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Lamar Central Outdoor d/b/a Lamar Advertising of Hartford *and* Gary Crump. Case 34–CA–10254

September 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On July 7, 2003, Administrative Law Judge Michael A. Marcionese issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs.

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

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions in part and to reverse in part, as explained below.[2]

A. Issues

The judge recommended that the complaint be dismissed in its entirety. The General Counsel states in his brief in support of exceptions that while he disagrees with the judge's recommended dismissal of the complaint in its entirety, he is "only appealing three aspects of the judge's decision":

> 1. The judge's recommended dismissal of the allegation that the Respondent violated Section 8(a)(1) of the Act by threatening Charging Party Gary Crump with discharge on October 2, [2002,[3]] in the course of an investigatory interview conducted by the Respondent's attorney, Clifford Nelson;
>
> 2. The judge's failure to find that the Respondent violated Section 8(a)(1) by threatening Crump with discharge on October 3 in a meeting with the Respondent's Vice President Steve Hebert and Sales Manager Jeff Burton; and
>
> 3. The judge's failure to find that the Respondent violated Section 8(a)(1) and (4) by discharging Crump on October 3.

B. Decision on Issues

We adopt the judge's recommended dismissals of the alleged 8(a)(1) threat of discharge by the Respondent's attorney on October 2 and the alleged 8(a)(1) and (4) discharge on October 3 (items 1 and 3, above). We reverse the judge's failure to find an 8(a)(1) threat of discharge on October 3 (item 2, above).

C. Factual Background

The Respondent operates an outdoor advertisement concern, with an office serving the Hartford, Connecticut area. Steve Hebert is the Respondent's vice-president and general manager in charge of the Hartford office. Jeff Burton is the sales manager responsible for a staff of about eight account executives. Gary Crump, the Charging Party, worked for the Respondent as an account executive from December 13, 2000, until October 3, 2002. As an account executive, Crump sold billboard advertising space, serviced existing clients, and sought new clients. As discussed more fully below, in September and early October 2002, the Respondent removed Crump from two major accounts, Sam's Outdoor Outfitters (Sam's) and Cracker Barrel Restaurants, and on October 3, the Respondent terminated Crump.[4]

1. The Sam's account

Problems with the Sam's account began in March, when the artwork for Sam's billboard was repeatedly produced incorrectly. After several failed attempts to get the artwork as the client wanted it, Sam's wrote several letters to the Respondent asserting that under the circumstances it did not wish to pay for the billboard. In its final letter, dated September 13, it stated: "We suggest some person in Baton Rouge get off their duff and call Mr. Gary Crump, your representative in Hartford Conn. for any further information and clarification."

In mid-September, Hebert and Burton arranged to meet with Sam's representatives in an effort to resolve the dispute, persuade the client to pay what was assertedly owed on the account, and retain the client's business. Hebert asked Crump before the meeting if there was anything he should know. Hebert testified that Crump did not provide details about Sam's complaints and that he and Burton were subsequently "ambushed" by the quantity and specificity of the problems the Sam's

[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 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall provide a new Order to reflect the majority findings set forth herein.

[3] All dates are 2002 unless otherwise specified.

[4] The complaint alleges that the removal of the Sam's Outdoor Outfitters account from Crump violated Sec. 8(a)(1) and (4). The judge recommended dismissal of this allegation. Although the General Counsel filed an exception to this recommendation, he does not make any argument in support of it, and he does not include this matter in the issues he specifically identifies as being at issue before the Board. Therefore, we consider the General Counsel to have abandoned this matter.

representatives cited. Hebert testified that he decided to take the account away from Crump on the trip back to the office. The Respondent sometimes took such a "clean slate" approach with difficult clients, by removing the account executive and assigning a new one to the account. On September 18, Crump was informed that he was no longer on the Sam's account.

Crump acknowledged that it was his responsibility to resolve problems like those that arose with the Sam's account, and that Burton and Hebert had asked him for details about the account before they met with the Sam's representatives. Crump testified that he updated Burton and Hebert about the issues, but did not provide them with documentation.[5]

The Respondent ultimately lost the Sam's account.

2. The Cracker Barrel/Dana Volkswagen matter

In early September, Crump negotiated a transaction with Cracker Barrel Restaurants, as mentioned, a major account, but also one of the Respondent's largest national accounts, to rent billboard space that another client, Dana Volkswagen, was already renting. The practice in the Respondent's business was to inform the client occupying the billboard of the situation and allow it to make a better offer. In this case, however, Crump had agreed to rent the space at a lower price than Dana was paying. Because of Crump's mishandling of the transaction, the Respondent was forced to provide Cracker Barrel with free billboard space until the end of the year, and to absorb the costs of moving both billboards.

The Respondent ultimately lost Dana Volkswagen as a client.

Although Dana was not as large an account as Cracker Barrel, the record shows that for the Respondent, the loss of a local client, like Dana, could damage the Respondent's reputation and business prospects, as the good will of local businesses—the "bread and butter" of the Respondent's client base—was a key factor in acquiring and retaining clients. A failure with such a client could result in negative "word-of mouth" regarding the Respondent, and discourage other enterprises from doing business with it.

In attempting to straighten out the Cracker Barrel/Dana matter, Crump bypassed Burton, his immediate superior, and sought a resolution to the problem directly from Hebert. Burton resented his actions and complained to Hebert, who took the view that Crump was calling Burton a liar. Hebert seriously considered discharging Crump, but on September 12, informed Crump that he had decided not to do so.[6]

3. The NLRB subpoena and Crump's discharge

In early 2002, the Communications Workers of America had unsuccessfully attempted to organize the Respondent's employees. Two terminated employees, Rachael Rychling and Kenneth Simmons, filed unfair labor practice charges against the Respondent, alleging, inter alia, that the Respondent had discharged them in violation of Section 8(a)(3) and (1) of the Act. A hearing in the Rychling/ Simmons proceeding was scheduled for October 7.[7]

In mid-September, Crump and two other account executives were subpoenaed by the General Counsel to testify at the hearing. On September 18, Crump informed Hebert about the subpoena. About 30 minutes later, the Respondent's sales manager, Burton, emerged from a meeting with Hebert and told Crump that the Respondent was removing him from the Sam's account because of "customer service." Crump complained that he had not done anything wrong, but Burton replied, "That doesn't matter; that's the way it is."

On October 2, the Respondent's attorney, Clifford Nelson, interviewed Crump about his testimony in the unfair labor practice case mentioned above. Nelson gave Crump a written statement advising him of his rights under *Johnnie's Poultry*.[8] After reading the statement,

[5] The judge found that Crump was not personally responsible for the problems with the Sam's account. Although the record contains testimony by Crump indicating that closer attention to detail might have prevented some of the problems, we find it unnecessary to pass on who was at fault in the alleged mishandling of the account. The focus of the testimony at the hearing concerning the decision to remove Crump from the account was on Hebert's sense that Crump had put him and Burton, and the Respondent itself, in a painful position by failing to apprise them of the extent of the problems with the account.

[6] As with the Sam's Outdoor Outfitters account, above, the complaint also alleges that the removal of the Cracker Barrel account from Crump violated Sec. 8(a)(1) and (4). The judge recommended dismissal of this allegation. Although the General Counsel also filed an exception to this recommendation, he again does not make any argument in support of it, and he does not include this matter in the issues he specifically identifies as being at issue before the Board. Therefore, we consider the General Counsel to have abandoned this matter.

[7] There is no allegation that Crump engaged in union activity related to the unsuccessful campaign

[8] 146 NLRB 770, 775 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965). *Johnnie's Poultry* affords employers an opportunity to question employees in preparation for unfair labor practice hearings, under the following safeguards:

> [T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. [146 NLRB at 775.]

The statement signed by Crump states in its entirety:

Crump expressed some concerns about confidentiality. Nelson told him that, by law, Crump was protected, and that he had nothing to worry about. Changing the subject, Crump then asked Nelson how old he was. When Nelson replied that he was 50, Crump stated that he was 43 and added, "We both know what the reality is, that if the company wants to terminate you, they're going to find a way to terminate you." Nelson replied, "There are loopholes and that's a possibility." Nelson then returned to the subject of the *Johnnie's Poultry* interview, and questioned Crump about Rychling and Simmons' union activities. Crump answered fully and without hesitation. At the end of the interview, Crump again expressed concerns about testifying adversely to the Respondent's interests. Nelson replied, "Gary, we just want you to tell the truth."

Later that day, the Respondent entered into a non-Board settlement of the Rychling/Simmons proceeding. This action resulted in the cancellation of the scheduled hearing and obviated any need for Crump's testimony. The two alleged discriminatees, Rychling and Simmons, were not reinstated under the terms of the settlement.

In other events on October 2, Hebert and Burton told a Cracker Barrel representative that Crump should not have sold Cracker Barrel the advertising space, that the deal had caused another client to suffer financially, and that Crump was going to be removed from the account.

The next day, October 3, the Respondent told its employees about the settlement. Shortly thereafter, Hebert told Crump that he was being removed from the Cracker Barrel account. Although the testimony as to exactly what transpired at that point differs slightly, it is undisputed that Crump told both Hebert and Burton that, if the Respondent took the Cracker Barrel account away from him, he would seek legal advice.

Later on October 3, Hebert and Burton confronted Crump. Hebert said, "You leave me no alternative but to terminate you. *What were you thinking, especially after what just happened to Ken and Rachael*?" Hebert said that he did not really want to fire Crump, and offered Crump the opportunity to dissuade him. They raised Crump's threat to sue the Respondent. Crump replied that he had not threatened to sue, but had merely stated that he was going to seek legal advice. Burton stated, "We're tired of the NLRB poking and digging through our books and records." Hebert said that he was trying to find a way to avoid terminating Crump, and that all Crump had to do was to say that he was not going to seek legal advice and sue the Respondent. Crump refused, saying that today it was Cracker Barrel, tomorrow it could be another account. Hebert told Crump that he was probably right, and that he was terminated.[9] Hebert testified that he viewed the threat to consult an attorney as one more attempt by Crump to avoid the blame for his performance problems.

D. Review of Judge's Findings

The judge dismissed the allegation that Nelson's statement that "there are loopholes and that's a possibility" was an implied threat of job loss related to Crump's having been subpoenaed to testify in a Board hearing and the possibility that his testimony would be adverse to the Respondent. The judge found that Nelson made the "loopholes" statement in the context of an employee interview that in all other respects satisfied the Board's *Johnnie's Poultry* criteria. In addition, the judge noted, Crump admitted that Nelson had assured him that he was protected by law and that the Respondent only wanted him to tell the truth. The judge found that, in that context, Nelson's agreement with Crump's comment about what went on in the "real world" was not an implied threat of job loss because of the subpoena or because Crump would testify adversely to the Respondent's interests. The judge found that Hebert's remark to Crump about "what happened with" Rychling and Simmons created reasonable cause to believe that the Respondent equated Crump's expressed intent to seek legal advice with the initiation of unfair labor practice proceedings against it. The judge, however, recommended dismissal of the 8(a)(1) allegation that the remark constituted an unlawful threat.

Finally, the judge recommended dismissal of the allegation that the Respondent violated Section 8(a)(4) and (1) by terminating Crump because he cooperated with the General Counsel and planned to give testimony in a Board proceeding. In his complaint and at the hearing,

I was interviewed today by Clifford H. Nelson Jr., attorney for Lamar Central Outdoor, Inc. d/b/a Lamar Advertising of Hartford ("the Company"), concerning NLRB Case Nos. 34–CA–10118, 34–CA–10119, and 34–CA–10120.

I was informed that the interview was for the purpose of investigating the unfair labor practice charges and that it was completely voluntary on my part to cooperate or not. I was informed that all questions asked were only those considered relevant and that no information concerning my union sympathies or any activities was desired or sought. I was informed that even if I voluntarily agreed to the interview, if I chose to refuse to answer any particular question or questions I could do so. I was specifically informed that the Company would take no adverse action against me of any kind based on my refusal to answer any questions or cooperate in the interview.

The above statement is true and correct to the best of my knowledge and belief and is signed voluntarily this 2nd day of October, 2002. [Signed] Gary Crump

[9] Hebert and Burton did not specifically deny making the above statements attributed to them by Crump (although Hebert did contradict Crump's general version of the final meeting between them).

the General Counsel's theory of this alleged violation was that the Respondent took the Sam's and Cracker Barrel accounts away from Crump and terminated him because Crump was subpoenaed and was cooperating with the General Counsel in that he was to give testimony to the Board in the Rychling/Simmons case. Although the judge found that the General Counsel met its burden of proving that Crump's cooperation was a motivating factor for the adverse actions,[10] the judge dismissed the allegation, finding that the Respondent would have taken the two accounts away from Crump and terminated him even if he had not been cooperating with the Board.

According to the judge, Crump lost the Sam's account when the Respondent knew nothing more than that Crump was one of three employees who had been subpoenaed, and before it could have been aware that Crump was testifying and the content of Crump's testimony.[11] The judge also found persuasive Hebert's testimony that Crump should have done a better job of resolving the problems with these major accounts before they became so serious. With respect to the Cracker Barrel account, the judge concluded that Burton was equally at fault with Crump, but the Respondent wished to protect Burton, and it did so by making Crump the scapegoat for mishandling the account. However, the Respondent's motivation for doing so was not unlawful under the Act.[12] The judge found that the Respondent terminated Crump when he threatened to consult an attorney over loss of the Cracker Barrel account, which the judge found would have been in Crump's own economic interest and was therefore unprotected by the Act. Thus, he found that the Respondent's motivation for discharging Crump was not unlawful under the Act, and recommended dismissal of the allegation.

E. Findings and Discussion

1. We agree with the judge that Nelson's "loopholes" comment to Crump during the *Johnnie's Poultry* interview did not constitute a threat of discharge in violation of Section 8(a)(1). In addition to the judge's findings, we also note that other factors in Crump's conversation with Nelson militate against an interpretation of Nelson's remark as a threat. Before Nelson made the "loopholes" comment, Crump shifted the subject matter of the discussion sharply away from the subpoena and his upcoming testimony to a different area of concern—the two men's relative ages and, by obvious implication, workplace pressures on employees as they gain in years. It is difficult to fathom why Crump made the remark and what he meant. Given the ambiguity of the remark, it is also difficult to ascertain the meaning of Nelson's response about "loopholes." However, it is the General Counsel's burden to show that the response was a threat to discharge Crump because of his anticipated testimony. The very ambiguity and puzzling nature of the remark and response show that the burden was not met.

We disagree with our dissenting colleague's argument that the "loopholes" comment "trumped" or made hollow the *Johnnie's Poultry* assurances. As described above, Nelson's matter-of-fact comment was elicited by Crump after Crump raised the age issue. In the overall context of the interview, Nelson's comments cannot reasonably be viewed as a threat, either direct or indirect, that the Respondent would discharge Crump because of the subpoena or his testimony at the pending hearing. Indeed, apart from Crump reading the Respondent's written assurances under *Johnnie's Poultry* and Nelson assuring him that he was protected by law, the interview concluded with Nelson reassuring Crump once again when he said, "we just want you to tell the truth."

2. We disagree with the judge's finding that Hebert's "What were you thinking, especially after what just happened to Ken and Rachael?" comments to Crump did not violate Section 8(a)(1), and find that the Respondent violated Section 8(a)(1) by linking Crump's termination to the fates of Rychling and Simmons. Crump was fully aware, when Hebert invoked the situations of Simmons and Rychling as points of comparison for Crump's situation, that they had filed unfair labor practice allegations against the Respondent, and that they were not being reinstated to their jobs under the settlement agreement. Burton provided another link to Board processes when he stated, "we're tired of the NLRB poking and digging through our books and records."[13] We find that Crump could reasonably believe, based on Hebert and Burton's statements, whether they were made intentionally or unintentionally, that the Respondent was linking his termi-

[10] The judge found that Burton's comment that the Respondent "was tired of the NLRB poking and digging through [the Respondent's] book s and records" demonstrated animus. We do not adopt this finding.

[11] The fact that an employer becomes aware that an employee has received a subpoena in a case against the employer does not, standing alone, show that an adverse action taken against the employee was for a retaliatory motive. This appears especially true in this case, where other employees were subpoenaed and were subject to no adverse actions.

[12] The judge characterized the Respondent's treatment of Crump as "unfair." We express no view as to these comments.

[13] Burton's statement that he and Hebert were tired of the NLRB poking in the Respondent's books and records is not alleged to be unlawful, nor do we find it to be so. But taken with the linkage of Crump's statement about seeking legal advice to Rychling and Simmons, we find that this further comment reasonably established a nexus between Crump's situation, the Respondent's unwillingness to undergo another Board investigation, and the threat of discharge.

nation to the Rychling/Simmons proceeding. We further find that Crump could reasonably understand the Respondent's statements as threatening him with discharge if he filed unfair labor practice charges over the loss of the account. Accordingly, we find that the Respondent violated Section 8(a)(1).[14]

3. We agree with the judge that the Respondent's discharge of Crump did not violate Section 8(a)(4) and (1), but for the following reasons. As an initial matter, the General Counsel no longer argues that the removal of Crump from the Sam's and Cracker Barrel accounts violated the Act, and we find these decisions were based on the Respondent's business judgment; they were not motivated by Crump's receipt of the Board subpoena and planned testimony. We further find that the Respondent has successfully established that it discharged Crump for legitimate business reasons, and it would have done so even in the absence of the subpoena and Crump's planned testimony.[15]

In the months immediately preceding the discharge, Crump made serious errors in his handling of at least two major accounts, one of which was one of the Respondent's largest national clients. These errors resulted in significant business losses for the Respondent. Crump admitted that he had been told by the Respondent that he did not accept criticism well, and that he made excuses rather than taking responsibility for problems with his accounts. Moreover, between September 9 and 12, before the Respondent was aware that Crump had been subpoenaed, he came close to being terminated for a conflict with Burton related to the Cracker Barrel account. Finally, although Crump had been a productive account executive, his revenues had begun to fall off, and, according to unrebutted testimony, his problems in collecting fees from his clients persisted. With all this record evidence, we find that, apart from any activity of Crump relating to the unfair labor practice proceeding, the stage was set for Crump's discharge. Although, as the judge found, Crump's threat to consult an attorney was a key element of the termination decision, we find that, as Hebert testified, it underscored the Respondent's conclusion that Crump would not take responsibility for his performance deficiencies, which had recently resulted in the loss of major accounts, and the performance problems were the reason for the discharge. Our conclusion is supported by the fact that neither of the two other employees who were subpoenaed in connection with the Rychling/Simmons proceeding suffered any adverse consequences as a result.

In his exceptions, the General Counsel expands the theory of the violation beyond what was alleged in the complaint and litigated at the hearing. The General Counsel now argues to the Board that Crump's protected activity consisted both in his cooperation with the General Counsel, albeit under subpoena, and his threat to retain counsel, which he alleges, was a threat to file an unfair labor practice charge. The General Counsel argues that a finding that the Respondent violated Section 8(a)(4) and (1) by terminating Crump is important, because employees must feel free to seek recourse from the Board. While we certainly agree with the principle that employees must be able to go to the Board without fear of retaliation or interference, we find no merit in these exceptions.

The complaint does not allege that Crump's threat to retain counsel was protected and a motivating factor in Crump's discharge, and the General Counsel did not seek to amend his complaint and argue this theory of the violation. It is too late for him to do so now. The theory of the General Counsel's allegation, as it was litigated at the hearing and argued to the judge, was that the protected activity at issue was Crump's receipt of a subpoena and subsequent cooperation with the General Counsel in the Rychling/Simmons case. To find that the Respondent violated Section 8(a)(4) and (1) by discharging Crump on a theory that it was in retaliation for his threat to hire an attorney and presumably to file an unfair labor practice charge would violate fundamental principles of procedural due process, which require meaningful notice of a charge and a full and fair opportunity to litigate it.

> The fundamental elements of procedural due process are notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Congress incorporated these notions of due process in the Administrative Procedure Act. Under the Act, "[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted." 5 U.S.C. Section 554(b). To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971). Additionally, "an agency may not change theories in midstream without giving respondents reasonable notice of the change." Id. (quoting *Rodale Press v. FTC*, 407 F.2d 1252, 1256 (D.C. Cir. 1968)).

[14] While we agree with the dissent that the statements of Hebert and Burton in the October 3 meeting with Crump gave Crump *reasonable cause to believe* that Hebert was threatening him with discharge if he filed an unfair labor practice charge against the Respondent, we find in the following section that the record does not establish that Hebert was *in fact* motivated to discharge Crump for this reason.

[15] In view of this finding, we need not reach the issue of whether the General Counsel has established a prima facie case.

Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 357 (6th Cir. 1992). See also *Henry Bierce Co. v. NLRB*, 23 F.3d 1101, 1107 (6th Cir. 1994).

Our dissenting colleague argues that a finding that the Respondent unlawfully discharged Crump because it suspected or believed that Crump planned to file unfair labor practice charges over removal of the Cracker Barrel account is justified under the two-part test set out in *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). We firmly disagree.

In *Pergament*, the Board held that it "may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated" (footnote omitted). Applying this standard the Board adopted the judge's finding that the respondent had violated Section 8(a)(4) and (1) based on the unambiguous testimony of an official of the respondent that he halted the rehire of employees because unfair labor practice charges had been filed. The Board based its finding that the issue had been fully and fairly litigated on this admission, which corroborated the testimony of the General Counsel's witness and was not realistically subject to rehabilitation through rebuttal witnesses. Id. at 335. By contrast, in this case there is no comparable evidence.

Even assuming arguendo that the finding of an 8(a)(4) violation based on the suspicion that Crump planned to file unfair labor practice charges because of the loss of the Cracker Barrel account is closely related to the complaint allegations, the necessary predicates for an 8(a)(4) finding—one, that the Respondent understood Crump's statement that he would hire an attorney if he lost the account to mean that he would file a charge with the Board, as opposed to a civil law suit, and two, that Crump's statement constituted protected concerted activity—were not litigated. Neither the General Counsel nor the Respondent sought to develop evidence on either issue. There was simply no exploration on either direct or cross-examination of what Crump meant or what Hebert understood Crump to be saying. Without such evidence, a violation of Section 8(a)(4) and (1) cannot lie, and finding one would constitute a denial of due process.

Further, even if these procedural problems were surmounted, and even if a reason for discharging Crump was the concern that he was going to file a charge with the NLRB, we find that the Respondent would have fired Crump in any event for the work-related reasons set forth above.

Our dissenting colleague contends that the Respondent's discharge of Crump was "solely and immediately" motivated by Crump's refusal to promise not to seek legal advice, and, as a result, violated Section 8(a)(4) and (1). We disagree for the reasons set forth above.

ORDER

The National Labor Relations Board orders that the Respondent, Lamar Central Outdoor d/b/a Lamar Advertising of Hartford, Windsor, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge employees for filing unfair labor practice charges against it.

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

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

(a) Within 14 days after service by the Region, post at its facility in Windsor, Connecticut, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 34, 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 ensure 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 October 3, 2002.

(b) 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.

Dated, Washington, D.C. September 30, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[16] 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."

MEMBER WALSH, concurring and dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) of the Act on October 3, 2002,[1] by threatening Charging Party Crump with discharge for filing unfair labor practice charges against it.

I disagree with my colleagues, however, that (1) the Respondent's attorney did not threaten Crump with discharge in violation of Section 8(a)(1) on October 2, and (2) the Respondent did not discharge Crump in violation of Section 8(a)(1) and (4) on October 3 because the Respondent believed that Crump was going to file unfair labor practice charges against it. The record establishes these violations.

1. The 8(a)(1) threat of discharge on October 2 by the Respondent's attorney

a. Facts

The Respondent's attorney, Clifford Nelson, interviewed Crump about a pending separate unfair labor practice case against the Respondent. Nelson gave Crump a written statement advising him of his rights under *Johnnie's Poultry*.[2] Crump expressed concerns to Nelson about confidentiality, and Nelson told Crump that Crump was protected by law and did not have to worry about anything. Crump then asked Nelson how old he was. Nelson replied that he was 50. Crump then said that he was 43 and that "we both know what the reality is, that if the company wants to terminate you, they're going to find a way to terminate you." Nelson replied that "there are loopholes and that's a possibility."[3] At the end of the interview, Crump again expressed his concern to Nelson about having talked with Nelson after being subpoenaed by the General Counsel. Crump asked Nelson what he should do if the General Counsel asked him questions about Rychling and Simmons. Crump told Nelson, "I'm damned if I do and damned if I don't." Nelson told Crump, "We just want you to tell the truth."

b. Analysis and conclusions

(1) Applicable principles

It is a violation of Section 8(a)(1) of the Act for an employer to threaten to discharge an employee for cooperating in a Board investigation.[4] The standard for determining an 8(a)(1) violation is whether the employer engaged in conduct that reasonably tends to interfere with the free exercise of employees' Section 7 rights.[5] This standard is objective; the subjective perceptions of individual employees are not taken into account.[6] And the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on an employer's motive or on whether the coercion succeeded or failed; the test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.[7]

(2) Application of principles

Nelson's remark constitutes an 8(a)(1) threat of discharge for cooperating in the Board's investigation. Nelson's reference to "loopholes" could reasonably be understood by Crump as a reference to loopholes in the written statement of *Johnnie's Poultry* safeguards that Crump had just been given only moments before, or, more generally, loopholes in the Respondent's legal obligation not to terminate Crump for unlawful reasons. The Respondent's written presentation of *Johnnie's Poultry* safeguards to Crump does not immunize Nelson's subsequent unlawful remark made during the interview. Accordingly, Nelson's earlier statement to Crump, that Crump was protected by law and had nothing to worry about, was trumped and made to ring hollow by Nelson's subsequent reference to "loopholes" in direct response to Crump's suggestion that the Respondent could find a way to discharge him, notwithstanding Nelson's statement that Crump was protected by law.

[1] All dates are 2002 unless otherwise stated.

[2] 146 NLRB 770, 775 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965). My colleagues have set out the *Johnnie's Poultry* safeguards and the related statement signed by Crump in the course of his interview with Nelson.

[3] I disagree with my colleagues that Crump was changing the subject when he asked Nelson how old he was, and in turn volunteered his own age. There was nothing in Nelson's interview, either before or after Crump's question, that even remotely supports the notion that Crump was suddenly, but only momentarily, shifting the entire focus of the discussion at that point from Crump's expressed concern about confidentiality in the Respondent's *Johnnie's Poultry* interview to an amiable rumination about workplace pressures on employees as they grow old at ages 43 and 50. A far more reasonable inference to be drawn from Crump's question at this point in the interview about how old Nelson was, and his reciprocal disclosure of his own age to Nelson, is that Crump was implying to Nelson that they were both well experienced in workplace and employment matters by this time in their working lives, and that Crump and Nelson both understood based on their experience that, notwithstanding the facially reassuring language in the Respondent's written statement of *Johnnie's Poultry* safeguards that Crump had just signed, he was not beyond the reach of possible adverse action by the Respondent based on his disclosures during the interview. Nelson immediately agreed with Crump's experience-driven assessment by acknowledging that there were loopholes and that termination was a possibility.

[4] See, e.g., *Morgan Services*, 284 NLRB 862, 862 fn. 3 (1987) (employer's threats of reprisal if employees cooperated with Board in investigation of unfair labor practice charges and objections to election violated Sec. 8(a)(1)); *Certain-Teed Products*, 147 NLRB 1517, 1519–1520 (1964) (employer's statements that employees need not voluntarily cooperate with Board investigation violated Sec. 8(a)(1)).

[5] See, e.g., *American Freightways Co.*, 124 NLRB 146, 147 (1959).

[6] See, e.g., *Curwood, Inc.*, 339 NLRB No. 148, slip op. at 4 (2003).

[7] See, e.g., *American Freightways Co.*, supra, 124 NLRB at 147.

Again, this is not a question of whether Nelson intended to threaten Crump with discharge, or even whether Crump subjectively in fact felt threatened, but rather a question of whether, objectively, Crump could reasonably understand Nelson's reference to "loopholes," and (in response to Crump's assertion) the "possibility" of being terminated, as a threat of discharge for conduct detrimental to the Respondent—notwithstanding the written *Johnnie's Poultry* safeguards that Nelson had just presented to Crump. Crump reasonably could have perceived such a threat, and the Respondent therefore violated Section 8(a)(1) by making it.

2. The 8(a)(1) and (4) discharge of Crump on October 3

a. Facts

Crump separately told Hebert and Burton on the morning of October 3 that he was going to seek legal advice if the Respondent took the Cracker Barrel account away from him. At the start of Crump's meeting with Hebert and Burton that afternoon, Hebert said, "You leave me no alternative but to terminate you. What were you thinking, especially after what just happened with Ken [Simmons] and Rachael [Rychling]?" (i.e., the alleged discriminatees in the unfair labor practice case that had just settled the day before). Hebert then told Crump that Hebert did not want to fire him, and that Crump should try to talk Hebert out of it. Thereafter, Hebert and Burton brought up Crump's asserted "threat to sue" them. Crump replied that he had not threatened to sue, but only said that he was going to seek legal advice. Burton said, "We're tired of the NLRB poking and digging through our books and records." Hebert said that he was trying to find a way to avoid terminating Crump, and that all Crump had to do to avoid termination was to say that he was not going to seek legal advice and not going to sue them. Crump would not say that, because in his expressed view, today it was Cracker Barrel, but tomorrow it could be another account. Hebert told Crump that he was probably right, and that he was terminated.

b. Analysis and conclusions

(1) Applicable principles

It is a violation of Section 8(a)(1) and (4) of the Act for an employer to take action against an employee because the employer believes, or even suspects, that the employee plans to avail himself of the Board's services.[8] This is so even if the employee himself does not in fact intend to avail himself of the Board's services.[9] The analytical framework set forth in *Wright Line* [10] (which involved an 8(a)(3) discharge) is applicable to the 8(a)(4) situation involved here,[11] because the Respondent argues that Crump was discharged because of poor work performance.

In order to establish an 8(a)(1) and (4) violation under *Wright Line*, the General Counsel must first establish that the Respondent suspected or believed that Crump was going to file unfair labor practice charges against it; that the Respondent harbored animus toward Crump based upon this suspicion or belief; and that the Respondent took an adverse employment action against Crump. Proof of the above elements would shift the burden to the Respondent to establish an affirmative defense to the unlawful discharge allegation. Under *Wright Line*, the Respondent must do more than show that it had reasons that could have warranted discharging Crump. Rather, the Respondent must show by a preponderance of the evidence that it would have discharged Crump even in the absence of its belief or suspicion that he was going to file unfair labor practice charges against the Respondent.[12]

(2) Application of principles

First, the record establishes that the Respondent suspected or believed that Crump was going to file unfair labor practice charges against it over the removal of the Cracker Barrel account. Crump told Hebert and Burton only that Crump was going to seek legal advice if the Respondent took the Cracker Barrel account away from him. But Hebert responded to that by rhetorically asking Crump what Crump was thinking, especially after what just happened to Rychling and Simmons, whom Hebert, Burton, and Crump all knew had recently been discharged after filing unfair labor practice charges against the Respondent. For his part, Burton responded to Crump's stated intent to seek legal advice by telling Crump that the Respondent was tired of the NLRB pok-

[8] See, e.g., *National Surface Cleaning*, 314 NLRB 549 (1994), enfd. 54 F.3d 35 (1st Cir. 1995); *Trayco of S.C.*, 297 NLRB 630, 636 (1990), enf. denied mem. 927 F.2d 597 (4th Cir. 1991).

[9] See, e.g., *National Surface*, supra at 552, where the Board found that Sec. 8(a)(4) is applicable when an employer discriminates against an employee because the employer suspects him of filing a charge or giving testimony; *Trayco*, supra, where the employer violated Sec. 8(a)(1) and (4) when a supervisor issued a written warning because the supervisor believed that the employee's threat to "go over the head" of the employer's president with a pay dispute/requested raise was actually a threat to file charges with the Board (although the employee herself did not in fact make any threat to go to the Board). 297 NLRB at 635–636.

[10] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 NLRB 393, 399–403 (1983).

[11] See, e.g., *Montag Oil*, 271 NLRB 665 (1984).

[12] See *Wright Line*, supra, 251 NLRB at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

ing and digging through the Respondent's books and records, presumably in the course of conducting an investigation. The record establishes, therefore, that the Respondent clearly equated Crump's statement of intent to seek legal advice as a threat to file unfair labor practice charges against the Respondent with the Board.

Second, the record also establishes that the Respondent harbored animus toward Crump based upon its suspicion or belief that he was going to file unfair labor practice charges against it. Specifically, the Respondent unlawfully threatened to discharge Crump when Hebert told Crump that by threatening to seek legal advice (which, in the Respondent's eyes, was a threat to file unfair labor practice charges against it) if the Respondent took away the Cracker Barrel account, Crump had left Hebert with no alternative but to discharge him. In addition, the timing of the discharge, immediately upon Crump's refusal to promise the Respondent that he would not seek legal advice or sue the Respondent (which, in the Respondent's eyes, was a refusal to promise not file unfair labor practice charges against it) also establishes the Respondent's animus toward him based upon its suspicion or belief that he was going to file unfair labor practice charges against it.

Finally, the Respondent ultimately took adverse employment action against Crump by discharging him.

Because the General Counsel has therefore met his evidentiary burden under *Wright Line* as described above, the burden shifts to the Respondent to establish that it would have discharged Crump even if it did not believe or suspect that he was going to file unfair labor practice charges against it. The Respondent has failed to meet that burden.

Hebert testified that he decided to terminate Crump because of Crump's track record of customer service complaints, with the Cracker Barrel/Dana Volkswagen issue being the last straw, and Crump's unwillingness to take responsibility for any of the problems that arose with his clients. Hebert testified that Crump's threat to seek legal advice did not affect his decision to terminate Crump, other than to confirm his belief that Crump was unwilling to take responsibility for any mistakes he made.

The Respondent's assertion that Crump was terminated because of poor job performance culminating in the Cracker Barrel incident is belied by the sequence of discussion at what turned out to be Crump's discharge meeting on the afternoon of October 3. Compelling evidence establishes that the Respondent discharged Crump not because of any job performance shortcomings, but solely and immediately because of his refusal to promise not to seek legal advice and not to sue the Respondent, which the Respondent considered to be a refusal to promise not to file unfair labor practice charges against it. Thus, when Crump met with Hebert and Burton on the afternoon of October 3, a few hours after telling each of them separately that he was going to seek legal advice if the Cracker Barrel account was taken away from him, Hebert first unlawfully threatened to discharge Crump because of what the Respondent believed to be Crump's plan to file unfair labor practice charges against it. Crump told Hebert and Burton that Crump was not threatening to sue the Respondent, only to seek legal advice about the removal of the Cracker Barrel account. But, as established above, the Respondent demonstrably construed Crump's threats to seek legal advice as a threat to file unfair labor practice charges against it. Nevertheless, Hebert next told Crump that Hebert did not want to fire Crump and that Crump should try to talk Hebert out of it. But the focus of the discussion soon shifted back to Crump's stated intent to seek legal advice. Burton then said that the Respondent was tired of the NLRB poking and digging through the Respondent's books and records. Again, however, Hebert told Crump that Hebert was trying to find a way to avoid discharging Crump, and that all Crump had to do to avoid being discharged was to promise not to seek legal advice and sue the Respondent. Crump refused to make that promise and Hebert immediately discharged him.

Thus, notwithstanding any and all of Crump's asserted job performance shortcomings, until the precipitous moment in the meeting between Crump, Hebert, and Burton on the afternoon of October 3, the Respondent admittedly and manifestly did not want to discharge Crump, and Hebert was purposefully trying to find a way to avoid doing so. The Respondent discharged Crump only when Crump refused to promise not to seek legal advice and sue the Respondent, which the Respondent perceived as a refusal to promise not to file unfair labor practice charges. The record therefore establishes that, but for what the Respondent perceived to be Crump's refusal to promise not to file unfair labor practice charges against it, the Respondent would not have discharged him. Accordingly, the Respondent did not meet its burden of establishing that it would have discharged Crump even if it did not believe or suspect that he was going to file unfair labor practice charges against it. Consequently, Crump's discharge violates Section 8(a)(1) and (4) of the Act.

I disagree with my colleagues that the Respondent cannot properly be found to have been unlawfully motivated to terminate Crump because of its suspicion or belief that Crump was going to file unfair labor practice charges against it over the Respondent's removal of the

Cracker Barrel from Crump, assertedly because this theory of the alleged unlawful termination was not set out in the complaint or litigated at the hearing.

It is well established that the Board may find and remedy a violation not specifically alleged in the complaint without violating a party's due process rights if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Under the instant circumstances, a finding that the Respondent violated Section 8(a)(1) and (4) of the Act by discharging Crump because the Respondent suspected or believed that Crump was going to file unfair labor practice charges over removal of the Cracker Barrel account meets the *Pergament* two-part test.

With respect to the first part of the test, the complaint alleged that the Respondent violated Section 8(a)(1) and (4) by, inter alia, discharging Crump because he planned to testify against the Respondent in a Board unfair labor practice proceeding. A close connection exists between that allegation and the question whether the Respondent violated Section 8(a)(1) and (4) by discharging Crump because the Respondent believed that Crump was planning to file unfair labor practice charges against the Respondent. In both instances, the lawfulness of the Respondent's motivation for discharging Crump is directly at issue.

With respect to the second part of the test, the record reveals that the Respondent had a full and fair opportunity to litigate the issue of its motive for discharging Crump. The Respondent raised no objection to Crump's testimony on direct examination that he threatened to seek legal advice over removal of the Cracker Barrel account from him in his separate morning conversations with Hebert and Burton on October 3, and in his termination meeting with Hebert and Burton together that afternoon. Indeed, the Respondent itself specifically questioned Crump on cross-examination about his threats to seek legal advice during his separate morning meetings with Hebert and Burton. In addition, both Hebert and Burton testified for the Respondent, but neither of them denied making the statements at issue attributed to them by Crump during the October 3 meeting. Finally, Hebert was questioned on direct examination about whether Crump's threat to seek legal advice played a part in Hebert's decision to discharge him. Although the General Counsel objected to the leading nature of the question, the judge overruled the objection and permitted Hebert to answer it on the grounds that although the question was leading, it was "intended to rebut something specifically," and permissible on those grounds. (Hebert answered no to the question.) Under these circumstances, there has been fair and full litigation of the issue of whether the Respondent discharged Crump because the Respondent believed that Crump was going to file unfair labor practice charges against the Respondent. Consequently, there is no due-process barrier to finding and remedying the serious unfair labor practice that the Respondent committed.

Dated, Washington, D.C. September 30, 2004

Dennis P. Walsh, Member

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to discharge our employees for filing unfair labor practice charges against us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights set forth above.

LAMAR CENTRAL OUTDOOR D/B/A LAMAR ADVERTISING OF HARTFORD

Quesiyah S. Ali, Esq. and *Thomas E. Quigley, Esq.*, for the General Counsel.

Cliford H. Nelson, Jr., Esq. and *Leigh Tyson, Esq. (Wemberly, Lawson, Steckel, Nelson & Schneider, P.C.)*, of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Hartford, Connecticut, on April 1–3, 2003. Gary Crump, an individual, filed the charge on October 11 and

amended it on November 22, 2002.[1] The complaint issued December 10, alleging that Lamar Central Outdoor, Inc. d/b/a Lamar Advertising of Hartford (the Respondent) violated Section 8(a)(1) and (4) of the Act. Specifically, the complaint alleges that the Respondent violated Section 8(a)(1), through its alleged supervisors and agents, by threatening Crump with unspecified reprisals because he engaged in protected concerted activities, threatening him with job loss because he had been subpoenaed by the General Counsel in connection with an unfair labor practice hearing; and informing Crump that he was being terminated because he had been subpoenaed. The complaint alleges that the Respondent also violated Section 8(a)(1), through Sales Manager Jeff Burton, by threatening employees with loss of bonuses because the General Counsel had issued subpoenas to Crump and several other employees. Finally, the complaint alleges that the Respondent took certain customer accounts away from Crump and terminated him, in violation of Section 8(a)(1) and (4), because he cooperated with the General Counsel and planned to give testimony in a Board proceeding. The Respondent filed its answer to the complaint on December 23, denying the unfair labor practice allegations.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the production and sale of outdoor advertising at its facility in Windsor, Connecticut, where it annually derives gross revenues in excess of $500,000 and purchases and receives goods valued in excess of $50,000 directly from points outside the State of Connecticut. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Evidence

The Respondent, which is headquartered in Baton Rouge, Louisiana, is a national company that owns and operates outdoor advertising structures, commonly referred to as billboards. The facility in Windsor, Connecticut (the Hartford office), is one of 153 local offices throughout the United States. The Respondent acquired the Hartford office when it purchased another outdoor advertising company in 1999. The Hartford office operates, maintains, and services billboards in Connecticut and in western Massachusetts. The Massachusetts operation became part of the Respondent's business in the fall 2000 when the Respondent acquired a company called Springfield Advertising. Currently, the Hartford office consists of the facility in Windsor and an operations facility in Springfield, Massachusetts. [2]

At the time relevant to these proceedings, the Respondent employed 22 individuals in the Hartford office. Steve Hebert is the Respondent's vice president and general manager in charge of the Hartford office. Jeff Burton is the sales manager responsible for a staff of about eight account executives, including the Charging Party. The Respondent also employed several other managers and administrative and clerical employees in Windsor and an operations crew in Springfield. The Springfield employees were already represented by the Painters Union when the Respondent acquired that facility. The employees working out of the Windsor office were unrepresented.

Crump, the Charging Party, began working for the Respondent on December 13, 2000, as an account executive. He was paid a salary and received commissions and bonuses based on his individual sales performance as well as bonuses tied to the performance of the office. When he was hired, Lynn Terlaga was the general manager and Drew Driscoll was the sales manager. Hebert replaced Terlaga in March 2001 and Burton replaced Driscoll in September 2001. As an account executive, Crump was responsible for selling and servicing outdoor advertising on the Respondent's billboards.[3] Crump acknowledged that he was expected to maintain existing clients and find new ones, through cold-calling if necessary. Crump also conceded that as the Respondent's account representative he was the primary link between the clients and the Respondent and was expected to oversee things from negotiation of the initial contract for outdoor advertising space through production of the advertising material to posting on the billboard, resolving any issues that might come up along the way.

In approximately March, the Communications Workers of America attempted to organize the Respondent's Hartford employees. In early May, the Union and two individuals, Rachael Rychling and Kenneth Simmons, filed unfair labor practice charges against the Respondent. Those charges led to issuance of a complaint by the Board's Regional Director on July 30. The complaint alleged independent violations of Section 8(a)(1) of the Act, allegedly committed by Hebert, and the termination of Rychling and Simmons as violative of Section 8(a)(1) and (3) of the Act.[4] The hearing on the complaint was scheduled for October 7. The parties stipulated that the General Counsel issued subpoenas to three of the Respondent's current employees, Crump, David Angeli, and Eric Lambert, to appear as witnesses at the hearing. On or about October 2, the Respondent entered into a non-Board settlement of the case with the Union and the individual Charging Parties. By Order dated December 17, the Board's Regional Director approved withdrawal of the charges conditioned on the Respondent's compliance with the

[1] All dates are in 2002 unless otherwise indicated.

[2] The employees at the Springfield facility are responsible for hanging the advertisements on the outdoor structures and maintaining those structures.

[3] At the hearing, the witnesses referred to billboards, bulletins, and posters. For ease of reference, I will use the term billboards to refer to all the outdoor structures.

[4] I took official notice of the pleadings in the earlier cases, Cases 34–CA–10118, 34–CA–10119, and 34–CA–10120, at the request of the General Counsel. I make no findings as to the merits of the allegations in the earlier complaint, which have been settled and were not litigated before me.

terms of the non-Board settlement.[5] The allegations in the instant case relate to the Respondent's treatment of Crump after he received the subpoena.

Crump testified that he was initially contacted by a Board agent during the investigation of the charges that were filed in May. According to Crump, he met with the Board agent in the Board's Hartford Regional Office but declined to give an affidavit, expressing a fear of retaliation. Crump was again contacted by the Board's agents in September about testifying in the unfair labor practice trial scheduled for October 7. Crump told the Board's counsel that he would only cooperate if subpoenaed because he feared losing his job. On September 13, counsel for the General Counsel issued a subpoena ad testificandum to Crump, which he recalled receiving the next day.[6] Crump testified that he anticipated that he would be testifying about the meetings held by Hebert on the subject of the Union and about Rychling's and Simmons' union activities. There is no evidence that the Respondent was aware of Crump's contacts with the Board before he received his subpoena or of the substance of the testimony he was expected to give.

Crump testified that, on September 18, he went into Hebert's office and told Hebert that he had been subpoenaed to testify in the unfair labor practice case. According to Crump, Hebert replied that he figured it was Crump, Eric (Lambert), and Dave (Angeli), and that Dave had already told Hebert he had been subpoenaed.[7] Crump testified further that he saw Burton go into Hebert's office after he informed Hebert about the subpoena. Crump recalled that Burton came out of Hebert's office about 30 minutes later and told Crump that they were thinking of taking the Sam's Outdoor account away from Crump.[8] When Crump asked why, Burton responded, "customer service." Crump then told Burton that he hadn't done anything wrong and Burton replied that "doesn't matter; that's the way it is." Burton also told Crump that it hadn't been decided yet, they were just thinking about it. When Crump returned to the office in the afternoon, Burton told him that the Respondent was going to take the Sam's account away from him and that he wouldn't be getting his commission for the contract that had just been signed.

Crump testified that problems with the Sam's account began in March when Lamar Graphics, the Respondent's affiliate in Louisiana, produced the wrong size poster for the billboard Sam's had contracted to use. When the poster was reproduced at the right size, the client was unhappy because a topographical map in the ad was faint and not as visible as in the original version. The record reveals it took several attempts to get the poster put up to the client's satisfaction and that the client had written several letters to the Respondent's Hartford office and its billing department in Baton Rouge objecting to being billed for the period that the ad was not properly posted. The last letter in evidence is dated September 13 and ends with the following sentence:

> ***We suggest some person in Baton Rouge get off their duff and call Mr. Gary Crump, your representative in Hartford Conn***. for any further information and clarification. [Emphasis in original.]

It is undisputed that after the last letter Hebert and Burton drove to Vermont to meet with the client to try to resolve the dispute. Hebert testified that he asked Crump before going to this meeting if there was anything he should know. Hebert testified that Crump did not provide any details regarding the clients' complaints and that, when he and Burton met with the client, they were "ambushed" with a file several inches thick. Hebert testified that it was on the way home from Vermont that he decided to take the account away from Crump. Although he was called as a witness for the Respondent, Burton was not asked any questions about this matter.

Crump acknowledged that as the account representative it was his responsibility to work with the client to resolve issues like those that were raised by Sam's. Crump acknowledged being asked about the account by Burton and Hebert before they went to Vermont for their meeting with the client. According to Crump, he did update Burton and Hebert regarding the issues with Sam's, although he did not provide them with any documents. In any event, it is clear from the evidence that Crump was not responsible for the errors and delays in getting the ad posted in accordance with the contract. It also appears that the client never complained about Crump's handling of the account.

Crump testified that on the same day that he informed Hebert about the subpoena and lost the Sam's account Burton held an impromptu sales meeting with all the account executives.[9] According to Crump, Hebert was also present. Crump recalled that Burton expressed his concern that the office was $68,000 short of its monthly space budget.[10] Burton asked the employees how they were going to make up the difference. He replied by going out and selling. Crump also recalled that Burton told the account executives to be "creative" in finding sources of revenue. According to Crump, Burton told the employees that they would lose their bonuses for the remainder of the year if they did not make up the $68,000 shortfall. After this sales meeting, Crump, Lambert, and Angeli met with Hebert who told them that because they had been subpoenaed they would

[5] Because the General Counsel has not attempted to revoke approval of the withdrawal of the prior charges, I must infer that the Respondent satisfactorily complied with the terms of the settlement agreement.

[6] The parties stipulated that Angeli and Lambert were subpoenaed at about the same time as Crump.

[7] Angeli, who testified as a witness for the Respondent, recalled that he mentioned to Hebert, in passing, that he had been subpoenaed. He could not recall any response from Hebert.

[8] Sam's Outdoor Outfitters is a store in Brattleboro, Vermont, that caters to outdoor enthusiasts and had a contract with the Respondent for a billboard in Massachusetts. Sam's was one of Crump's accounts.

[9] It is undisputed that weekly sales meetings are usually held on Friday mornings. September 18, 2002, was a Wednesday.

[10] The space budget, according to Crump, is the income received from rental of billboard space. The monthly budget is the total of all revenue, including from sale of advertising, production of advertising materials, etc. Crump testified that the Respondent had already met its monthly budget by the time of this meeting.

have to meet with the Respondent's attorney when he came to the Hartford office to prepare for the trial.[11]

The Respondent chose not to ask Burton any questions about this meeting. The Respondent did ask Angeli about it. According to Angeli, Burton held a meeting with the employees in September to discuss the upcoming fourth quarter. Burton told the employees that the Respondent was going into the quarter short of its goals and that they needed to make up the difference. Angeli testified that Burton then jokingly told the employees that if they didn't make up the difference, he would take the money he lost out of their paychecks. Angeli explained that Burton's compensation, as sales manager, was more directly tied to the overall performance of the office and he would be hurt more by a shortfall than the individual account executives. Angeli described this meeting and Burton's statements as typical of the motivational tools used by a sales manager to inspire the sales people. Dan Giordano, another account executive who was called as a witness by the Respondent, was also asked generally about Burton's practice of holding sales meetings. According to Giordano, if the Respondent was not making budget, Burton would tell the employees this and would offer some kind of incentive to get them to increase their sales. If employees did not make the goal set, they would not get whatever incentive was offered. Giordano did not testify specifically about the meeting that Crump described.

There is no dispute that Crump met with the Respondent's attorney, Clifford Nelson, on October 2. It is also undisputed that Nelson gave Crump a written statement advising him of his rights under the Board's *Johnnie's Poultry*[12] decision and that Crump read and signed this statement before being interviewed by Nelson. No one else was present during the interview. Crump testified that on reading the statement he expressed some concerns about confidentiality and Nelson told him that by law Crump was protected and that he didn't have anything to worry about. Crump then asked Nelson how old he was. Nelson replied that he was 50. Crump then said that he was 43 years old and "we both know what the reality is, that if the company wants to terminate you, they're going to find a way to terminate you." Crump testified that Nelson replied, "There are loopholes and that's a possibility." According to Crump, Nelson then proceeded to ask Crump questions about the duties and responsibilities and the union activities of the alleged discriminatees and whether they were open about such activities. Crump answered the questions without hesitation, confirming for Nelson that both discriminatees, Rychling and Simmons, were active in support of the Union. At the end of the interview, Crump again expressed his concerns about being in the position he was in, i.e.,, having talked to Nelson after being subpoenaed by the General Counsel. Crump testified that Nelson told him that the Board would probably ask him questions about Rychling and Simmons. When Crump asked Nelson, "What should I do? I'm damned if I do and damned if I don't." Nelson replied, "Gary, we just want you to tell the truth." Because Nelson did not take the stand to testify in this proceeding, Crump's testimony about his meeting with the Respondent's attorney was not contradicted

Crump testified that, earlier the same day, Hebert told him to call Joey Boykin and ask him to "end his day in Hartford,"referring to the Respondent's Hartford office. Boykin was a field account manager for Buntin Out-of-Home Media, the advertising agency for one of Crump's accounts, Cracker Barrel Restaurant. Boykin was scheduled to be in town for a market visit, i.e., to check on the advertising that his agency had placed in the local market. Crump did as Hebert instructed. Later that day, Crump introduced Boykin to Hebert and Burton when Boykin came into the Hartford office as requested. According to Crump, he saw Boykin again as he was finishing up his interview with Attorney Nelson. Hebert came into the room and told Crump that he was finished his meeting with Boykin and Nelson suggested Crump attend to his client. Crump and his wife went out to dinner with Boykin that evening. According to Crump, Boykin told him, over dinner, that he was concerned that Hebert was not very happy about a contract that Crump had recently negotiated with Boykin for a Cracker Barrel billboard and had tried to renegotiate the deal. Boykin spent the night at Crump's house and the next morning, over breakfast, told Crump that Hebert had also suggested, during their meeting the previous day, that he was going to take the Cracker Barrel account away from Crump and make it a house account, i.e., one serviced by the sales manager. Boykin told Crump he thought Crump should be aware of this before going into the office.

According to Crump, the issue regarding the Cracker Barrel billboard began in about June when Boykin expressed interest in moving an ad from a billboard owned by a competitor of the Respondent to one owned by the Respondent that was already occupied by another of the Respondent's clients, Dana Volkswagen. Crump testified that he discussed this with Burton, Hebert, and Dave Angeli, who was Dana's account executive. Crump testified that Hebert said if they could get more money from Cracker Barrel for the billboard and take them away from a competitor, it was a win-win situation. Dana Volkswagen had a pre-emptible contract for that space which meant that its ad could be bumped by another client willing to pay more for the space. Crump testified that there was another billboard available where Dana's advertising could be moved. By August, Crump had negotiated the details of a 3-year contract with Boykin, i.e., $2200/month for the first 12 months, increasing in each succeeding year. On August 20, Boykin's agency faxed a contract for the Respondent to sign confirming the agreement to place a Cracker Barrel ad on the Dana billboard. The record shows that Boykin's agency faxed two more requests that the Respondent sign this contract, on August 23 and 29, the last one designated as "urgent" because the ad was scheduled to go up October 1 and needed to be produced. Crump testified that he had several conversations with Burton about getting the contract signed. The apparent cause of the delay in finalizing the contract was the Respondent's efforts to find a satisfactory result for Dana, which was unhappy about being bumped from their billboard. Although the evidence in the record shows that

[11] Angeli also recalled the three subpoenaed employees telling Hebert, after a sales meeting, that they had been subpoenaed. Again, he did not recall any specific response from Hebert to this information.

[12] 146 NLRB 770 (1964).

Burton signed the contract with Boykin's agency on August 30, the issue continued to fester into September.[13]

Crump testified that in early September[14] he approached Burton and Angeli who were in Burton's office about the Dana Volkswagen board, telling them that they needed to resolve the issue because Cracker Barrel was scheduled to go up October 1. Burton instructed Angeli to get Dana's contract. Crump went with Angeli to retrieve the contract and, while doing so, "poked his head in Hebert's office" and asked if they could "pick his brain" about an issue. Angeli followed Crump into Hebert's office. Crump then proceeded to tell Hebert about the contract with Cracker Barrel and its impact on Dana's ad. Crump admittedly prefaced his remarks to Hebert with the statement, "I hate to go over Jeff [Burton]'s head, but." While Crump was discussing the issue with Hebert, Burton came into the office and said he needed to speak to Crump and Angeli right away. According to Crump, when they got into the hallway, Burton angrily said, "Gary, don't you ever go over my head again." The three men then walked toward Burton's office. After Angeli went back to his cubicle, Burton asked to speak to Crump alone. According to Crump, Burton said, "Don't ever go over my head again or I'll make your life so miserable you can't stand it."

The next day, Crump told Hebert about Burton's "threat." Hebert called Burton into the office and relayed what Crump had just reported. Burton denied making the statement attributed to him by Crump. According to Crump, Hebert said this was a serious situation, calling one of his managers a liar. Crump said that they were calling him a liar. Hebert then asked Burton how he should handle this and Burton said he thought Crump needed to resign. Crump replied that he was not going to resign. Hebert told Crump he wanted to think about it. He told Crump to come back at the end of the day. When Crump returned, at about 4 p.m., he spoke to Kathie Houghton about Burton's threat. Houghton is the Respondent's office manager and, according to Crump, the designated human resources representative for the Hartford office. Crump testified that when he told Houghton that Burton was calling him a liar, Houghton said "B . . . S . . . I heard part of it and Dawn Thibodeau heard it too." Thibodeau is the Respondent's billing coordinator. She works at a desk in front of Houghton.

Houghton, who testified for the Respondent, corroborated Crump's testimony in substantial part. Houghton recalled seeing Crump and Angeli go into Hebert's office with Burton following them in there several minutes later. She recalled seeing all three men leave Hebert's office and heard Burton yelling at Crump and Angeli about having gone over his head. According to Houghton, she and Thibodeau looked at one another with expressions of shock at Burton's conduct. Houghton also corroborated Crump's testimony that he came to see her about this incident in her role as a liaison with ~~personnel in Louisiana. She recalled,~~ however, that Crump She recalled, however, that Crump came to see her the same day that Burton yelled at him. Houghton denied hearing Burton make any threats to Crump or Angeli.

After his conversation with Houghton, Crump met with Hebert. Hebert told Crump he was upset that he had spoken to Houghton about the issue. Crump asked who else was he supposed to talk to. Hebert then brought Burton in and said that he thought he had a resolution but, because Houghton said she heard part of the conversation, he needed to think about it overnight. Crump testified that "out of the blue" Burton and Hebert brought up new "versus" renewal contracts. Although Crump explained the difference between new and renewal contracts and testified that the Respondent had a formula of new and renewal contracts account executives were expected to have, he did not testify precisely what Hebert and Burton said about this issue in the meeting.[15] The next morning, according to Crump, Hebert told him that after a sleepless night he had decided he was not going to terminate Crump over this incident, that it had been blown out of proportion.

The General Counsel called Boykin as a witness. Boykin was no longer employed by Buntin at the time of the hearing, having left employment on good terms in November. According to Boykin, Cracker Barrel was one of Lamar's largest accounts nationwide and used to getting whatever it wanted in terms of location and pricing of ad space. Boykin recalled, contrary to Crump, that it was Crump who first broached the subject of Cracker Barrel taking over the billboard occupied by Dana.[16] Boykin testified that because Cracker Barrel was locked into a contract with another billboard company at the time he told Crump he could not make a move at that time but would consider it when the other contract came up for renewal. These conversations occurred in the spring. Boykin testified further that when the time came for Cracker Barrel to renew its contract for the other board he again spoke to Crump about moving to the Dana board. After he and Crump reached an agreement on the terms of a contract for that board, Boykin sent the proposal to his client, Cracker Barrel, which signed off on it, and then had his office fax a contract to the Respondent for signature. Boykin identified the three requests sent to Respondent between August 20 and 29 as emanating from his office. After the third request was sent, Boykin spoke to Crump about the issue. According to Boykin, Crump told him that the Respondent did not want to sign the contract because the rate was too low. After Boykin spoke to Burton, Burton signed and returned the contract to Buntin and the advertisement was prepared and posted by October 1 as agreed.

Boykin testified that he heard nothing further about this issue until he came to Hartford for a market visit on October 1 or 2. During that visit, he verified that the ad was posted in the new location and was satisfactory. At the end of his visit, he went to the Respondent's Hartford office, as requested by Crump and

[13] It is undisputed that Burton has the authority to review and initial contracts but only Hebert can sign a contract.

[14] Earlier in his testimony, Crump placed this conversation as occurring on the same day he told Hebert that he had been subpoenaed by the General Counsel. Later, he testified that it occurred on September 9. He finally acknowledged that he could not recall whether it happened before or after he received his subpoena.

[15] A weekly sales report summary for the week ending September 13 reveals that Crump had the lowest ratio of new to renewal contracts of any account executive.

[16] When recalled as a Rule 611(c) witness by the Respondent, Crump admitted that he was the one who first suggested the Dana billboard to Boykin.

met with Burton and Hebert. Hebert did most of the talking for the Respondent at this meeting. According to Boykin, Hebert said that Crump shouldn't have sold Boykin that board at that price. He told him that Dana, which had been paying more for the space, was very unhappy about being moved. Boykin told Hebert and Ross that while he was sorry to hear this there was nothing he could do about it, that his client had a signed contract for that location at an agreed-upon rate and he was not going to change it. Boykin recalled that Hebert asked during this meeting how Crump had done as his account representative. Boykin testified that he replied that there had been a few problems, citing the incident in late 2000 when Cracker Barrel had been taken down from a board without its consent, but that Crump was eager and had resolved any problems that came up. Hebert also told Boykin in this meeting that he was going to take Crump off the account. Boykin testified that he replied it was their decision to make. Boykin testified that it appeared that Hebert and Burton blamed Crump for the problem that arose over Cracker Barrel bumping Dana off the board. Boykin testified that he told Crump about Hebert's plans to remove him from the Cracker Barrel account over dinner, not breakfast, as Crump recalled. Boykin also acknowledged that it was not unusual for a sales manager or general manager to service the Cracker Barrel account, that Lamar's practice varied from office to office.

Boykin testified that the Cracker Barrel/ Dana Volkswagen dispute was resolved, after Crump's termination, by Dana's ad being returned to the billboard it had been occupying and the Cracker Barrel ad being moved to another location further north. This arrangement was to last through the end of the year, at which point Dana's ad would come down and the Cracker Barrel ad would go back to the location specified in the contract signed by Burton on August 30. According to Boykin, the Respondent was to bear the costs involved in producing new advertising material and taking down and putting up Cracker Barrel and Dana's ads. In addition, the Respondent agreed not to bill Cracker Barrel for the rest of the year while its ad was on a different billboard than that specified in the contract.

Angeli also testified regarding the Cracker Barrel/Dana Volkswagen issue. He recalled that Crump first approached him in August about Cracker Barrel bumping Dana off its billboard. Angeli acknowledged that, because of its pre-emptible contract, Dana was always at risk of being bumped off the board by another client willing to pay more for the space. Angeli testified that the practice, however, is to give the holder of a pre-emptible contract an opportunity to match or beat the higher rate being offered by the other client. According to Angeli, Crump did not do this. Angeli testified that after the initial conversations about Cracker Barrel bumping Dana, he heard nothing further until he learned that a contract with Cracker Barrel had already been signed at a lower rate than Dana was paying. Specifically, he recalled that Crump never told him, before the contract was signed, the terms of Crump's offer to Cracker Barrel.

Angeli recalled being in Burton's office in early September with Crump when he learned that Cracker Barrel had a signed contract for Dana's board. Angeli admits that he was upset that his client had not been given a chance to match the rate offered to Cracker Barrel. Angeli conceded that because Cracker Barrel was a national account and a bigger client than Dana it would probably get whatever it wanted. Angeli recalled Burton asking him to pull the Dana contract. He and Crump left Burton's office and went to the file cabinets outside Hebert's office to pull the contract. According to Angeli, Crump went into Hebert's office while he got the contract. Next thing he knew, Angeli was called into Hebert's office. Angeli recalled that Hebert did not appear to be familiar with the issue and seemed surprised to learn that there was a signed contract with Cracker Barrel. While he and Crump were discussing the issue, Burton came into Hebert's office. Angeli recalled Hebert telling Burton to "wait till you're a General Manager before you start signing contracts." He also recalled Hebert telling Burton to take his account executives and resolve the problem. Angeli testified that Burton was "mad" and that on leaving Hebert's office Burton told him and Crump that he was not happy with their going over his head to talk to Hebert. According to Angeli, the three men returned to Burton's office, he stated his case and went back to his cubicle, telling Burton and Crump that they had to work it out and let Angeli know what he was supposed to do with Dana. Crump was still in Burton's office when he left. Angeli confirmed Boykin's testimony regarding the compromise that ultimately resolved the issue. According to Angeli, he lost Dana as a client when its contract ran out in December, despite having proposed a number of different locations to replace the board it lost to Cracker Barrel.

Burton also testified about the incident with Crump and Angeli. He recalled that this meeting occurred in late August. According to Burton, this was the first discussion he had with either of them about the disputed billboard. Burton recalled that after Crump and Angeli laid out the facts he asked them to retrieve a copy of the Dana contract to verify that it was pre-emptible and what rate they were paying. After Crump and Angeli left his office, Burton waited about 10 minutes and then went to look for them. He admitted being surprised and "very upset" to find them in Hebert's office discussing the issue. He told them to return to his office so they could work it out without involving the general manager. Burton admitted telling Crump and Angeli not to go over his head again, but denied making any threat to Crump. According to Burton, the matter escalated after this meeting. Although Burton believed he made notes of this incident, none were produced. The only handwritten note from Burton offered into evidence is dated October 3, the date of Crump's termination, and refers only to the removal of the Cracker Barrel account from Crump and Crump's "threat..to hire a lawyer to protect his income."

Hebert confirmed Crump's testimony that Crump complained to him that Burton had threatened to "make his life so miserable he couldn't stand it" after Crump had gone over his head to talk to Hebert about the Cracker Barrel/Dana billboard dispute. Hebert investigated this complaint by meeting with Burton and Angeli to get their versions of what happened. The Respondent offered into evidence handwritten notes made by Hebert in the course of investigating Crump's complaint. Hebert's notes are dated August 27 and Hebert testified that he believed that was the date he conducted the investigation. The handwritten notes essentially corroborate the testimony of the

other witnesses as to their respective versions of the event with one exception. Hebert's notes indicate that Crump also stated that Burton told him he would "fry his ass." Crump denied that Burton said this or that he told Hebert that Burton said this. Hebert's notes also do not reflect that he spoke to Houghton about Burton's alleged threat even though Houghton herself recalled being asked about it by Hebert.

Crump testified that after having breakfast with Boykin on October 3 he went into the Hartford office. Sometime after he arrived, Hebert called the employees together and announced that the Respondent had settled the unfair labor practice case for a specified amount of dollars and that this was good for the company and good for the employees who had been subpoenaed. According to Crump, Hebert said the subpoenaed employees wouldn't have to feel uncomfortable and worry that their jobs were in jeopardy. Hebert admitted gathering the employees together and telling them that the case had been settled. He also admitted telling the employees that this was good for the company and that nobody would have to testify. He specifically denied telling the employees that the subpoenaed employees wouldn't have to worry about their jobs being in jeopardy. None of the employees who testified in the Respondent's case recalled learning about the settlement at a meeting. Angeli testified that he learned from the Board's counsel, not the Respondent, that he did not have to testify.

Immediately after this meeting, Crump asked to speak to Hebert about what Boykin had told him over breakfast. Hebert confirmed what Boykin had told Crump, i.e., that the Respondent was going to take the Cracker Barrel account away from him. When Crump asked why, Hebert said that Crump had taken Cracker Barrel down without their permission. Crump said that was correct but that Hebert knew about it. Crump then reminded Hebert that this had occurred when the Respondent had a dispute with a landowner, Peter Picknelly, over leases for billboards in Massachusetts and that the account executives had been instructed not to tell the clients that the billboards were coming down until the last minute.[17] According to Crump, although Hebert agreed with his recollection of the events, he told Crump that they were taking the account away from him anyway. Crump denied that Hebert cited the more recent issue with the Cracker Barrel/Dana Volkswagen board as the reason for this action. Crump then told Hebert that he hoped he wouldn't go through with this because, if he did, Crump would have very little alternative than to seek legal advice. At that point, according to Crump, Hebert told him to get out of his office.

After leaving Hebert's office, Crump went to see Burton. According to Crump, Burton told him the decision was not "written in stone yet." Crump told Burton that he hoped they changed their mind because, if they took Cracker Barrel away from him, he would have no alternative but to seek legal advice. According to Crump, Burton did not give him any reason why the Respondent was considering removing the account from him. Crump left the office to go out to work after his conversation with Burton.

Hebert testified that he took Crump off the Cracker Barrel account because of what happened with the Dana Volkswagen board. According to Hebert, Crump should not have promised Cracker Barrel that location at the rate he did because it caused problems for the Respondent with one of its largest national clients as well as with a local client. Hebert specifically denied that the earlier issue with Cracker Barrel, when they were removed because of the Picknelly lease dispute, had anything to do with his decision to remove Crump from the account. Hebert testified further that, when Crump asked him, on October 3, why Hebert was taking the account away, he told Crump that it was because of the "many discussions they had about his lack of attention to detail and paperwork that caused problems like this." According to Hebert, he told Crump that his actions had caused problems for the Respondent with a national and local client and that they couldn't have it happen again. Hebert testified further that Crump said he was going to hire a lawyer. According to Hebert, he responded to this by telling Crump to "do what you feel you need to do." Burton was not asked any questions by the Respondent's counsel about this issue.

When Crump returned to the office in the afternoon, on October 3, Hebert called him into his office. Burton was also there. According to Crump, Hebert said, "You leave me no alternative but to terminate you. What were you thinking, especially after what just happened with Ken and Rachel?" Hebert told Crump he didn't want to fire him and he asked Crump to "talk me out of it." Crump responded that his numbers speak for themselves, that he had billed $1.3 million for the current year and almost $490,000 for the next year. He told Hebert that if he was going to start terminating people because of their numbers, that there were a lot of people whose numbers were lower. Burton then interjected that Crump was not committed to the Company. When Hebert asked Crump what he thought of Burton's comment, Crump responded with examples of his commitment to the Company. According to Crump, Hebert and Burton then brought up his "threat to sue" them. Crump replied that he did not threaten to sue them, he only said he was going to seek legal advice. Crump testified that Burton then said, "We're tired of the NLRB poking and digging through our books and records." Crump recalled that Hebert wrapped up the meeting by telling Crump that he was trying to find a way out of this, that all Crump had to do was say he was not going to seek legal advice and sue them. Crump replied that he could not say this because today it was Cracker Barrel, tomorrow it could be another account. Hebert responded, "You're probably right." Hebert told Crump that he was terminated and that he would contact Crump later to discuss severance and COBRA. According to Crump, Hebert did contact him later that evening and asked for a couple days so Hebert could talk to "corporate" and come back with a settlement offer that would be agreeable to everyone. Crump testified that Hebert never did contact him again with such an offer.

Burton was not asked any questions about Crump's termination and the meeting at which Crump was informed he was terminated. Burton did not specifically deny the statement attributed to him by Crump about the NLRB. Hebert testified that

[17] There is no dispute that the Picknelly lease dispute occurred in late 2000-early 2001 and was resolved shortly after Hebert took over as General Manager.

he made the decision to terminate Crump and that he relied on Crump's track record of customer service complaints with the Cracker Barrel/Dana Volkswagen issue being the last straw. According to Hebert, it was Crump's unwillingness to take responsibility for any of the problems that arose with his clients that persuaded him to take the drastic step of termination. Hebert acknowledged that his memory regarding the meetings was "fuzzy" and he exhibited confusion regarding some of the meetings. Nevertheless, he claimed that he reviewed with Crump at this meeting all of the issues in his "critical incident file" and that the meeting lasted several hours. Hebert denied that Crump's "threat" to seek legal advice affected his decision other than to confirm his belief that Crump was unwilling to take responsibility for any mistakes he may have made. Hebert did not specifically contradict Crump's testimony that Hebert referred to Rychling and Simmons when discussing Crump's "threat to sue." Hebert also did not specifically contradict Crump's testimony that Hebert said during this meeting that all Crump had to do to avoid termination was say he wasn't going to seek legal advice and sue them. Although Hebert and Burton referred in their testimony to a "critical incident file," which Burton apparently started maintaining sometime in June, no such file was offered into evidence.[18]

In an attempt to show disparate treatment, the General Counsel offered into evidence documents purported to be written warnings given to other employees before they were terminated. Hebert conceded that he has in some situations issued written warnings to employees before terminating them. Hebert testified further that it is his practice to try to work with an employee, or "coach" them, before taking the step of termination.[19] He claimed that he, in fact, did this with Crump. According to Hebert, he met with Crump on numerous occasions to discuss customer complaints, Crump's lack of attention to details and poor paperwork. He conceded that there was no written documentation of these "coaching" sessions. Although Crump denied receiving any warnings before his termination that his job was in jeopardy, he did acknowledge having discussions with Burton and Hebert about issues that arose with his clients. While disagreeing with Respondent's counsel's characterization of these discussions during cross-examination, Crump did acknowledge being told by Burton and Hebert that he did not take constructive criticism very well and always made excuses. He did not say when this occurred.

Finally, the General Counsel offered, as rebuttal evidence, the position statement submitted by the Respondent's attorney on November 22, during the investigation of Crump's charge. During the investigation, the Respondent took the position that Crump was discharged for poor customer service and unsatisfactory job performance.[20] As examples, the Respondent's attorney cited the same issues with some of Crump's accounts that it developed at the hearing through cross-examination and Rule 611(c) examination of Crump.[21] In the position statement, counsel also claimed that Crump's sales performance had declined after April 2002, attaching documents to support this claim. Similar documents were introduced at the hearing. Although Hebert did not emphasize the declining sales performance in his testimony, he did refer to it when question by counsel for the General Counsel and the Respondent. Moreover, the documentary evidence does support the claim that Crump's sales performance, including his solicitation of new business, had declined, even though he had already made his yearly budget by the time of his discharge. Finally, the Respondent's counsel, in the position statement, cited Crump's handling of the Cracker Barrel/Dana Volkswagen billboard dispute as the event that triggered his termination. Hebert's explanation at the hearing of his reason for discharging Crump over this dispute was almost identical to counsel's claim in the position statement that Crump sold a billboard that was already under contract to a local client to one of the Respondent's biggest national clients for less than the local client was paying, resulting in a loss of revenue to the Respondent.

B. Analysis

1. 8(a)(1) allegations

The complaint alleges that the Respondent, through Burton, violated Section 8(a)(1) of the Act on or about September 9 by threatening Crump with unspecified reprisals because Crump concertedly complained to Hebert about Burton's supervision. This allegation is based on Crump's testimony that Burton told him, after he and Angeli had met with Hebert about the Cracker Barrel/Dana dispute, "don't ever go over my head again or I'll make your life so miserable you can't stand it." Burton denied making this statement. No other witness could corroborate Crump as to this particular statement because it was uttered when he and Burton were alone in Burton's office. I credit Crump's testimony that the statement was made because it is consistent with the testimony of other witnesses that Burton was angry and yelled at Crump and Angeli in the hallway about their having gone over his head. Considering Burton's state of mind at the time, it is likely he did go further and threaten Crump when the two of them were alone in his office.

Crediting Crump's testimony does not end the analysis with respect to this allegation because the threat is unlawful only if directed at concerted activity that is protected under the Act. It is clear that the threat was made by Burton because he believed

[18] During the course of the hearing, the Respondent offered a number of documents, including correspondence regarding some of Crump's accounts, into evidence and questioned Crump and other witnesses about problems that arose with specific clients, some dating to a year or more before Crump's termination. It was never explicitly stated that these were the "incidents" in Crump's file that Hebert relied on to terminate Crump.

[19] Although Hebert identified four other employees he terminated for poor performance and a fifth who he terminated because of a customer complaint, no specifics were provided regarding what led to the termination of each. In light of the absence of such evidence, it is impossible to determine whether the circumstances surrounding their terminations were comparable to that of Crump.

[20] This is similar to the reason identified by Hebert on a termination report he prepared on October 4, i.e., "poor performance regarding customer service."

[21] Although Crump disputed most of the claims made by Respondent's counsel regarding these accounts, the issues cited at the hearing regarding these accounts do not differ from those cited in the position statement.

Crump and Angeli had "gone over his head" when he found them in Hebert's office discussing the Cracker Barrel/Dana issue. Burton was, in fact, correct in his belief. There is no dispute that Crump took it upon himself to "pick [Hebert's] brain" for a creative solution to the dispute at a time when he and Angeli were in the midst of a meeting with Burton over the same issue. Although Crump testified that he solicited Angeli's agreement to bring the matter to Hebert, I find Angeli's testimony, that Crump went into Hebert's office first and then he was called in, more credible. Thus, there was nothing concerted about Crump's activity. Even assuming Crump and Angeli did discuss soliciting Hebert's input before they went into the office to discuss the matter, the subject of the meeting, i.e., what to do about the competing claims to the billboard, is not a matter protected by the Act. No employee right within the broad definition of Section 7 was implicated by this essentially routine workplace encounter. I specifically find that the General Counsel has not proved that Crump and Angeli concertedly complained about Burton's supervision. Crump's sole interest in going into Hebert's office that day was to get a favorable resolution for his client to the dispute to protect his commission. While Burton's threat in response to this was unprofessional and inappropriate, it did not rise to the level of an unfair labor practice under the Act. Accordingly, I shall recommend dismissal of this allegation of the complaint.

The complaint alleges that the Respondent, again through Burton, violated Section 8(a)(1) of the Act on or about September 18, by threatening employees with the loss of bonuses because the General Counsel had issued subpoenas to several employees, including Crump, in connection with the unfair labor practice trial in the prior case. The General Counsel relies upon Crump's testimony about the impromptu sales meeting Burton held on the same day Crump informed Hebert that he had been subpoenaed. Burton did not specifically contradict Crump's testimony regarding this allegation. At the same time, no other employee who was allegedly present when the threat was made corroborated Crump. Angeli, who was called as a witness by the Respondent recalled a different meeting, one at which Burton referred to the Respondent's shortfall going into the fourth quarter and "jokingly" threatened to take any bonuses he lost out of the employees' pay if the Respondent did not improve in the next quarter.

I find it unnecessary to make any credibility resolution with respect to this allegation because I find that even if Crump were credited the statements attributed to Burton would not violate the Act. I note, in particular that Crump did not testify that Burton linked the potential loss of bonuses to the upcoming unfair labor practice trial or the issuance of subpoenas. The only connection between Burton's alleged threat and the issuance of subpoenas is the timing of the alleged statement. The fact that Burton told employees they would lose their bonuses if they did not make up a budget shortfall on the same day that Crump and Angeli told Hebert that they had been subpoenaed is nothing more than a coincidence. Without any express linkage by Burton in his statements to employees, it is unlikely the employees would reasonably believe that the potential loss of bonuses had something to do with the trial or the fact that some of them had received subpoenas. In fact, there is no evidence that any employees, other than those who had been subpoenaed, even knew that subpoenas had been issued. In making these findings, I also note the testimony of Angeli and Giordano that it was not uncommon to have sales meetings and to offer incentives to the account executives to push them to meet their goals. I find that Burton's statement on September 18 was nothing more than a motivational sales tool unrelated to any activity protected by the Act. Accordingly, I shall recommend dismissal of this allegation as well.

The complaint alleges that the Respondent, through its attorney and agent, Nelson, violated Section 8(a)(1) of the Act on or about October 2 by impliedly threatening Crump with job loss because he had informed the Respondent that he had been subpoenaed by the General Counsel to testify at the unfair labor practice hearing and that his testimony would be unfavorable to the Respondent. The General Counsel relies upon Crump's uncontradicted testimony that, during his meeting with Nelson in preparation for the trial, Nelson said, "there are loopholes and that's a possibility" in response to Crump's statement that if a company wants to terminate an employee, it's going to find a way to do it.

While there is no dispute that such a statement was made, it occurred in the context of an employee interview that in all other respects satisfied the Board's Johnnie's Poultry requirements. Crump acknowledged reading and signing a written statement of his rights under that decision, he confirmed that Nelson told him he was protected under the law and that he didn't have anything to worry about, and he admitted that, when he asked Nelson what he should do, Nelson told him that all the Respondent wanted him to do was tell the truth. Only when Crump pushed him to acknowledge "the reality" that an employer will find a way to rid itself of an employee it didn't want did Nelson acknowledge this grim reality. I find that Nelson's agreement with Crump's description of the "real world," when considered in the context of the entire interview, did not amount to an implied threat of job loss because Crump had been subpoenaed or was going to testify adversely to the Respondent. Accordingly, I shall recommend dismissal of this allegation as well.

Finally, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act on October 3 when Hebert allegedly informed Crump that he was being terminated because he had informed the Respondent that he had been subpoenaed by the General Counsel to testify at the unfair labor practice hearing and that his testimony would be unfavorable to the Respondent. Crump did not testify that this was the reason he was given when Hebert terminated him on October 3. Rather, Crump testified that Hebert opened the meeting on October 3 by saying, "you leave me no alternative but to terminate you. What were you thinking, especially after what happened with Ken [Simmons] and Rachel [Rychling]" and that Hebert ended the meeting by saying that "all Crump had to do [to avoid termination] was say he was not going to seek legal advice and sue them" and that Hebert told him he was terminated when he wouldn't say this. Hebert did not specifically deny making these statements but he did contradict Crump's version of the final meeting between them.

Looked at narrowly, the General Counsel has not met his burden with respect to this allegation because there is no evidence that Hebert in fact told Crump specifically that he was being terminated because of the subpoena or because of his expected testimony at the unfair labor practice hearing which, by October 3, was no longer going forward. The statements attributed to Hebert by Crump are subject to the interpretation that Crump was being fired because he had indicated his intent to seek legal advice over the Respondent's removal of the Cracker Barrel account. Hebert's alleged reference to what had just happened with the two alleged discriminatees in the prior unfair labor practice case suggests that Hebert may have linked Crump's desire to seek legal advice with those two former employees having pursued charges with the NLRB. Under this analysis, it could be argued that Hebert was essentially telling Crump he was being fired for threatening to file a charge with the NLRB. However, even assuming the complaint allegation were broad enough to cover this theory of a violation, I am not prepared to reach this conclusion. As will become apparent in the next section of this decision, I find that Hebert's reference to Crump's perceived threat to sue was not a reference to his having been subpoenaed by the Board. Moreover, because there is no evidence that Crump ever told Hebert that his testimony at the unfair labor practice hearing was going to be unfavorable to the Respondent, Hebert could not have cited this as a factor in his decision to terminate Crump. In sum, I find that even considering Crump's testimony in the most favorable light, the General Counsel has not proved that the Respondent told Crump that his being subpoenaed or his participation in the Board's unfair labor practice proceedings was the reason for his termination. Accordingly, I shall recommend dismissal of this allegation. In the next section of this decision, I will address the question whether, irrespective of what Hebert said on October 3, he in fact terminated Crump because of he had been subpoenaed.

2. The 8(a)(1) and (4) allegations

The complaint alleges that the Respondent took the Sam's Outdoor and Cracker Barrel accounts away from Crump on September 18 and October 3, respectively, and terminated Crump on October 3 because Crump cooperated with the General Counsel and planned to give testimony to the Board in the prior unfair labor practice case. Because resolution of this issue turns on motivation, the Board's decision in *Wright Line*[22] is applicable. Under *Wright Line*, the General Counsel bears the initial burden of proving by a preponderance of the evidence that protected activity, such as participation in a Board proceeding, was a motivating factor in the employer's decision to take adverse action against an employee. To meet this burden, the General Counsel must offer evidence that the employer was aware of the employee's protected activity, and had animus against such activity motivating the employer to take the action it did. The Board has recognized that direct evidence of an unlawful motivation is rarely available. The General Counsel may meet his burden through circumstantial evidence, such as timing and disparate treatment, from which an unlawful motive may be inferred. See *Naomi Knitting Plant*, 328 NLRB 1279 (1999), and cases cited therein. However, mere suspicion is not enough to sustain the General Counsel's burden. *King's Terrace Nursing Home*, 229 NLRB 1180 (1977). See also *New Otani Hotel & Garden*, 325 NLRB 928 (1998); *Alexian Bros. Medical Center*, 307 NLRB 389 (1992). If the General Counsel meets his burden, then the burden shifts to the respondent to prove by a preponderance of the evidence that it would have taken the same action, or made the same decision, even in the absence of protected activity. To meet its burden, a respondent simply has to show that it "possessed a good-faith belief (e.g., not one that was the result of a discriminatory failure to investigate) that [the employee] engaged in misconduct and that that belief was the motivating cause of the discharge." *Doctor's Hospital of Staten Island, Inc.*, 325 NLRB 730 fn. 3 (1998). See also *Rockwell Automation/Dodge*, 330 NLRB 547, 549–551 (2000).

It is undisputed that Crump was subpoenaed to testify in the prior unfair labor practice case by the General Counsel. I credit Crump's testimony, over Hebert's denial, that Crump informed Hebert that he had received a subpoena on September 18. Angeli corroborated Crump to the extent he testified that the three subpoenaed employees, Crump, Angeli, and Lambert, met with Hebert in September and told Hebert that they had all received subpoenas. In any event, the Respondent was aware that Crump was going to be a witness for the General Counsel by the time Crump met with attorney Nelson on October 2. Although there is no evidence that Crump told Hebert what he was going to testify about, he did provide information to Nelson on October 2 indicating that, at the least, he would corroborate the union activity of the two alleged discriminatees. To the extent that proof of such activity was a critical element in the General Counsel's case against the Respondent, this information would put the Respondent on notice by October 2 that Crump's testimony would be adverse to the Respondent.[23] As previously noted, there is no evidence that the Respondent was aware before September 18 of any participation by Crump in the investigation or prosecution of the prior unfair labor practice charges.

Having recommended dismissal of the independent 8(a)(1) allegations, the only remaining evidence of animus on the part of the Respondent is Burton's statement during Crump's discharge meeting that the Respondent was "tired of the NLRB poking and digging through our books and records." Because Burton is still employed as the Respondent's sales manager and would be expected to be favorably disposed to the Respondent, I must draw an adverse inference from the Respondent's failure to question Burton about this comment. *Queen of the Valley Hospital*, 316 NLRB 721 (1995). Such a comment is evidence that the Respondent did not view NLRB investigations favorably. In addition, Crump's testimony that Hebert asked, "what were you thinking, especially after what just happened with

[22] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

[23] Because the Respondent admitted that Nelson was its agent for purposes of representing the Respondent in the unfair labor practice case, any knowledge he had must be imputed to the Respondent.

Ken and Rachel" another reference to the unfair labor practice charges that had just been settled, is further evidence of animus that was not contradicted by the Respondent.

The timing of the Respondent's actions against Crump, i.e., removing the Sam's Outdoor account on the same day that Crump told Hebert that he had been subpoenaed and removing the Cracker Barrel account and terminating him soon after Crump met with Attorney Nelson, strongly supports an inference that Crump's participation in the unfair labor practice case played a role in the Respondent's decision to take these actions. Further support for such an inference can be found in the seemingly abrupt nature of the Respondent's actions, there being no dispute that the Respondent took these actions without warning Crump in advance of the possibility he could lose two valuable accounts and his job. In this regard, I find that whatever conversations occurred beforehand among Crump, Burton, and Hebert, regarding specific issues that cropped up involving Crump's handling of his accounts, were not sufficient to put him on notice that his livelihood and job were in jeopardy.

Because the General Counsel has proved knowledge and animus and sufficient circumstances to support an inference of unlawful motivation, I find that the General Counsel has met his initial burden of proof in this case. The burden was thus on the Respondent to show, notwithstanding the strong indication that it took adverse action against Crump because he had been subpoenaed, that it would have acted the same even in the absence of the subpoena. Resolution of this issue is complicated by the coincidence of events here. Specifically, Crump was subpoenaed and suffered these adverse actions at the same time that the Respondent was dealing with significant problems on two of Crump's accounts. Although the problems with the Sam's Outdoor account began 6 months earlier, they apparently came to a head in September when Burton and Hebert went to Vermont to meet with the client, shortly after receiving the last angry letter from this client. Crump was removed from the account shortly after Burton and Hebert returned from Vermont. Similarly, the dispute over the Cracker Barrel/Dana Volkswagen billboard was being played out in August and September, reaching a head on October 2, when Hebert met with Boykin in an unsuccessful attempt to renegotiate the Cracker Barrel contract that had been proposed by Crump and signed by Burton. Under these circumstances, it is almost impossible to know, with any certainty, which was the true motivating factor, the Respondent's animus toward Crump's participation in the NLRB proceeding, or its displeasure with the way he was handling his accounts.

After careful consideration, I have concluded that the weight of the evidence establishes that the Respondent would have taken the two accounts away from Crump and terminated him even had he not been subpoenaed by the Board. I have reached this conclusion notwithstanding the fact that Crump was not the cause of Sam's disagreements with the Respondent and notwithstanding the fact that it was Burton, not Crump, who signed the contract with Cracker Barrel before a resolution was reached with Dana Volkswagen, even though Burton had no authority to do so. I reach this result because I found Hebert's testimony, that Crump should have done a better job of resolving the problems with Sam's before they reached the point they did and that Crump should not have undersold the local client, persuasive. With respect to the removal of the Sam's account, Hebert's testimony was bolstered by the testimony of Angeli that, at times, the best way to handle a difficult client is to change account representatives, essentially to start over with a clean slate. Moreover, the removal of the Sam's account took place at a time when the Respondent knew no more than that Crump was one of three employees who had been subpoenaed by the General Counsel. Because the Respondent took no adverse action against the other two, the balance tips in favor of a nondiscriminatory motive for this particular action.

The Cracker Barrel/Dana Volkswagen dispute is more troublesome. Although Crump may have erred in promising the billboard to Boykin at a lower rate than Dana was paying for the same spot and in not advising Angeli beforehand that this was the offer being extended to Cracker Barrel, Burton erred in signing a contract committing the Respondent to these terms without authorization. While Crump lost the account and was terminated over this, Burton apparently suffered no adverse consequences for his involvement in the dispute. This set of circumstances suggests that Crump was unjustly terminated. The same set of circumstances also suggests that the true motivation behind this unjust discharge was not Crump's subpoena but Burton's and Hebert's desire to protect Burton and make Crump the scapegoat for the problems caused by the Cracker Barrel contract. Any injustice suffered by Crump at the hands of the Respondent, however, is not one cognizable under the Act.[24]

The timing of the Respondent's decisions to remove Crump from the Cracker Barrel account and terminate him also tip the balance in favor of the Respondent. The decision to remove Crump from the account was made after Boykin had refused Hebert's request to renegotiate the contract, and the decision to terminate Crump was made after he informed the Respondent that he was going to seek legal advice if they took this account away. By the time these decisions were made, the unfair labor practice case had been settled, eliminating the possibility that Crump would testify adversely to the Respondent. There was thus no reason, at the time, to retaliate against Crump for his participation in the Board's processes. I find, as noted above, that the Respondent's true motivation for taking Crump off the Cracker Barrel account is that described above, i.e., to make Crump the fall guy for the problems that arose between Cracker Barrel and Dana Volkswagen. I also find that the Respondent decided to go further and terminate Crump when it believed he was going to hire a lawyer and sue the Respondent for taking the account away. Crump's "threat to sue" was not protected activity under the Act because it is clear that he intended to seek legal advice to protect his individual interest in income from this account rather than to promote any common interest among the Respondent's employees.

In conclusion, I find that the General Counsel has not proved by a preponderance of the evidence that the Respondent took the actions it did against Crump because he had been subpoe-

[24] I express no opinion on what, if any, private cause of action Crump may have against the Respondent. That is a matter for discussion between Crump and an attorney of his choosing.

naed and planned to testify in a Board proceeding. Accordingly, I shall recommend dismissal of this allegation of the complaint.

CONCLUSION OF LAW

The Respondent has not committed any unfair labor practices in violation of Section 8(a)(1) and (4) of the Act, as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 7, 2003

[25] 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.