mileage reimbursement policy, in order to discourage our employees from engaging in union or other protected concerted activity.

WE WILL NOT promise employees improved compensation and other benefits in order to discourage them from engaging in union or other protected concerted activity.

WE WILL NOT threaten plant closure should the employees pursue their union activity.

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

THE BURLINGTON TIMES, INC.

Donna D. Brown, Esq., for the General Counsel.

Joseph J. Costello, Esq., of Philadelphia, Pennsylvania, for the Respondent.

David A. Gaudioso, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Philadelphia, Pennsylvania, on July 8, 1997, upon the General Counsel’s complaint, which alleged various violations of Section 8(a)(1) of the National Labor Relations Act. It is also alleged that the Respondent refused to recognize and bargain with the Charging Party as the duly selected representative of a majority of its employees in an appropriate bargaining unit in violation of Section 8(a)(5) of the Act. Finally, it is alleged that the violations were so pervasive that the Respondent should be ordered to recognize and bargain with the Charging Party.

The Respondent generally denied that it committed any violations of the Act, or that a bargaining order is unjustified and affirmatively contends that all but two allegations of the complaint should be dismissed as being barred by Section 10(b) of the Act.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following findings of fact, conclusions of law and recommended order

I. JURISDICTION

The Respondent is a New Jersey corporation owned by Calkins Newspapers, Inc., engaged in the publication of a newspaper with its plant and principal office at Willingboro, New Jersey. During the course of its business, the Respondent has held membership in, or subscribed to, interstate news services, has published nationally syndicated features, has advertised nationally sold products, has derived gross revenues in excess of \$200,000, and has received goods valued in excess of \$50,000 from points outside the State of New Jersey.

The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, Teamsters Local 628, a/w International Brotherhood of Teamsters, AFL-CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Fact*

The Respondent employs 11 outside sales representatives who work out of the Willingboro facility and the Medford, New Jersey office. From sometime in 1994, when he transferred from another Calkins newspaper, until November 6, 1996,¹³ David Renne was the Respondent's advertising director, and the direct supervisor of the outside sales representatives.

While Renne had worked for the chain many years, and for the Respondent more than two, according to Publisher Stanley Ellis his performance was not satisfactory. Ellis testified that he met with Renne twice in 1996 to discuss with him issues relating to his management style. Ellis testified that he had determined to discharge Renne, but by November had not done so because of other management demands at the time.

In late October, Michael Mohollen contacted John Dagle, a representative of the Union, and thereafter Dagle met with some of the sales representatives, of whom 10 signed authorization cards by October 31. The employees' principal reason for seeking union representation was their treatment by Renne, and specifically a new mileage reimbursement policy he had initiated.

On Monday, November 4, Dagle went to the Willingboro facility, located Renne, and told him the Union represented a majority of the sales representatives. Renne left and returned, and after some discussion told Dagle to leave the premises. That afternoon Dagle filed a petition for representation.¹⁴

On the previous Friday, Ellis called a meeting of the sales representatives which lasted from about 4:15 to 6:25 p.m. During the course of this meeting Ellis said that he had heard of the

"possibility of an outside concern coming into the plant" and discussed with employees their concerns. During this meeting, as will be discussed in more detail below, Ellis is alleged to have created the impression of surveillance, solicited employees' grievances, promised to rectify them, and threatened to close the facility.

All witnesses agree that the principal subject of concern to the employees was Renne and the new mileage reimbursement policy he had initiated.

On November 5, Ellis, along with Edward Birch, comptroller of Calkins Newspapers, Ken Long, comptroller of the Respondent, and Grover Friend, president and chief executive officer of Calkins Newspapers, met with the sales representatives. They told employees that the new mileage reimbursement policy was harsh, unprofessional, unfair, and was to be immediately rescinded. It is also alleged that they solicited grievances and promised to improve working conditions and provide employees with requested materials.

Also on November 5, Renne was given the option of resigning or being terminated. He chose the former, and this fact was relayed to employees by Advertising Manager Barbara Basham on November 6.

An election was held on December 20, resulting in four votes being cast for the Union and seven against. The Union filed objections to conduct affecting the results of the election. A hearing was held, following which the hearing officer filed a report recommending that certain objections be overruled, but that others be sustained and a second election directed. No exceptions were taken, and the Board issued an order setting aside the first election and directing a second.

B. *Analysis and Concluding Findings*

1. *Recession of the mileage reimbursement system*¹⁵

There is no question that the principal matter of discontent among the outside sales representatives was their supervisor in general, and his implementing a new system for mileage reimbursement in particular. In effect the new system required the employees to account for their time in great detail, which they thought was demeaning, unprofessional and unnecessary.

Ellis and other company officials now contend that they agreed and the new system implemented by Renne was rescinded—not, however, until the employees had sought out the Union, signed authorization cards, and the Union, representing a majority, had demanded recognition.

When Ellis held his first meeting with employees on November 1, and asked about their concerns, the primary subject was Renne, and the new system. I conclude that the employees

¹⁵ At the hearing, and on brief, counsel for the General Counsel and counsel for the Charging Party, contend that this issue, and the discharge of Renne, were litigated in hearing on objections and therefore cannot be relitigated here, citing Sec.102.67 of the Board's Rules and Regulations. I disagree. The issues precluded from relitigation "in any related subsequent unfair labor practice proceeding" are typically those arising in a preelection proceeding which would be identical in both a representation and unfair labor practice case, such as jurisdiction, unit placement, unit scope, and the like. Here, while the facts that the mileage system was rescinded and Renne was terminated are the same in this and the representation case (and are not contested) whether such amount to objectionable conduct is not the same as whether they were unfair labor practices. To grant the General Counsel's motion would deny the Respondent the opportunity to present its defenses to the substantive allegations of the complaint to an administrative law judge.

¹³ All dates are in 1996, unless otherwise indicated.

¹⁴ Case 4-RC-18975.

sought to be represented for purposes of collective bargaining precisely in order to have something done about the mileage reimbursement system and Ellis knew it.

Under such circumstances, for the Respondent to rescind the new system was conferring a benefit which necessarily had the effect of interfering with employees' rights under the Act, and, I conclude, was violative of Section 8(a)(1).

The new reimbursement system was announced by Renne in a memo of October 15 to be effective October 28. The Respondent contends that Ellis rescinded Renne's act 2 days after finding out about the change, and therefore would have done so absent the employees' union activity. Thus on brief, the Respondent defends its action, arguing that it "had a legitimate business reason for" doing so, in that the new policy was a significant departure from general corporate policy and was "a draconian monitoring system that, in essence, tracked on a minute-by-minute basis the precise whereabouts of the sales representative."

I find this argument, and Ellis' testimony, self-serving and unpersuasive. To believe Ellis is to conclude that he did not bother to learn of the change in the reimbursement policy until the employees had contacted the Union. Then he swung into action. It is of course possible that absent the union activity, eventually the mileage reimbursement change would have been rescinded because it was a profound and drastic departure from long-term policy. But such a possibility does not negate the clear fact that it was changed after Ellis called a meeting of employees to tell them he had learned about the "outside forces," asked about their concerns and learned they were really upset about the new policy.

I conclude, as did the hearing officer and the Board in the objections case, that rescinding the mileage reimbursement system was granting a benefit in effect asked for by employees in order to dissuade them from proceeding with their union activity. It was therefore violative of Section 8(a)(1) of the Act.

2. The discharge of David Renne

Along with the recession of new mileage reimbursement policy, the discharge of Renne was the significant event in this matter. There is no question, indeed the Respondent admits, that on November 1 Ellis met with employees and asked about their concerns, having learned about the union activity. The 2-hour meeting consisted primarily of employees telling Ellis that Renne was a "cancer," and the like. However, other issues were mentioned such as pricing flexibility, bonus quotas, commissions, special ads, and media kits. Ellis testified that he took notes.

On November 5 Renne was given the opportunity to resign in lieu of being discharged, an offer he accepted. This was communicated to employees on November 6.

The record is clear that Renne was a very unpopular supervisor who was terminated in an attempt by the Respondent to grant a benefit to discourage employee union activity. Such is violative of Section 8(a)(1). *Eagle Material Handling of New Jersey*, 224 NLRB 1529 (1976), enf'd. 558 F.2d 160 (3d Cir. 1977). I further conclude that informing employees that Renne had resigned was, as alleged in the amendment to the complaint, violative of Section 8(a)(1).

In defense the Respondent argues that Renne would have been discharge even without the employees' union activity. I find this argument unpersuasive. It is based on the self-serving testimony of Ellis, which I found not to be credible. Ellis testified that he had had problems with Renne for some time, and

had counseled him. Among the problems Ellis testified he had with Renne concerned the resignation of Jack Lough, the retail advertising manager under Renne. This occurred in early September and bothered Ellis because Lough was a well respected, 15-year employee. However, Ellis accepted Renne's statement that they did not get along and Renne remained employed. Ellis claimed that he was too busy to terminate Renne, which necessitated finding a replacement, though with on a phone call in early November he found a retired employee to take Renne's place.

Maybe Ellis would eventually have taken action against Renne, but the facts do not persuade me that Renne would have been terminated when he was absent the union activity. However before the employees sought out a union, Renne was known to Ellis to be a poor supervisor and had caused the resignation of a valued employee, yet Ellis took no steps to replace him. I therefore conclude there was a causal connection between the employees' union activity, and the termination of Renne.

3. Other complaint allegations

Counsel for the Respondent argues that the remaining complaint allegations should be dismissed as being time barred under Section 10(b) since they were not alleged in the amended charge, citing *Nippondenso Mfg. U.S.A.*, 299 NLRB 545 (1990); *Redd-I, Inc.*, 290 NLRB 1115 (1988); and *Nickles Bakery of Indiana, Inc.*, 296 NLRB 927 (1989), and others.

In the original charge, it is alleged:

On or about November 6, 1996, and thereafter, the Employer interfered with and violated the rights of its employees guaranteed by the Act and coerced and intimidated those employees in violation of the Act. The Employer also refused to recognize the Union and, despite its majority status, took steps designed to diminish the majority status, all in violation of the Act.

In the amended charge, it is alleged:

Employer engaged in conduct with the objective and effect of interfering with it's [sic] sales representative employees in the exercise of their §7 rights, and otherwise inducing these employees to abandon support of the Union, by discharging an unpopular supervisor and revoking a mileage voucher reimbursement system which had been objected to by employees.

Such conduct by the Employer has destroyed the laboratory conditions necessary for a free and fair election. Prior to the above noted unfair labor practices, the Union enjoyed majority status. Therefore, an order requiring the Employer to bargain with the Union is necessary as a remedy for the Employer's unfair labor practice.

Since a complaint can only issue based on a charge, whether a charge is sufficient to support the complaint allegations depends on whether those allegations are sufficiently related to the allegations in the charge. Thus in *Nippondenso*, the charge alleged an unlawful discharge, whereas the complaint alleged various violations of Section 8(a)(1). The Board found the complaint allegations not to be closely related, except by legal theory, and such is not sufficient. Similarly, in reversing the Board in *Drug Plastics & Glass Co. v. NLRB*, 44 F.3d 1017 (D.C. Cir. 1995), the court concluded that the charge alleging a single discharge was insufficient to support additional complaint allegations of 8(a)(1) violations.

I conclude that the 8(a)(1) conduct alleged in the complaint was part of the Respondent's overall activity to resist the organizational activity, which was the essential allegation in both the original and amended charges. This conduct is therefore closely related to the charges. *Well-Bred Loaf*, 303 NLRB 1016 (1991). See also *Harmony Corp.*, 301 NLRB 578 (1991), where the Board held certain activity not closely related to the allegations in the complaint, as having occurred before any of the charge allegations, but "the threats and warnings arose from the same sequence of events as the pending timely charges, albeit they involved different sections of the Act. Accordingly, the 'closely related' test of *Redd-I* and *Nickles Bakery*, supra, has clearly been met."

a. The meeting of November 1

At the outset of the meeting Ellis had with the sales representatives on November 1, he said it "had come to his attention that some of them had gone to an outside concern." By this statement he is alleged to have created the impression that their union activities were under surveillance. I disagree. "In determining whether a respondent has created an impression of surveillance, the Board applies the following test: whether employees would reasonably assume from the statement in question that their union activities have been placed under surveillance." (Citing cases.) *United Charter Service*, 306 NLRB 150 (1992). I do not believe without more, the statement by Ellis would reasonably cause employees to conclude that the Respondent was engaged in unlawful surveillance. There are many ways an employer can learn of union activity other than surveillance. I shall therefore recommend that this allegation be dismissed.

Ellis testified that on November 1 he learned from Renne that two sales people had been complaining about the mileage reimbursement form and that some employees had contacted a union. Thus, he called a meeting for that afternoon saying "it had come to my attention there were some concerns and that the concerns had gotten to the point where it was my understanding that some members of the staff had contacted an outside concern. And that we . . . were here to listen to what they had to say." There followed a 2-hour discussion primarily centered on Renne and the mileage reimbursement policy he had instituted, along with several other items of concern to the employees.

Ellis closed the meeting "by thanking them for their time. I appreciated it that they had been very open about the concerns that they had. I said that it has been the history of the newspaper that we have always worked together to make decisions in the best interests of all involved, and I was confident we could do that again."

In the context of this meeting and the Respondent's lack of a practice of having such employee meetings, I conclude that in fact Ellis did solicit grievances from the employees and implicitly promised to resolve them, which he in fact did with regard to Renne and the mileage reimbursement policy. I conclude that Ellis thereby violated Section 8(a)(1). *Uarco, Inc.*, 216 NLRB 1 (1974).

Michael Mohollen credibly testified that during the meeting Ellis "said that this is a family owned business and that he feels as though that we've been able to take care of our problems in the past. We don't need any outside concern now or in the future. And that if what he hears is true, that it could put the entire plant in jeopardy." This statement is alleged to have

contained a threat in violation of Section 8(a)(1). I agree. By suggesting that a union "could put the entire plant in jeopardy," Ellis implicitly threatened plant closure. *Mississippi Chemical Corp.*, 280 NLRB 413 (1986) (union activity jeopardizing job found an implicit threat).

b. The meeting of November 5

On November 5 Ellis and other high level management met again with the sales representatives. In addition to telling the employees that the new mileage reimbursement policy had been rescinded, it is alleged that they solicited grievances and promised to provide employees with material they had requested.

Carol Hendrickson, for instance, testified that "there were pledges that were made to try to help us as sales reps provide tools to help us sell better and to also be more open to listening to our complaints." Mohollen testified that Ellis said he had reviewed the complaints from the meeting of November 1, and that he had rescinded the mileage policy, pledged to give them circulation figures to help with sales, and promised there would be better two-way communications. Mohollen also testified that "we brought up that we felt as though that our salaries weren't comparable or compatible to the job that we were doing. And Stan (Ellis) said that all of these things would be rectified."

I credit the employee witnesses and conclude that in fact at the November 5 meeting of employees Ellis not only granted the benefit of announcing rescission of the new mileage reimbursement policy, but implicitly promised to grant other benefits to employees. In this context such amounted to unlawful promises of benefits to discourage union activity and was violative of Section 8(a)(1).

c. Meetings between November 6 and December 20

The Respondent held meetings with employees in November and December during which it is alleged that grievances were solicited and promises were made to increase employees' wages and bonus incentive program.

Although Mohollen testified that there were about a dozen meetings at which the union activity was discussed,¹⁶ his recollection was rather general and centered on the Respondent's position that "we don't need a Union as employees." Beth Tender's testimony was similar. She further testified that at one meeting "We discussed pay structures, plans that we currently had, knowing at the beginning of January what they were in the works of redesigning a new bonus plan, but they couldn't get into detail with it other than the fact that obviously it would be better than the last one." Hendrickson testified along similar lines.

Telling employees that an increase in the bonus plan was being redesigned, is, I conclude, a promise of a benefit to dissuade employees from engaging in union activity and was violative of Section 8(a)(1).

d. Acts since December 20

It is alleged that since December 20 (the day of the election) employees have been told that the Respondent could not make any changes in the employees' terms and conditions of employment because of the Union and the charges. Among oth-

¹⁶ The Respondent offered into evidence Ellis' calendar for December showing four meetings that month at which the union activity was the subject.

ers, this is based on the testimony of Hendrickson: "Maybe a few weeks after the election we had a meeting and were notified that the Union had filed charges or a complaint and that everything was to remain the same, nothing could be changed again until that problem was resolved." Similarly, Tender testified that her pay structure differed from the others and she discussed this with Basham who said nothing could be done until the union matter was settled.

The General Counsel argues that an employer must proceed with wage and benefit adjustments as if the union were not present, citing *Atlantic Forest Products*, 282 NLRB 855 (1987), and that by the above statement the Respondent violated Section 8(a)(1) by telling employees it could not implement changes until the union situation was resolved. I disagree. I conclude that it is not unlawful for an employer to tell employees consideration of adjustment of benefits must be held in abeyance pending resolution of the union representation matter. *Toys-R-Us, Inc.*, 300 NLRB 188 (1990). Such is the essence of Basham's statements and I conclude she did not violate the Act as alleged.

4. Refusal to bargain

As of October 31, 10 of the 11 sales representatives had signed cards authorizing the Union to represent them for purposes of collective bargaining. On November 1 Ellis had his first meeting with employees, and on November 4 the Union made a demand for recognition, which was refused. Given the Respondent's pervasive unfair labor practices, I conclude that its refusal to bargain was violative of Section 8(a)(5).

REMEDY

Having concluded that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including recognizing the Union as the designated representative of the following appropriate unit of employees:

All full-time and regular part-time advertising outside sales representatives employed by Respondent at its Willingboro facility and Medford Office, excluding all other employees, guards and supervisors as defined in the Act.

As of October 31, the Union had received authorization cards from 10 of the 11 unit employees designating it as the employee's representative. There can be no dispute that motivating cause of the employees seeking union representation was their complete dissatisfaction with their supervisor and specifically the mileage reimbursement system he invoked. Within days after a majority of employees signed authorization cards, and the union business agent demanded recognition, both major grievances were resolved by the Respondent in favor of the employees—Renne was terminated and the mileage reimbursement policy was rescinded.

I conclude that the unfair labor practices associated with the departure of Renne and recession of the mileage reimbursement policy can best be remedied, and the interests of the employees best protected, by entering a bargaining order. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). While these are the less pervasive, or category II, violations described in *Gissel*, they were sufficiently serious as to make the possibility of a fair rerun election unlikely and therefore entry of a bargaining order appropriate. *Acme Markets*, 319 NLRB 270 (1995).

The standard applied by the Board in these matters was stated in *Holly Farms Corp.*, 311 NLRB 273, 281 (1993), enf'd. 48 F.3d 1360 (4th Cir. 1995):

In determining whether a bargaining order is appropriate to protect employee sentiments and to remedy an employer's misconduct, the Board examines the nature and pervasiveness of the employer's practices. In weighing a violation's pervasiveness, relevant considerations include the number of employees directly affected by the violation, the size of the unit, the extent of dissemination among the work force, and the identity of the perpetrator of the unfair labor practice. (Citation omitted.)

In *Holly Farms*, the Board focused particularly on the grant of economic benefits to employees, a violation similar to the Respondent's grant of benefits here by discharging an unpopular supervisor and rescinding an unpopular reimbursement policy. Here the entire bargaining unit was affected and the perpetrator was the Respondent's highest level of management. Further, here the Union had almost unanimous support.

In defending against the General Counsel's proposed bargaining order, the Respondent contends, in part, that the principal issue, the discharge of Renne, is not something about which the Union could negotiate. While the Union could not have negotiated concerning Renne's tenure, it could negotiate restrictions on supervisors exercising arbitrary authority. Renne's treatment of employees was very much a working condition which could be the subject of negotiations.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

The Respondent, The Burlington Times, Inc., Willingboro and Medford, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees' complaints and grievances and promising to remedy them in order to discourage them from engaging in union or other protected, concerted activity.

(b) Granting employees the benefit of improved working conditions by terminating an unpopular supervisor and by rescinding and unpopular mileage reimbursement policy.

(c) Promising employees improved compensation and other benefits in order to discourage them from engaging in union or other protected concerted activity.

(d) Threatening plant closure should the employees pursue their union activity.

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

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

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

¹⁷ 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.

All full-time and regular part-time advertising outside sales representatives employed by Respondent at its Willingboro facility and Medford Office, excluding all other employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by Region 4, post at its The Burlington Times, Inc., Willingboro and Medford, New Jersey facilities copies of the attached notice marked "Appendix."¹⁸

¹⁸ 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."

Copies of the notice, on forms provided by the Regional Director for Region 4 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.

(c) Within 21 days after service by the Region, file with the Regional Director in a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.