

Bo-Ty Plus, Inc. and Linda Wood. Case 11–CA–18574

July 13, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN AND TRUESDALE

On April 23, 2001, Administrative Law Judge George Carson II, issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bo-Ty Plus, Inc., Greenville, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following after paragraph 2(b) and reletter subsequent paragraphs accordingly.

“(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure and refusal to hire and within 3 days thereafter notify Lisa Johnson, Ronald Bowlin, and Linda Wood in writing that this has been done and that the failure and refusal to hire will not be used against them in any way.”

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

APPENDIX

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

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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² No exceptions were filed to the judge's dismissal of the allegations that the Respondent unlawfully discharged Lisa Johnson and Ronald Bowlin.

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 fail and refuse to hire any employees because they have engaged in protected concerted activities.

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

WE WILL, within 14 days of the Board's Order, rescind the letter that we sent to Local 929, International Alliance of Theatrical, Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the US and Canada, AFL–CIO, on December 8, 1999, directing the Union not to refer Lisa Johnson, Ronald Bowlin, and Linda Wood to work for Bo-Ty Plus, Inc., and WE WILL advise the Union that we have no objection to these employees being referred to work for Bo-Ty Plus, Inc.

WE WILL, jointly and severally with the Union, make Lisa Johnson, Ronald Bowlin, and Linda Wood whole for any loss of earnings and other benefits suffered by reason of our unlawful failure and refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful failure and refusal to hire Lisa Johnson, Ronald Bowlin, and Linda Wood and within 3 days thereafter notify each of them in writing that this has been done and that the failure and refusal to hire will not be used against them in any way.

BO-TY PLUS, INC.

Jasper C. Brown Jr., Esq., for the General Counsel.
Brian P. Murphy, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Greenville, South Carolina, on January 29 and 30, 2001. The charge in Case 11–CA–20235 was filed on January 31, 2000. A charge in a related case, Case 11–CB–3052, was filed on April 26, 2000, and was thereafter amended. A consolidated complaint issued on September 29, 2000. On December 28, 2000, counsel for the General Counsel filed a Motion for Partial Summary Judgment with the National Labor Relations Board, moving that the Board find all violations alleged in Case 11–CB–3052 because the Respondent Union filed no answer to the consolidated complaint. On February 22,

2001, the Board granted that motion and issued an Order finding that the Respondent Union violated the National Labor Relations Act by unlawfully failing and refusing to refer Lisa Johnson, Ron Bowlin, and Linda Wood to work because of their involvement in filing internal union charges or supporting those who had filed internal union charges. *Stage Employees IATSE (Bo-Ty Plus)*, 333 NLRB No. 54 (2001) (not reported in Board volumes). The Board severed Case 11–CB–3052 from Case 11–CA–18574. The complaint herein, as amended, alleges that Bo-Ty Plus, Inc. violated the Act by discharging Lisa Johnson and Ron Bowlin and by failing and refusing to hire, or to consider for hire, Johnson, Bowlin, and Linda Wood at all times after December 8, 1999.¹ The Respondent’s answer denies all violations of the Act. I find no violation of the Act with regard to the alleged discharges of Johnson and Bowlin. I find that the Respondent unlawfully failed and refused to hire Johnson, Bowlin, and Wood.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Bo-Ty Plus, Inc. (Bo-Ty or the Company), a South Carolina corporation, is engaged in the business of providing stage and production labor to various entities in the State of South Carolina, including Volume Services, Inc. Volume Services, Inc., is a Delaware corporation engaged in the management of the Bi-Lo Center in Greenville, South Carolina. Bo-Ty annually provides services valued in excess of \$50,000 to Volume Services, and Volume Services annually purchases and receives goods and materials valued in excess of \$50,000 directly from points located outside the State of South Carolina. Respondent Bo-Ty admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.²

The Respondent admits, and I find and conclude, that Local 929, International Alliance of Theatrical, Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the US and Canada, AFL–CIO (Local 929 or the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

Bo-Ty was formed in 1998. Steve Chastain, who formerly owned and operated Entertainment and Convention Services, Inc., ECS, was hired as president. He was never an owner of Bo-Ty. ESC had been engaged in the business of providing labor to various entertainment facilities in the Greenville, South

Carolina, area, including the Bi-Lo Center. When Chastain became president of Bo-Ty, ESC ceased to operate. Bo-Ty, like ESC, obtained the individuals who performed the labor at various entertainment facilities in the Greenville area through the Union. Notwithstanding this arrangement, there is no allegation or evidence that Bo-Ty had a contract with the Union. Rather, as alleged in the complaint, Bo-Ty and the Union have “maintained a practice” pursuant to which the Union is “the sole and exclusive source of employees” for employment by Bo-Ty. Chastain permitted Bo-Ty to use the initials ESC as a trade name to avoid confusion among former customers of ESC. On August 9, 2000, Chastain became Director of Events for Volume Services, Inc.

The complaint is predicated upon alleged discriminatory actions taken by Chastain after Lisa Johnson and Ron Bowlin filed internal union charges against Union Business Agent Gene Coffey in early August. Johnson lives with Bowlin. Linda Wood is Bowlin’s mother. She is also secretary-treasurer of the Union. All of the complaint allegations relate to matters arising after the filing of these internal charges.

The internal union charges against Business Agent Coffey were heard by the executive board of Local 929 on September 13. Three members of the four-member executive board, President Rocky Simpkins, secretary-treasurer Wood, and recording secretary Lea Senuik, found that Coffey had “blacklisted,” i.e., refused to refer, Johnson and Bowlin and recommended that he be “[p]ut on probation and fined.” Vice President Dirk Holloman was absent. The recommendation was acted upon on September 27. Neither Simpkins nor Holloman were present on September 27, thus only half of the executive board, Wood and Senuik, less than a majority, were present. Although the recommendation of September 13 was that Coffey be placed on probation, the document reflecting the action of September 27 reports that Coffey be “[s]uspended from his office and be fined.” On September 28 or 29 (the letter is undated), Wood wrote Chastain a letter stating:

As Secretary-Treasurer of Local 929 it is my duty to inform you that our Business Agent Gene Coffee [sic] has been suspended from his position. The membership of Local 929 has appointed Brother Jeff Henderson and Ron Bowlin as our temporary Business Agent until our election can be held in December. I hope you will be able to, in good faith, work with these two very capable members of our Local. All future work calls handled by Local 929 should be forwarded to either Jeff Henderson or Ron Bowlin

Although purportedly suspended, Coffey continued to perform the functions of Business Agent. Notwithstanding the contents of the foregoing letter, the complaint herein alleges that, “[a]t all times material herein” Coffey was the Business Agent of Local 929. Chastain continued to deal with Coffey, and there is no allegation that his doing so violated the Act.

¹ All dates are in the year 1999 unless otherwise indicated.

² The Board in *Stage Employees IATSE (Bo-Ty Plus)*, supra, at fn. 2, noted that Bo-Ty did not deny jurisdiction in its answer. At the hearing counsel for the Respondent moved to amend Bo-Ty’s answer in order to deny jurisdiction. I denied the motion as untimely, but noted that the issue of subject matter jurisdiction could be raised at any time. I requested counsel to present any evidence disputing jurisdiction within 3 weeks of the adjournment of the hearing. No evidence disputing jurisdiction has been proffered.

B. Facts

1. Events prior to October 1

In July, Lisa Johnson perceived that she was not being properly referred to jobs by Business Agent Coffey, and she signed and submitted internal charges against him. On July 16, Bowlin had requested Susan Forrester, who testimony establishes is Coffey's girlfriend, to get to work after observing her rubbing her feet instead of working like everyone else. Thereafter, Coffey failed to refer Bowlin. On August 2, Bowlin signed charges against Coffey.

Johnson and Bowlin gave their charges to Wood who, after first showing them to President Simpkins, served them upon Business Agent Coffey at a show at the Peace Center, an entertainment facility in the Greenville, South Carolina area. Shortly after the charges were filed, Bowlin, Johnson, and Wood spoke with President Simpkins. Simpkins advised that he would seek to have Johnson and Bowlin referred but cautioned them to watch their "P's and Q's" and not "to talk to anybody." After this meeting, Johnson and Bowlin worked on August 6, 7, and 8. After August 8, Bowlin lost no work, but he was often referred to work as a stagehand rather than the higher paying job of rigger. There is no complaint allegation in this regard. Bowlin testified that "Coffey was out of town . . . during this time," and that "[President] Rocky Simpkins gave us those work days."

On August 8, Bowlin and Johnson had been referred to work for Bo-Ty at a Black Sabbath concert at the Bi-Lo Center. Coffey was out of town. Susan Forrester was the job steward. After the concert, the employees were packing equipment. Bowlin had been assigned to drive the forklift. Johnson observed that one of the prongs of the forklift was stuck in a pallet and walked over to the pallet and placed her foot upon it so that Bowlin could back the forklift away without dragging the pallet. Forrester observed this and directed Johnson to "come over to her section with her people." Bowlin recalls that Johnson replied that "she would be just a minute." Forrester said that she "wasn't going to take her mouth and she [Johnson] was fired, to leave the building." Johnson recalls saying that she told Forrester to "wait a second," and that Forrester told her that she was "out of here," that Johnson no longer worked "for Bo-Ty or anybody else." President Simpkins observed the foregoing transaction but did not intervene. Chastain was not present.

Following this incident, Johnson received no referrals from the Union, but she did work on the weekends of August 13 through 15 and August 20 through 22, having been called personally by the South Carolina Children's Theater. Johnson, having received no referrals from the Union, spoke with Chastain, "three or four times." She did not specify the dates of these conversations, nor did she assert that she asked Chastain to take any action. She testified that, in those conversations, Chastain stated that he had no problem with her working for him. During this period, Bowlin testified that Chastain was "saying we weren't fired," but Coffey "was telling everybody that we were fired." Although Bowlin used the plural "we," his testimony is relevant only with regard to Johnson since he was being referred. On September 12, Johnson asked Chastain to

write the Union on her behalf. He did so the following day. The letter, dated September 13, states, "As for Lisa Johnson, she hasn't been fired from Bo-Ty Plus, Inc. I have no problem with her working again and if she does something for dismissal from my company, then *I'll notify her that she's fired.*" (Emphasis added.) Chastain testified that he did not know what "was going on at the time" Forrester discharged Johnson. The statement, "if she does something for dismissal . . . I'll notify her," confirms that he knew on September 13 that the Union considered Johnson to be fired, but the record does not establish when he learned this. On September 23, Johnson was referred by Coffey to work on September 29. She last worked pursuant to a referral on October 10. The conversation on September 12 was the last conversation Johnson had with Chastain regarding the Union's failure to refer her properly.

After the September 13 hearing by the executive board on the internal union charges, notwithstanding the finding that Coffey had blacklisted Bowlin and Johnson, Johnson was not immediately referred to work. On September 20, Bowlin worked a NHL preseason hockey match. Following the match, Bowlin was in an office with Chastain, union member Fred Johnson, and Local Union President Simpkins. Bowlin told Simpkins that it looked to him as if Johnson "was never going to be reinstated, and Gene [Coffey] wasn't going to give up his office because of it, and I didn't see the need to take any more calls from Gene Coffey because by the ruling that we had on the 13th, he should not have been Business Agent, because of the fact that he did not reinstate Lisa Johnson immediately for work." Upon hearing Bowlin's comment to Simpkins, Chastain stated to Bowlin that he "did not understand what was going on, and . . . why . . . [Bowlin] was quitting ." Bowlin did not reply, started out the door, heard some additional comment, and stated, "[T]his is not the time nor the place. I will not conduct this conversation in your work place." He then left. Bowlin, in explaining that he did not quit, testified, "I stated that I was quitting taking calls from Gene Coffey. I never stated that I would not take calls from Steve Chastain directly." The following day, Bowlin left a message on Chastain's answering machine. He asked Chastain "if he was going to follow the guidelines of . . . his agreement with us, and work closely with the new business agents that would be replacing Mr. Coffey."

Chastain testified that, following the hockey match on September 20, Bowlin stated that "he would no longer take calls from Gene Coffey and that he quit." Bowlin's testimony that Chastain commented that he did not understand why he was quitting confirms that, on September 20, Chastain misunderstood what Bowlin said. Bowlin did not state that he quit. Chastain further testified that, on the following day, he received a message from Bowlin on his answering machine in which Bowlin stated that he quit and requested that Chastain "override Gene's [Coffey's] decisions." I do not credit Chastain's testimony that Bowlin stated that he quit in the message left on the answering machine. Bowlin's request that Chastain "override" Coffey's decisions is inconsistent with quitting and is consistent with Bowlin's testimony that he requested that Chastain "work closely with the new business agents that would be replacing Mr. Coffey." I need not address the basis for Bowlin's statement that Coffey was going to be replaced. I find that

Bowlin did not state that he quit. He stated that he would not accept referrals from Coffey.

Chastain was aware that internal charges had been filed against Coffey by Johnson and Bowlin. He acknowledged having at least one conversation with Coffey in which this was mentioned. On September 27, Coffey was purportedly suspended by Local 929. On September 28 or 29, Chastain received the letter from Wood advising that Coffey had been suspended and that he was to deal with Henderson and Bowlin. Chastain denies having any conversation with Coffey regarding his suspension. Notwithstanding the letter advising of the purported suspension of Coffey, Chastain continued to call Coffey for stagehands. The complaint alleges Coffey as the Business Agent of the Union “[a]t all times material herein.”

2. Events between October 1 and December 7

In October and November, Chastain was aware that Johnson, Bowlin, and Wood were not working, but he did not question Coffey about this. Wood sought to speak with him about internal union affairs but he informed her he “was not in the Union and did not want to get involved.” Johnson has received no referrals, unless requested by name, since October 10. Bowlin has not been referred since September 20. Wood was last referred on September 21.

Wood, although receiving no referrals after September 21, has continued to perform her duties as secretary-treasurer of the Union. In October or early November, Wood, accompanied by Johnson, went to Chastain’s home to pick up assessment and payroll checks. Wood asked Chastain when “we were going back to work.” Chastain replied, “after December.” Wood asked why, but Chastain did not reply. This is the last conversation that Wood recalls having with Chastain regarding working for Bo-Ty.

In mid- or late November, Wood applied for unemployment compensation. The agent with whom she dealt was unable to locate any record for Bo-Ty. A form letter dated December 9 to Wood from the South Carolina Employment Security Commission advises that her claim was being sent to the “Status Unit to locate an employer account.” Wood also went to the Social Security Administration. The available records at Social Security did not reflect any payments by Bo-Ty. At a scheduled meeting of the Union in late November, Wood informed the members who had come to the meeting that she “had discovered there was no unemployment benefits and Social Security benefits.” She advised the members to “go and check their records . . . to make sure there were no discrepancies in their paychecks.” The scheduled November union meeting was postponed until December 6. On December 6, “the discussion about the unemployment was brought up at the rescheduled union meeting.”

Johnson also applied for unemployment compensation and, like Wood, discovered that the agent could locate no record for Bo-Ty. Johnson also noted that her social security number was missing from one of her checks. Johnson could not recall whether she mentioned these matters at a union meeting, but acknowledged discussing them with other employees.

There is no evidence that Bowlin applied for unemployment or made any comment relating to the absence of records with the Employment Security Commission regarding Bo-Ty.

At the rescheduled union meeting on December 6, Bowlin asked President Simpkins whether Johnson and Wood were going to be reinstated. Coffey was present. Simpkins stated that Wood was a “victim of circumstances.” Wood also appears to have been present when this conversation occurred and confirmed that Simpkins stated that she was a “victim of circumstance.” Although Wood testified that Simpkins gave no further explanation, on cross-examination she testified that Simpkins “produced the letter stating that we were no longer employed by Bo-Ty, that we were fired for insubordination.” Wood gave no further description of the document to which Simpkins purportedly referred. Bowlin made no mention of a document. He testified that Coffey informed him that neither Johnson nor Wood would be referred to work because of “insubordination.” In further conversation, Coffey laughed at Bowlin and told him that he, Bowlin, had quit.

Wood testified that everything said at union meetings “went straight to Mr. Chastain after the meetings.” Following the December 6 meeting, on December 7, Wood received a message on her answering machine from Chastain in which he stated, “[A]fter the meeting you had last night, I’m over it.” Thereafter, the message dealt with assessment checks. Wood testified that, as a result of the message, she wrote a letter to Chastain, and identified an unsigned document dated December 20 as the letter she sent. Chastain denies receiving the letter. The letter recites her actions, including her visits to the Employment Security Commission and the Social Security Administration. I find that the letter, whether or not Chastain received it, confirms that Wood, after learning of problems regarding the Company’s unemployment account, also contacted the Social Security Administration. The letter notes that the Social Security Administration had no record of payments for two years and that “they are checking back records.”

3. Events on and after December 8

On December 8, Chastain wrote a letter addressed to Coffey, business agent, I.A.T.S.E. Local 929, stating:

Due to the continued turmoil and insubordination that has been happening on Bo-Ty Plus, Inc., workplaces, I feel that I must step in for the good of the whole.

Be hereby advised that I do not want Ron Bowlin, Lisa Johnson and Linda Wood on any of Bo-Ty Plus, Inc., calls. I feel that the name calling, back stabbing, rude attitudes, shouldn’t be in the workplace. Behavior such as this not only effects the person that’s doing it, but it effects everyone that works with this person, this is not good for the workplace and/or the workers.

The answer filed by the Respondent refers to, and attaches, a letter dated February 14, 2000, in which Chastain responded to the unfair labor practice charge filed against Bo-Ty. The letter, in pertinent part, explains Chastain’s decision to write the letter of December 8:

The reason that I wrote the letter requesting that Linda Wood, Ron Bowlin and Lisa Johnson not work for me anymore is

because of them running to everyone telling how bad I am and how dishonest that I was, and how rich I was getting off of everyone, etc.

.....
I haven't stopped working the three due to their union and/or protected concerted activities, but due to their conspired insubordination due to me not interfering with them and the Local Union.

When called as an adverse witness by counsel for the General Counsel at the beginning of the hearing, Chastain acknowledged knowing about the dissention between Coffey and the three alleged discriminatees. He testified that he felt that there was disruption in the workplace as of December because of reports that he received that Johnson, Bowlin, and Wood were "[a]ccusing me of taking assessment money, accusing me of cheating IRS, tax evasion, that I was going to go bankrupt."

When called by counsel for Respondent near the end of the hearing, Chastain acknowledged that union members informed him that Wood had told them to confirm that their correct social security number was being used on their checks. He testified that, in addition to this, "people were saying that Johnson, Wood, and Bowlin were complaining about tax evasion and unemployment, and things of that nature." In December, he had "enough of these calls," and wrote the letter of December 8.

Chastain's letter of December 8 refers to insubordination. He admitted that none of the three alleged discriminatees had refused to follow any instructions that he gave. When questioned about his use of the word insubordination, Chastain testified that he was referring to "spreading rumors and lies against the Employer." He denied that Coffey suggested that he use the term insubordination.

Chastain acknowledged that an investigator from the South Carolina Employment Security Commission contacted him. He referred the investigator to his accountant, and "they cleared it up." Chastain denied that he had to pay a fine. The record thus confirms the documentary evidence and testimony of Wood that the Employment Security Commission had to locate an employer account for Bo-Ty. The matter was not resolved until an investigator met with Chastain's accountant.

Chastain never questioned any of the three employees regarding anything that they had allegedly stated to other employees. Chastain testified, "I don't recall," when asked if he ever confronted any of the alleged discriminatees concerning the rumors of alleged accusations. Johnson credibly testified that she last spoke with Chastain in September, when she asked him to write the letter on her behalf. There is no evidence that Bowlin spoke with him after September 20. The last conversation Wood recalled in 1999 was in October or early November when Chastain stated that she would be returned to work "after December." Chastain never told her that she had been insubordinate.

On January 10, 2000, an International representative of the Union, Ronald Lynch, attended a meeting of Local 929. Bowlin, who had purportedly been appointed steward, sought to have Lynch address what he perceived to be problems in Local 929. Bowlin testified that he made his arguments clearly, but the International Representative "was saying . . . he was not

familiar with the case . . . although the man had transcripts from the trial," presumably the trial of Coffey. In response to Bowlin, "the only thing that came out of . . . [Lynch's] mouth was 'more members, more contracts.'" Bowlin withdrew from the Union on that day.

Johnson also resigned from the Union in January 2000.

Wood continues to serve as secretary-treasurer of the Union. Despite the absence of any referrals, she had not, as of the date of the hearing, filed any internal charge.

C. Analysis and Concluding Findings

1. The alleged discharges of Johnson and Bowlin

The complaint alleges that Respondent Bo-Ty unlawfully discharged Johnson on August 8 and Bowlin on September 20. In *Wolf Trap Foundation*, 287 NLRB 1040 (1988), the Board, rejecting the principle of strict liability, held that an employer would be held jointly and severally liable for a union's discriminatory operation of a hiring hall only if it knew or could be reasonably charged with notice of the union's discrimination. Notwithstanding this principle, an employer is liable for the actions of its own supervisors, even if the supervisor is a dual agent "acting on behalf of the Union as well as the Employer." *North Carolina Shipping Assn.*, 326 NLRB 280, 286 (1998). Job stewards who exercise independent judgment when directing employees are supervisors of the employer. *Vanguard Tours*, 300 NLRB 250, 251 (1990). Applying the foregoing precedent to the facts herein, I find it immaterial that Chastain was unaware of Forrester's action in discharging Johnson. Forrester's announcement that Johnson no longer was employed "by Bo-Ty" underscores her status as a supervisor of Respondent.

In applying *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), in circumstances involving internal union activities, the Board has recognized that dissident internal union activities, although not "classic 'union activities'" in support of a union, constitute union activity. *Nationwide Transport Service*, 327 NLRB 1033, 1034 (1999). Pursuant to *Wright Line*, in the circumstances of this case, it was incumbent upon the General Counsel, (1) to establish that the employee, Johnson, was engaged in protected activity, albeit dissident union activity, (2) that the employer was aware of that activity, and (3) that animus against that protected activity was a substantial or motivating reason for the employer's action. The General Counsel argues that it is "reasonable to infer" that Forrester's termination of Johnson constituted retaliation for her filing of internal charges. Such an inference would be permissible if the record established that Forrester was aware that Johnson had filed charges. The conclusion requested by the General Counsel is, however, predicated upon two inferences, first, that Forrester was aware that Johnson had filed charges and, second, that Forrester retaliated against her for that action. The Board has long held that "[i]nferences must be founded on substantial evidence upon the record as a whole" and, since an inference is not substantial evidence, "an inference based on an inference" is impermissible. *Steel-Tex Mfg. Corp.*, 206 NLRB 461, 463 (1973); *Diagnostic Center Hospital Corp.*, 228 NLRB 1215, 1216 (1977). There is no evidence whatsoever that Forrester,

who was serving as a dual agent of the Union and Respondent, was aware that Johnson had filed internal union charges. Forrester did not testify. The record provides no basis for drawing an inference that Forrester knew that Johnson had filed charges. Even if there were some basis for drawing such an inference, a second inference, that the termination of Johnson was in retaliation for that action, would be impermissible. I shall, therefore, recommend that this allegation be dismissed.

Even if I were to have found that the termination of Johnson was unlawful, I would further find that it was rescinded by Chastain's letter of September 13 in which he stated that he had no problem with Johnson working again.

There is no evidence that the Respondent discharged Bowlin on September 20. Bowlin acknowledges stating that he was "quitting taking calls from Gene Coffey." When Bowlin made the foregoing statement, the only action pending against Coffey was the recommendation that he be placed on probation. Despite Bowlin's dissatisfaction with Coffey, he was the business agent. The purported suspension of Coffey did not occur until September 27. Although Bowlin testified that he never stated that he "would not take calls from Steve Chastain directly," Chastain had no obligation to call Bowlin directly since, as alleged in the complaint, the Respondent "maintained a practice" pursuant to which the Union is "the sole and exclusive source of employees" for employment by Bo-Ty. Furthermore, the complaint alleges that, "[a]t all times material herein," Coffey was the business agent of the Union. Thus, the pleadings establish no obligation on the part of the Respondent to deal with anyone other than Coffey. Bowlin's unwillingness to accept calls from Coffey does not establish his termination by Respondent. I shall, therefore, recommend that this allegation be dismissed.

2. Failure to hire or consider for hire after December 8

The Board, in *Stage Employees IATSE (Bo-Ty Plus)*, 333 NLRB No. 54 (2001) (not reported in Board volumes), found that the Union violated the Act by failing to refer these employees after October 26, the 10(b) date. Although testimony and documentary evidence establishes that none of the alleged discriminatees received any referrals for some 2 months prior to December 8, there are no complaint allegations relating to Respondent Bo-Ty during this period. The complaint, in pertinent part, alleges that, since December 8, Respondent failed and refused to hire, or to consider for hire, Johnson, Bowlin, and Wood, in violation of Section 8(a)(1) and (3) of the Act because they "joined, supported, or assisted the Respondent Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid and protection." There is no probative evidence that any action taken by the Respondent was motivated by the union activity of these employees. Chastain took no action against them in response to Wood's letter advising that Coffey had been suspended and that he should deal with Henderson and Bowlin. The only conversation between Chastain and any of the alleged discriminatees after Coffey was purportedly suspended was in October or early November when Chastain stated to Wood that she would be returned to work "after December." Chastain's letters and testimony establish that his letter of December 8 was not moti-

vated by the union activity of these employees. Rather, as Chastain wrote on February 14, 2000, the letter resulted from his belief that these employees had "conspired." I shall, therefore, recommend that the Section 8(a)(3) aspect of this allegation be dismissed.

Chastain, in his letter of February 14, 2000, stated that he wrote the letter of December 8 that barred these three employees from working for Respondent because of their "conspired insubordination" and "because of them running to everyone." I am mindful that there is no probative evidence whatsoever that Bowlin, Johnson, and Wood conspired. Nevertheless, "when an employee is disciplined for concerted or union activities which his employer mistakenly believes he had participated in, the statute affords him relief." *Gulf-Wandes Corp.*, 233 NLRB 772 (1977). A respondent's belief that protected activity has occurred is controlling. *Henning and Cheadle*, 212 NLRB 776, 777 (1974). The statements in the Respondent's letter and Chastain's testimony establish, and I find, that the Respondent believed that these employees had engaged in concerted activity.

The concerted activity that the Respondent believed these employees had engaged in included protected activity, specifically, complaints relating to statutory benefits. In his letter of December 8 advising the Union that he did not want any of the three employees working on Respondent's calls, Chastain characterized their conduct as insubordination. When testifying regarding what he meant by that term, Chastain said that he was referring to "spreading rumors and lies against the Employer." The "rumors and lies" to which Chastain referred were based upon his receiving reports of statements that Bowlin, Johnson, and Wood had purportedly made. His testimony established that these included reports that Wood advised employees to confirm that their correct social security number was being used on their checks, and that "people were saying that Johnson, Wood, and Bowlin were complaining about tax evasion and unemployment, and things of that nature." Social Security benefits and unemployment compensation are statutory benefits. "[E]fforts to invoke the protection of statutes benefiting employees are efforts engaged in for the purpose of 'mutual aid or protection'" when those efforts are engaged in concertedly with other employees. *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986).

The Respondent, in its brief, refers to the evidence adduced by the General Counsel regarding Wood's discovery that the South Carolina Employment Security Commission had no employer record for Bo-Ty and her bringing this to the attention of union members. The Respondent argues that this "traverses well beyond" the allegations of the complaint, that the Respondent was "not on notice of these allegations," and that this theory is not encompassed in the charge or complaint. The single unamended charge filed against Bo-Ty alleges that Respondent Bo-Ty, since August 1, "failed and/or refused to call and/or refer" the three discriminatees "in retaliation for their union and/or protected concerted activities." The complaint alleges that since December 8, the date of Chastain's letter, the Respondent violated Section 8(a)(1) and (3) of the Act by failing to hire or consider for hire these employees because of they "joined, supported, or assisted the Respondent Union and en-

gaged in concerted activities for the purpose of collective bargaining or other mutual aid and protection and in order to discourage employee from engaging in such activities.” (Emphasis added.) The ultimate issue in this case is the motivation of the employer. In litigating Respondent’s motivation, Chastain asserted that the Respondent’s actions were not motivated by the dissident union activities of these employees but by their “conspired insubordination” and their “running to everyone telling how bad I am.” In response to a question posed by counsel for Respondent, Chastain testified that “people were saying that Johnson, Wood, and Bowlin were complaining about tax evasion and unemployment, and things of that nature.” The Respondent’s motivation was fully litigated. Furthermore, and contrary to the Respondent’s argument, I find that the allegation that Bo-Ty discriminated against these employees because they engaged in protected concerted activity was clearly alleged in both the charge and complaint.

Chastain characterized the purported accusations of these employees as “spreading rumors and lies against the Employer,” and he referred to “taking assessment money, accusing me of cheating IRS, tax evasion.” Accusations of criminality, such as tax evasion, made in the course of otherwise protected activity may remove that activity from the protection of the Act when those accusations are made in bad faith. *Pizza Crust Co.*, 286 NLRB 490, 507 (1987). There is no evidence that Bowlin, Johnson, or Wood made any accusation in bad faith, made any accusation of criminality, or ever used the term “tax evasion.” When an employee is terminated for misconduct while engaging in activity protected by Section 7 of the Act, the employer is not privileged to act upon a reasonable belief if, in fact, the employee is innocent of any wrongdoing. *Ideal Dyeing & Finishing Co.*, 300 NLRB 303, 319 (1990). As the Supreme Court stated in *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), “A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith.” The burden of proof is upon the General Counsel to show that the employer’s honest belief was mistaken, that the alleged misconduct did not in fact occur.

Chastain’s belief that these employees were concertedly making derogatory remarks about him was based solely upon rumors that he heard. He never sought to verify the truth of any statement that he heard, thus any claim that his belief was reasonable is spurious. Chastain’s own statements regarding the alleged misconduct that he attributes to the alleged discriminatees is illogical and contradictory. His letter of December 8 refers to what “has been happening on Bo-Ty Plus, Inc., workplaces, . . . that the name calling, back stabbing, rude attitudes, shouldn’t be in the workplace.” None of the alleged discriminatees could have participated in this conduct because none of them had been referred to a Bo-Ty workplace for the better part of two months. In his letter of February 14, 2000, Chastain referred to receiving reports of “how dishonest that I was, and how rich I was getting off of everyone,” but, when testifying, he accused Bowlin, Johnson, and Wood of stating “that I was going to go bankrupt.” Chastain did not address the inherent contradiction between getting rich and going bankrupt.

The General Counsel’s evidence reveals no false statements by Johnson or Wood. There is no probative evidence that Bow-

lin, Johnson, or Wood said anything about Chastain cheating the Internal Revenue Service, tax evasion, getting rich, or going bankrupt. There is no evidence whatsoever that Bowlin made any comment regarding Chastain’s business affairs. Johnson and Wood separately related their discovery that the South Carolina Employment Security Commission had no record of wages paid to them by Bo-Ty and Johnson noted that some of her check stubs contained no social security number. Johnson could not recall whether she discussed this at a union meeting. Wood made her comments at a union meeting and she urged employees to check their pay stubs. Wood also mentioned “no Social Security.” This statement is explained in the letter of December 20 in which Wood reported that the Social Security Administration had no record of her earnings from Bo-Ty and “were checking.” The document showing that the Employment Security Commission sought a status report for Bo-Ty and Chastain’s admission that he was contacted by an investigator confirm that the concerns expressed by Johnson and Wood, none of which asserted criminality, were factually justified. Although the comments of Johnson and Wood were not made concertedly, Chastain’s letters and testimony establish that he believed that Johnson, Bowlin, and Wood had conspired.

Applying the criteria of *FES*, 331 NLRB 9 (2000), I find that the Respondent had a continuing need for stage hands, that Bowlin, Johnson, and Wood were fully qualified to perform this work, and that Respondent refused to hire these employees because it believed they had engaged in concerted activities. Respondent was aware that the purported concerted activities in which these employees had engaged included complaints relating to social security and unemployment, statutory employee benefits. Such activity is protected by Section 7 of the Act. Although Johnson and Wood had truthfully reported their separate discoveries at the Employment Security Commission and Social Security Administration, Respondent, without ever verifying the source of reports it received, concluded that all three employees had engaged in “conspired insubordination.” Contrary to Respondent’s belief that these employees were “running to everyone” making false statements and spreading lies, there is no evidence that any one of them made any false statement that thereby rendered unprotected what Respondent understood to be their concerted conduct. General Counsel has established that the misconduct that Respondent attributed to these employees on the basis of unverified hearsay statements did not occur. The Respondent, on the basis of reports it received, believed that these employees were acting concertedly and understood that their statements to their fellow employees included comments regarding statutory employee benefits as well as accusations of improprieties regarding taxes. When employees are engaged in protected conduct, an employer is not privileged to act upon a belief that misconduct has occurred when, in fact, there has been no misconduct. Respondent’s refusal to hire these employees because of its belief that they had engaged in concerted activities there were protected by Section 7 of the Act violated Section 8(a)(1) of the Act.

CONCLUSION OF LAW

By refusing to hire employees because they engaged in protected concerted activities, the Respondent has engaged in un-

fair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully advised the Union not to hire Lisa Johnson, Ronald Bowlin, and Linda Wood, it must rescind the letter of December 8, 1999, and jointly and severally with the Union make these employees whole for any loss of earning and other benefits they suffered as a result of Respondent's refusal to hire them, computed on a quarterly basis from December 8, 1999, until the date of the rescission of its letter of December 8, 1999, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³

The employees of Respondent work at various venues. Insofar as the Respondent has no facility, I shall recommend that Respondent be ordered to mail copies of an appropriate notice to its current employees and any former employees who worked for Respondent after December 8, 1999, the date of the earliest unfair labor practice found herein. See *3E Co.*, 313 NLRB 12 at fn. 2 (1993).

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

ORDER

The Respondent, Bo-Ty Plus, Inc., Travelers Rest, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire employees because they have 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 them by Section 7 of the Act.

³ I am mindful that Bowlin stated that he would not accept referrals from Coffey. Bowlin never "quit." If he had quit, there would have been no need for Respondent to include his name in its letter of December 8. Bowlin, in August, sought and received referrals from Simpkins. I shall leave for compliance the determination of whether the Union would have made nondiscriminatory referrals of Bowlin but for the Respondent's letter of December 8, 1999.

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

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

(a) Within 14 days from the date of this Order, advise Local 929, International Alliance of Theatrical, Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the US and Canada, AFL-CIO, that the letter of December 8, 1999, is rescinded and that it has no objection to the Union referring Lisa Johnson, Ronald Bowlin, and Linda Wood to work for Bo-Ty Plus, Inc.

(b) Jointly and severally with the Union, make Lisa Johnson, Ronald Bowlin, and Linda Wood whole for any loss of earnings and other benefits suffered by reason of its unlawful failure and refusal to hire these employees since December 8, 1999, with interest, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail a copy of the attached notice marked "Appendix"⁵ to all current employees and former employees employed by the Respondent at any time since December 8, 1999. Such notice shall be mailed to the last known address of each of the current and former employees. Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be mailed at Respondent's expense within 14 days after service by the Region.

(e) Within 21 days after service by the Region, file with the Regional Director 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."