

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-1165

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

ACCURATE TOOL & MANUFACTURING, INC.
d/b/a ACCURATE WIRE HARNESS

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") for enforcement of its order against Accurate Tool & Manufacturing, Inc. d/b/a Accurate Wire Harness ("the Company"). The

Board's Decision and Order issued on September 19, 2001, and is reported at 335 NLRB No. 91. (D&O 1-20, A 7-26.)¹

The Board had jurisdiction of the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which empowers the Board to prevent unfair labor practices affecting commerce. The Board's jurisdiction is uncontested. This Court has jurisdiction over the proceeding under Section 10(e) of the Act (29 U.S.C. §160(e)) because the unfair labor practices occurred in Springboro, Ohio. The Board's order is properly appealable because it is a final order under Section 10(e) of the Act (29 U.S.C. §160(e)). The Board filed its application for enforcement on February 8, 2002. The Board's application was timely filed; the Act places no time limits on such filings.

¹ In this final brief, "A" references are to the joint appendix. Other references are to the original record. "D&O" refers to the Board's Decision and Order, including the decision of the administrative law judge. "Tr" refers to the hearing transcript. "GCX" and "RX" refer to the exhibits introduced at the hearing by the General Counsel and the Company, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by threatening to discharge employees and by discharging 12 employees for engaging in a protected concerted walkout.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by suspending and discharging employee Tammy Jackson for allegedly engaging in walkout-related misconduct that did not in fact occur.

STATEMENT OF THE CASE

This unfair labor practice case came before the Board on a consolidated complaint issued by the Board's General Counsel pursuant to charges filed by Tammy Jackson, an individual, alleging that the Company violated Section 8(a)(1) and (4) of the Act (29 U.S.C. §158(a)(1) and (4)). On June 30, 2000, following a hearing, Administrative Law Judge Nancy Sherman issued a decision finding that the Company violated Section 8(a)(1) of the Act by threatening employees with discharge if they engaged in a protected walkout and discharging 12 employees for engaging in a protected walkout. The judge also found that the Company violated Section 8(a)(1) and (4) of the Act by suspending and discharging employee Tammy Jackson for alleged misconduct arising out of her protected activity.

The Company filed exceptions to the judge's decision. The Board (Members Liebman, Truesdale and Walsh) issued a Decision and Order affirming the judge's rulings and finding that the Company violated Section 8(a)(1) of the Act by threatening employees, by discharging 12 employees for engaging in a protected walkout, and by suspending and discharging employee Tammy Jackson. The Board found it unnecessary to pass on the judge's conclusion that Jackson's suspension and discharge also violated Section 8(a)(4) of the Act. The Board filed an application in this Court for enforcement of its order.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company Changes Its Personnel Policies; the Employees Complain to Management About the Changes

The Company is engaged in the manufacture of wire harnesses at its facility in Springboro, Ohio. (D&O 4, A 10; Tr 21, A 143 (Jackson).) At that facility, the Company employs 18 employees in its automotive department and 7 employees in its steel-case department. (D&O 4, A 10; Tr 26, 32, A 146, 151 (Jackson).) The Company's employees are not represented by a union. (D&O 4, A 10; Tr 25, A 25 (Jackson).)

The Company maintained a 30-page policy manual that included rules governing attendance and punctuality. (D&O 4, A 10; Tr 398-99, A 227-28

(Fernandez), RX 6, A 88-90.) Under those rules, the employees received disciplinary "points" for each unexcused absence. Employees who received a sufficient number of such points were subject to various disciplinary measures, including a written warning, suspension, and discharge. The employees did not receive disciplinary points for excused absences, and an illness with a doctor's slip was deemed an excused absence. (D&O 4, A 10; RX 6, A 88.)

In early 1999, the Company distributed a seven-page document that changed some of the policy manual's rules. (D&O 4, A 10; Tr 488, A 261 (Fernandez), RX 7, A 110-16.) Under the new rules, an illness with a doctor's slip was no longer deemed an excused absence. (D&O 4, A 10; Tr 183, A 187 (S. Brown), RX 7, A 115.) The new rules also reduced the number of points necessary to trigger disciplinary measures. (D&O 4, A 10; Tr 35-36, A 152-53, (Jackson), RX 7, A 116.) On various occasions, employee Tammy Jackson and other employees complained to management about those changes and asked management to provide an up-to-date policy manual that clarified the changes. (D&O 4, A 10; Tr 26-29, 35-36, A 146-49, 152-53 (Jackson).) Jackson and other employees also complained to management that they were often required to work up to 15 minutes of overtime without being paid at the overtime rate or without being paid at all. (D&O 4, A 10; Tr 29-30, 37-38, A 149-50, 154-55 (Jackson).)

In early June 1999, Company President Nestor Fernandez announced that every steel-case employee would receive a wage increase of \$1.00 per hour. Fernandez also stated that the Company "would get to [the other employees]" at a later time. (D&O 4-5, A 10-11; Tr 250-52, A 206-08 (K. Brown), Tr 183, A 187 (S. Brown).) During June and early July, employees complained to management about that wage increase, stating that newly hired steel-case employees would be paid more than newly hired automotive employees, and that in some cases newly hired steel-case employees would be paid more than veteran automotive employees. Management replied that the Company was "working on" a wage increase for the other employees. (D&O 4-5, A 10-11; Tr 26, 32, A 146, 151 (Jackson), Tr 184, A 188 (S. Brown), Tr 251-52, A 207-08 (K. Brown), GCX 16, A 74-76.)

B. The Employees Decide to Ask Management for a Meeting to Discuss Their Concerns; the Employees Also Decide to Engage in a Walkout if Management Refuses to Meet with Them; Jackson Drafts a Letter Requesting a Meeting and the Employees Sign It

In early July, dissatisfied with the Company's response to their complaints, the employees decided to ask management to meet with them to discuss the changes in their working conditions. The employees also decided that they would engage in a walkout if management would not agree to a meeting. (D&O 5, A 11; Tr 41, A 156 (Jackson), Tr 251, A 207 (K. Brown).) On the morning of July 9,

Jackson drafted a letter to management requesting "an emergency meeting" to discuss some "troublesome and urgent concerns." The letter ended by stating, "RSVP by 3:00 or walkout." (D&O 5, A 11; Tr 43, A 157 (Jackson), GCX 2, A 157.) At the urging of Jackson and employee Kathy Brown, 18 employees signed the letter. Kathy Brown also instructed the employees not to punch the timeclock if they walked out that day; Brown told them that she did not want management to think that the employees were quitting their jobs. (D&O 5, A 11; Tr 257, A 209 (K. Brown).)

That same day, employee Stephanie Brown told Jackson that employee Jamie Jewell wanted to speak with her. Jackson met with Jewell, who stated that she was afraid to participate in the walkout because she was a probationary employee. Jackson told Jewell that she should do whatever was best for her and that it was an individual choice whether to join the walkout. (D&O 17, A 23; Tr 81, A 172 (Jackson), Tr 195-96, A 193-94 (S. Brown), Tr 553, A 265 (Jewell).) Shortly thereafter, Jackson and Jewell had a second conversation. Jewell told Jackson that a lawyer had advised her not to walk out because she was in her probationary period. (D&O 17, A 23; Tr 92-93, A 175-76 (Jackson), Tr 213-14, A 199-200 (Ehrnschwender).) Jackson repeated that Jewell did not have to walk out and that it was her decision. (D&O 17, A 23; Tr 92-94, A 175-77 (Jackson), Tr 198, A 196 (S. Brown).)

Early that afternoon, Jackson met with some of the employees and asked how many favored giving the letter to Production Supervisor Shirley Powers. (D&O 5-6, A 11-12 ; Tr 257-61, A 209-13 (K. Brown).) All those present raised their hands. At about 2:10 p.m., one of the employees gave Powers the letter. (D&O 6, A 12; Tr 262, A 214 (K. Brown).) Powers notified Fernandez, who summoned Powers and two other officials to his office. Powers stated that the letter appeared to be in Jackson's handwriting, and Fernandez asked why the employees were upset. Powers replied that she thought some of the employees were upset because of the pay increase to the steel-case line. (D&O 6, A 12; Tr 142, A 185 (McFarland), Tr 317, A 220 (Powers), Tr 403, A 231 (Fernandez).) Fernandez called an attorney and asked how he should handle a walkout, and the attorney advised him to tell the employees that the Company would treat a walkout as a resignation. (D&O 6, A 12; Tr 401-02, A 229-30 (Fernandez).) Fernandez told Powers to keep an eye on the employees and to tell them that the Company would treat a walkout as their resignation. (D&O 6, A 12; Tr 318, A 221 (Powers), Tr 141, A184 (McFarland).) Fernandez did not reply to the employees' request for a meeting. (D&O 6, A 12; Tr 58, A 160 (Jackson).)

C. The Employees Walk Out; Powers and Fernandez Tell the Employees that the Company Would Treat the Walkout as Their Resignation; Fernandez Posts a "Now hiring" Sign; the Employees Picket the Company, Jackson Files an Unfair Labor Practice Charge

At about 3:15 p.m. that same day, Jackson and other employees began walking toward the exit. Powers told the employees that if they walked out the Company would accept that as their resignation. (D&O 6, A 12; Tr 59, A 161 (Jackson), Tr 188-89, A 189-90 (S. Brown), Tr 263, A 215 (K. Brown), Tr 318-19, 221-22 (Powers).) Employees Bob Patel, Mena Patel, and Alpesh Patel -- three members of the same family -- were among those preparing to join the walkout. While the Patel family was still inside the building, Fernandez asked Mena Patel, "Do you know what this means? You have no job." Mena Patel's two family members and employee Kathy Brown overheard Fernandez' statement. (D&O 6, A 12; Tr 263-64, A 215-16 (K. Brown).) At that point, the Patel family decided not to participate in the walkout. (D&O 6, A 12; Tr 59-60, A 161-62 (Jackson).) A total of 12 employees, including Jackson and Kathy Brown, then walked out of the facility. (D&O 6, A 12; Tr 62-63, A 164-65 (Jackson).)

Fernandez immediately went outside and told all the employees that -- if they did not return within two minutes -- he would accept that as their resignation. (D&O 6, A 12; Tr 59, A 161 (Jackson), Tr 189, A 190 (S. Brown), Tr 265, A 217 (K. Brown), Tr 404, A 232 (Fernandez).) Jackson and employee Phyllis Gallienne

responded, "You can't do that." Kathy Brown told Fernandez that the employees had simply wanted the Company to talk to them. Fernandez pointed his finger at Kathy Brown and replied, "You went about it the wrong way." (D&O 6, A 12; Tr 60-61, A 162-63 (Jackson), Tr 189-90, A 190-91 (S. Brown), Tr 265, A 217 (K. Brown).) Fernandez then went inside the facility and returned with a sign that stated, "Now hiring, full and part time, inquire within." He posted the sign outside the facility; the sign was visible to the employees who had walked out. (D&O 6, A 12; Tr 61, A 163 (Jackson), Tr 265-66, A 217-18 (K. Brown).) Later that same day, the employees gathered at a nearby restaurant. Several employees stated that they "couldn't believe that [Fernandez] had fired" them. (D&O 7, A 13; Tr 63-64, A 63-69 (Jackson), Tr 191, A 192 (S. Brown), Tr 267, A 214 (K. Brown).)

At the end of that day, employee Jewell and the other employees who had not joined the walkout gathered in the Company's break room with Powers and another management official. (D&O 9, A 15; Tr 572, A 271 (Jewell), Tr 329, A 224 (Powers).) Powers asked Jewell whether she knew who had written the employees' letter, and Jewell replied that she thought Jackson had written it. (D&O 9, A 15; Tr 143, A 186 (McFarland).) Jewell also stated that she was nervous because she did not want to join the walkout, that the events had torn her up, that she just wanted to go to work and pay her bills, and that she did not want to get her "ass kicked." (D&O 9, A 15; Tr 572-73, A 271-72 (Jewell).)

On July 12, the next working day, many of the employees who had walked out set up a picket line on the street in front of the Company's facility. Their picket signs stated, "Boycotting AWH," "Unfair Labor Practices," "Unfair Pay Practices," and "Refusal to Discuss Company Issues." The employees also picketed on July 13. (D&O 7, A 13; Tr 65-66, A 167-68 (Jackson).) On July 14, Jackson filed an unfair labor practice charge alleging that the Company had "severed the [employment]" of its employees because they had exercised their right to engage in a strike. (D&O 8, A 14; GCX 1a, A 68.)

D. The Company Asks Jewell Whether Jackson Threatened Her Before the Walkout; the Company Calls Jewell to a Meeting, and Jewell Signs a Statement Alleging that Jackson had Threatened Her

Shortly after the walkout, Fernandez called employee Jewell into his office and gave her a \$1.00 per hour wage increase. Fernandez told Jewell that the raise was "for sticking by the Company and for staying there" and "for doing a good job." (D&O 9, A 15; Tr 573, A 272 (Jewell).) A couple of weeks after the walkout, Powers approached Jewell and asked, "[D]idn't you say that Tammy Jackson threatened to kick your ass?" Jewell replied that Jackson had not made that statement, and Powers repeated the same question. Jewell then stated that Jackson had made the statement. (D&O 9, A 15; Tr 573-74, A 272-73 (Jewell).)

On August 9, shortly before Jewell's probationary period was scheduled to expire, Powers told Jewell that Fernandez wanted to see Jewell in his office. (D&O 9, A 15; Tr 331, A 226 (Powers), 574-75, A 273-74 (Jewell).) Fernandez and the Company's attorney were present in the office. The attorney asked Jewell about her conversation with Jackson. Initially, Jewell said that she did not know what the attorney was talking about. Powers told Jewell that the attorney was talking about Jackson's statement that Jewell was going to "get [her] ass kicked." (D&O 10, A 16; Tr 575-76, A 274-75 (Jewell).) Jewell then told the attorney that Jackson had made that statement. The attorney prepared a handwritten document stating that Jackson told Jewell that she would "get [her] ass kicked" if she did not participate in the walkout. (D&O 10, A 16; Tr 558, 577, A 268, 276 (Jewell), RX 5, A 77-79.) Jewell read and signed the statement. (D&O 10, A 16; Tr 556, A 266 (Jewell).)

E. The Company Offers to Allow the Employees to Return to Work; Jackson Returns to Work and the Company Accuses Her of Threatening Jewell; Jackson Denies Making the Threat, and the Company Suspends Her; the Company Discharges Jackson

On August 9, Fernandez sent a letter to the employees who had walked out. The letter stated, "It is now clear to us that you did not quit, but that instead you went on strike." The letter also stated that the employees should report to the plant on August 16 if they wished to return to work. (D&O 10, A 16; GCX 5, A 71.)

Enclosed with Jackson's letter was an "Incident Report" that stated that Jackson had "threatened a co-worker with physical harm" on the day of the walkout.

(D&O 11, A 17; GCX 6, A 72.)

On August 16, when Jackson reported to work, she met with Fernandez, Powers, and two other management officials. (D&O 11, A 17; Tr 79, A 170 (Jackson).) Fernandez asked Jackson about the threat, and Jackson replied that she had not threatened anyone. Fernandez stated that an employee had informed the Company that Jackson had threatened to "kick her ass if she didn't participate in the walkout." Jackson replied that the allegation was a "total fabrication."

(D&O 11, A 17; Tr 79-80, A 170-71 (Jackson), Tr 432, A 246 (Fernandez).) The Company told Jackson that employee Jewell had made the accusation. Jackson explained that she had spoken with Jewell at Stephanie Brown's request, but that she had not threatened Jewell. (D&O 11, A 17; Tr 80-81, A 171-72 (Jackson).)

At the end of the meeting, Fernandez told Jackson that she was suspended effective immediately. (D&O 11, A 17; Tr 81-82, A 172-73 (Jackson).)

Soon thereafter, the Company spoke with Stephanie Brown, who said that she had overheard Jackson speaking with Jewell on the day of the walkout. Brown said that Jackson had not threatened Jewell and that other employees had overheard their conversation. (D&O 12, A 18; Tr 196-200, A 194-98 (S. Brown), RX 12, 13, A 133-34.) On August 23, Fernandez sent Jackson a letter informing

her that the Company was terminating her employment. (D&O 12, A 18; GCX 8, A 73.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Liebman, Truesdale, and Walsh) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening to discharge employees if they engaged in a protected walkout, and by discharging 12 employees for engaging in the protected walkout. (D&O 1-2, A 7-8.) The Board, in agreement with the administrative law judge, also found that the Company violated Section 8(a)(1) of the Act by suspending and ultimately discharging employee Tammy Jackson for allegedly threatening employee Jamie Jewell, when in fact Jackson made no such threat. (D&O 2, A 8.)

The Board's order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's order requires the Company to offer Tammy Jackson full reinstatement to her former position, to make her whole for any loss of earnings and benefits suffered as a result of her July discharge, August suspension, and August discharge, and to remove from its files all references to those unlawful actions. Affirmatively, the

order also requires the Company to make employees Mary Kathryn Brown, Stephanie Brown, Lester Carl, Toni Ehrnschwender, Phyllis Gallienne, Penny Harvie, Paul Morris, Patty Ross, and Doug Slacker whole for any loss of earnings or benefits as a result of their July discharge, and to remove from its files all references to the unlawful terminations of these employees, and the unlawful terminations of employees Jonathan Wyatt and Brian Moore.² The order also requires the Company to post copies of a remedial notice. (D&O 2-3, 19-20, A 8-9, 25-26.)

SUMMARY OF ARGUMENT

Frustrated by a series of changes in their working conditions, the employees engaged in a protected concerted walkout after the Company failed to respond to their request for a meeting to discuss their concerns. The Company told them twice that it intended to treat their walkout as a resignation. The employees objected, stating that the Company could not treat them in that manner and that all they wanted to do was meet with management. The Company, however, ignored their objections and posted a "Now hiring" sign near the entrance to its facility. In

² In August 1996, employees Moore and Wyatt signed a settlement agreement with the Company, which waived reinstatement and provided for backpay.

those circumstances, the Board had ample reason to find that the Company unlawfully threatened to discharge the employees, and that its overall conduct reasonably led the employees to believe that they had been discharged for engaging in a protected concerted walkout.

The Board reasonably rejected the Company's claim that the employees quit their jobs, given that the employees vigorously objected when the Company stated that it intended to treat their walkout as a resignation. Indeed, a month after the walkout, the Company admitted to the employees that they had not quit their jobs.

Similarly, the Board had good reason to reject the Company's claim that it did not discharge the employees, even assuming that they did not quit. As the Board found, the Company's conduct amounted to an unequivocal refusal to allow them to return to work. The Company told the employees twice that it intended to treat their walkout as a resignation. When the employees disputed that statement, the Company rebuffed them and immediately posted a "Now hiring" sign. For a full month after the walkout, the Company said nothing to the employees to urge them to return to work. Those circumstances easily distinguish this case from the cases the Company cites, where an employer's repeated efforts to persuade its striking employees to return to work showed that its treatment of them did not amount to a discharge.

After the Company finally allowed the employees to return to work, as the Board reasonably found, the Company unlawfully suspended and then discharged employee Jackson for allegedly engaging in walkout-related misconduct. The Company's treatment of Jackson was admittedly prompted by an alleged threat she made to employee Jewell shortly before the walkout. Jackson and Jewell, however,

credibly testified that Jackson made no such threat, and two other employees credibly corroborated their testimony. Given that the alleged misconduct did not in fact occur, the Board found that Jackson's suspension and discharge were unlawful under the principles set forth in *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964).

The Company claims that Jackson actually made the threat, but it does nothing more than attack the judge's decision to credit the testimony of the four employees. The Company points out that Jewell signed a company-drafted statement that alleged that Jackson made the threat. As the judge reasonably found, however, Jewell signed the statement in response to pressure from the Company's officials, even though she knew it was false. Based on Jewell's impressive demeanor, the judge reasonably decided to discount the written statement and to credit Jewell's testimony that Jackson never threatened her.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING TO DISCHARGE EMPLOYEES AND BY DISCHARGING 12 EMPLOYEES FOR ENGAGING IN A PROTECTED CONCERTED WALKOUT

A. Applicable Principles and Standard of Review

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" Among the concerted activities protected by Section 7 are work stoppages that are aimed at protesting working conditions. *See NLRB v. Valley Plaza, Inc.*, 715 F.2d 237, 244 (6th Cir. 1983) (a concerted walkout is protected by the Act). *Accord PHT, Inc., v. NLRB*, 920 F.2d 71, 73-74 (D.C. Cir. 1990) (concerted work stoppage protected by Section 7). *See also* Section 13 of the Act (29 U.S.C. § 163) ("Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike") . That guarantee applies with particular force to unorganized workers, who, "because they have no designated bargaining representative, have to speak for themselves as best they c[an]." *NLRB v.*

Washington Aluminum Co., 370 U.S. 9, 14 (1962) ("*Washington Aluminum*").

Accord NLRB v. Valley Plaza, Inc., 715 F.2d at 244.

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements that guarantee by making it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory rights. Accordingly, an employer violates Section 8(a)(1) by terminating employees for engaging in a protected concerted work stoppage. *See Washington Aluminum*, 370 U.S. at 14. *Accord NLRB v. Valley Plaza, Inc.*, 715 F.2d at 244. Similarly, an employer violates Section 8(a)(1) by threatening employees with discharge for engaging in a protected concerted work stoppage. *See Vic Tanny Int'l, Inc. v NLRB*, 622 F.2d 237, 241 (6th Cir 1980) (unlawful to threaten employees with discharge for protected walkout).

It is equally settled that, to effectuate a discharge, an employer need not use "the formal words of firing." *NLRB v. Hale Mfg. Co., Inc.*, 570 F.2d 705, 708 (8th Cir. 1978). Rather, the question is whether "the words or conduct of the employer would reasonably lead an employee to believe that he had been fired." *Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1282 (D.C. Cir. 1990). *Accord Ridgeway Trucking Co.*, 243 NLRB 1048, 1048-49 (1979), *enforced*, 622 F.2d 1222, 1224 (5th Cir. 1980). In short, whether employees have been discharged "depends upon the reasonable inferences that the employees

could draw from the language used by the employer." *NLRB v. Downslope Industries, Inc.*, 676 F.2d 1114, 1118 (6th Cir. 1982).

The Board's findings of fact are conclusive if supported by substantial evidence in the record considered as a whole. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. St. Francis Healthcare Ctr.*, 212 F.3d 945, 952 (6th Cir. 2000). The Board's application of law to facts is reviewed for substantial evidence, and "the Board's reasonable inferences may not be displaced on review even though the court might justifiably have reached a different conclusion had the matter been before it *de novo*." *St. Francis Healthcare Ctr.*, 212 F.3d at 952 (quoting *V&S ProGalv Inc. v. NLRB*, 168 F.3d 270, 275 (6th Cir. 1999)). "Evidence is substantial when it is adequate, in a reasonable mind, to uphold the [Board's] decision." *St. Francis Healthcare Ctr.*, 212 F.3d at 952. *Accord Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 901 (6th Cir. 1996).

Courts are particularly deferential to the Board's factual findings when they are based on credibility determinations. *Id.* Because "it is the Board's function to resolve questions of fact and credibility, . . . this court ordinarily will not disturb credibility evaluations by an ALJ who observed the witnesses' demeanor." *V&S ProGalv Inc. v. NLRB*, 168 F.3d 270, 275 (6th Cir. 1999) (quotations omitted). Deference to the Board's factual findings is "particularly" appropriate where, as here, "the record is fraught with conflicting testimony and essential credibility

determinations have been made." *Tony Scott Trucking v. NLRB*, 821 F.2d 312, 315 (6th Cir. 1987).

B. The Company Threatened to Discharge and then Actually Discharged the Employees for Engaging in a Protected Concerted Walkout

1. The employees were engaged in protected concerted activity when they walked out

As we now show, the record amply supports the Board's finding that the employees were engaged in protected concerted activity when they walked off the job to protest the Company's changes in their working conditions and its failure to meet with them to discuss those changes.

As shown above, the Company made a series of work-related policy changes that provoked considerable frustration among the employees. Under one such policy change, the Company required the employees to work up to 15 minutes of overtime, but refused to pay them the overtime rate and often refused to pay them at all. The employees repeatedly complained about this practice, but management was unresponsive. Additionally, in early 1999, the Company announced that it would no longer treat an absence with a doctor's slip as an excused absence that would prevent the assessment of points under the Company's disciplinary system. In other words, under the new policy, employees could receive disciplinary points even if they produced a doctor's slip to justify an

absence. On top of that, the Company reduced the number of points that were needed to trigger serious disciplinary actions against the employees. On various occasions, employee Jackson and other employees complained to management about those changes and about the Company's failure to issue an updated policy manual that would clarify the changes.

In early June 1999, the employees became even more upset when the Company granted a \$1.00 per hour wage increase to the steel-case employees but not to the automotive employees. That change prompted the employees to complain that newly hired steel-case employees would be paid more than newly hired automotive employees, and that, in some cases, newly hired steel-case employees would be paid more than veteran employees in the automotive department. Management officials responded by telling the employees that the Company was "working on" wage increases for the automotive employees. (D&O 5, A 11.)

Frustrated by the policy changes, and convinced that management was stalling them about the wage increase, the employees decided to demand a meeting and to walk out in protest if management did not agree to meet with them. On July 9, the employees signed and gave to President Fernandez a letter that requested "an emergency meeting at 3:15 to discuss some troublesome and urgent concerns." The letter also announced that the employees would engage in a "walkout" if the

Company did not reply by 3:00 p.m. (D&O 5, A 11; GCX 2, A 69.) About 3:15 p.m., having heard nothing from Fernandez, 12 of the Company's employees walked out.

In short, the employees made a series of concerted complaints about the changes in their working conditions, and all of that activity culminated in a walkout to protest those changes and the Company's failure to meet with them. Given those circumstances, the employees' concerted walkout fell comfortably within the protection of Section 7 of the Act (29 U.S.C. §157). *See Washington Aluminum*, 370 U.S. 9, 14-17 (1962) (walkout to protest lack of heat on harsh winter day protected); *NLRB v. Valley Plaza, Inc.*, 715 F.2d 237, 244 (6th Cir. 1983) (walkout to protest shift assignments for waitresses protected); *Vic Tanny International, Inc. v. NLRB*, 622 F.2d. 237 (6th Cir. 1980) (walkout to present job-related grievances to management protected).

2. The Company unlawfully threatened and then discharged the 12 employees who walked out

The Board was also fully warranted in finding that the Company unlawfully threatened the employees with discharge and then actually discharged them for engaging in their protected concerted walkout.

On July 9, as the employees were preparing to walk out, Production Supervisor Powers bluntly warned them that if they walked out the Company

would accept that action as their resignation. President Fernandez was equally blunt, telling employee Mena Patel -- within earshot of other employees -- that she would "have no job" if she joined the walkout. (D&O 6, A 12 .)

Moments after the 12 employees walked out, Fernandez confronted them and issued an ultimatum, warning them that if they did not return to work within two minutes, the Company would treat their walkout as a resignation. Employees Jackson and Gallienne immediately objected, telling Fernandez, "You can't do that." (D&O 6, A 12; Tr 189, A 190 (S. Brown).) Employee Kathy Brown also protested that the employees had simply wanted to talk with management about their complaints. Fernandez rebuffed Brown's protest, emphatically telling her, "You went about it the wrong way." (D&O 6, A 12; Tr 190, A 191 (S. Brown).) Fernandez promptly posted a "Now hiring" sign near the entrance to the facility, in full view of the 12 employees who were congregated outside.

Given those circumstances, the Board had more than ample reason to find that the Company's treatment of the employees was unlawful. In the first place, as the Board reasonably found (D&O 1, 16, A 7, 23), Powers and Fernandez unlawfully threatened the employees with discharge by telling them that the Company intended to treat their walkout as a resignation. *See Conair Corp. v. NLRB*, 721 F.2d 1355, 1369-71 (D.C. Cir. 1983) (employer unlawfully threatened

discharge by sending striking employees a mailgram stating that they would be "deemed to have voluntarily quit" unless they returned to work).

The Board was equally warranted in finding (D&O 1-2, 15-16, A 7-8, 21-22) that the Company's overall conduct reasonably led the employees to believe that they had been discharged. Fernandez' pointed warning to Mena Patel -- that she would "have no job" if she joined the walkout -- sent a clear message that the Company intended to discharge the employees. As just shown, Fernandez and Powers sent the same message by threatening the employees that the Company would treat their walkout as a resignation, even though the employees had said nothing at all about quitting their jobs. Quick to grasp the Company's message, employees Jackson and Gallienne objected that the Company could not treat their walkout as a resignation. Fernandez, however, did not budge from his position, nor did he budge when employee Kathy Brown protested that the employees had simply wanted to meet with management. Instead, Fernandez ignored Brown's plea and dismissively replied, "You went about it the wrong way." Then, in a dramatic gesture to confirm that the employees were discharged, Fernandez posted the "Now hiring" sign.

Given those circumstances, the Board had ample reason to find that the Company's conduct reasonably led the 12 employees to believe that they had been discharged for engaging in their protected walkout. *See Elastic Stop Nut Div. of*

Harvard Indus., Inc. v. NLRB, 921 F.2d 1275, 1283 (D.C. Cir. 1990) (employer unlawfully discharged striking employees by informing them that their employment status was being "changed immediately" to reflect the fact that they had "voluntarily resigned" their jobs); *NLRB v. Ridgeway Trucking Co.*, 622 F.2d 1222, 1223-24 (5th Cir. 1980) (employer unlawfully discharged employees engaged in a work stoppage by telling them if they were not going to go to work they should leave the property, and that the employer would call the police if they did not leave); *North American Dismantling Corp.*, 331 NLRB No. 163 at 2 (2000), 2000 WL 1283043 **1-2 (employer unlawfully discharged employees on the verge of walkout by telling them that unless they were willing to work under the employer's terms, they would have to leave and find another job), *enforced in relevant part in an unpublished opinion*, 2002 WL 554496 (6th Cir. 2002).

C. The Board Reasonably Rejected the Company's Attempts to Defend Its Treatment of the Employees

1. The evidence refutes the Company's claim that the employees voluntarily quit their jobs

The Company defends its treatment of the employees by claiming (Br 15, 16-19) that all of them simply quit their jobs. As we now show, the Board reasonably found (D&O 14-15, A 20-21) that the employees did not quit their jobs and that the Company was well aware that they did not quit.

To support its claim, the Company contends (Br 17) that the employees did not protest when Fernandez and Powers told them that the Company intended to treat their walkout as a resignation. As just shown, however, employees Jackson and Gallienne explicitly protested Fernandez' statement by pointedly telling him, "You can't do that." (D&O 6, A 12; Tr 189, A 190 (S. Brown).) Employee Kathy Brown echoed that protest and told Fernandez that the employees had simply wanted to meet with management. Accordingly, the employees sharply disputed management's claim that their walkout was a resignation. Moreover, the Company cites no evidence that any employee agreed with management's claim that all 12 of them were resigning.

Indeed, on the day of the walkout, the employees had sought to make it clear to the Company that they were protesting and not resigning. Their letter to the Company stated that they would engage in a "walkout" if the Company did not meet with them; the letter did not state that the employees would resign. (D&O 5, A 11; GCX 2, A 69.) Similarly, as the Board pointed out (D&O 14, A 20), the employees did not punch the timeclock before they walked out, because they did not want the Company to think that they were quitting their jobs.

In the days following the walkout, the employees continued to make it clear that they had not resigned. As the Board found (D&O 15, A 21), the employees promptly set up a picket line at the Company's facility, carrying signs

that protested the Company's pay practices and its failure to meet with them to discuss their concerns. As the Board pointedly observed (D&O 15, A 21), the formation of a picket line to continue a protest is hardly the behavior of employees who intended to resign their employment. Equally important, the Company ultimately admitted that the employees had not quit their jobs. On August 9, a month after the walkout, the Company sent the employees a letter explicitly admitting that they "did not quit" their jobs and that, instead, they had gone "on strike" over their terms of employment. (D&O 10, A 16; GCX 5, A 71.)

2. The Board reasonably rejected the Company's claim that it did not discharge the employees

Alternatively, the Company claims (Br 16-19) that it never actually discharged the employees, even assuming that they did not quit. To support that claim, the Company contends (Br 17-18) that Fernandez and Powers never unequivocally refused to allow them to return to work. As the Board reasonably found (D&O 1-2, A 7-8), the evidence readily refutes the Company's claim.

As the Board pointed out (D&O 1, A 7), both Fernandez and Powers "told the employees unequivocally that it would treat the walkout as a resignation." When the employees disputed that statement, Fernandez rebuffed them and posted the "Now hiring" sign. Given those circumstances, as the Board found (D&O 1, A 7), the Company "expressed no uncertainty" about the employees' fate -- that is,

the Company intended to terminate their employment. Moreover, the employees themselves had no uncertainty about their fate. Shortly after the walkout, as the Board found (D&O 7, 15, A 13, 21), the employees gathered at a nearby restaurant and shared their disbelief that the Company had just fired them. Within a week, as the Board also pointed out (D&O 8, 15, A 14, 21), Jackson filed an unfair labor practice charge alleging that the Company had "severed the [employment]" of the employees who had walked out.

Nevertheless, the Company insists (Br 17-18) that its actions were not unequivocal, claiming that it gave the employees the option of returning to work if they chose. That claim flies in the face of the evidence. Fernandez gave the employees only two minutes to return to work and then abruptly ended any option they may have had by posting the "Now hiring" sign. Nor did the Company give the employees the option of returning in the days following the walkout. For example, the Company's officials did not urge the employees to return to work when they picketed at the Company's facility on July 12 and 13. Instead, Fernandez told the employees that they were not allowed to picket and then called the police when they claimed they had the right to do so.

Indeed, for a full month after the walkout, the Company said nothing at all to the employees about returning to work. As the administrative law judge observed (D&O 8, A 14 ; Tr 421, A 242 (Fernandez)), Fernandez conceded at the

hearing that in fact he did not want any of them to return. Accordingly, the Board was fully warranted in finding that the Company unequivocally refused to allow the employees to return.

Given all of those circumstances, the Company is completely unpersuasive in citing (Br 17-18) *NLRB v. European Cars Ypsilanti, Inc.*, 324 F.2d 606, 607-08 (1963), where this Court held that an employer did not discharge a group of strikers by handing them a letter stating that they had voluntarily quit their jobs. Immediately after distributing that letter, as this Court pointed out, the employer repeatedly urged the strikers to return to work by speaking with them at its facility, by telephoning them, and by visiting them at their homes. *Id.* at 607. Unlike the Company's actions here, the employer's actions in that case hardly amounted to an unequivocal refusal to allow the employees to return to work.

The Company fares no better in citing (Br 18) *Cannady v. NLRB*, 466 F.2d 583, 585-88 (10th Cir. 1972), where the court held that the employer did not discharge a group of protesting employees by offering them paychecks and telling them that they would no longer be employed if they accepted the checks. As the court observed, the employer "attempted to encourage the employees to return to their jobs" even after they accepted the checks. *Id.* at 586, 588. Here, as just shown, the Company gave no such encouragement to the employees for a full month.

The Company is equally misguided in citing (Br 17) *Pink Supply Corp.*, 249 NLRB 674, 674, 678-80 (1980), where the Board found that an employer did not discharge a group of striking employees. In that case, the employer urged the employees to return to work and told their spokesperson that if they did not return, then he would have to act as though the employees had quit and find replacements. *Id.* When the spokesperson denied they were quitting, the employer replied, "Well, what do you call it? What am I supposed to do?" *Id.* The employer's conduct in that case, as the Board pointed out here (D&O 1-2, A 7-8), reflected so much uncertainty about the employees' status that it did not amount to an unequivocal refusal to allow them to return to work. Here, as the Board observed (D&O 1, A 7), the Company "expressed no uncertainty" at all about how it would treat the employees who walked out.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY SUSPENDING AND DISCHARGING EMPLOYEE TAMMY JACKSON FOR ALLEGEDLY ENGAGING IN WALKOUT-RELATED MISCONDUCT THAT DID NOT IN FACT OCCUR

A. Applicable Principles

As shown above, an employer violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging or disciplining employees who exercise their Section 7 (29 U.S.C. § 157) right to engage in "concerted activities for the purpose of

collective bargaining or other mutual aid or protection." In *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964) ("*Burnup & Sims*"), the Supreme Court held that an employer's discharge of an employee also violates Section 8(a)(1) where "it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct."

As the Supreme Court explained in *Burnup & Sims*, 379 U.S. at 23-24, it is not an employer's state of mind that is the controlling factor in determining whether the employer violated the Act; rather, it is the tendency of the employer's conduct to interfere with protected rights. As the Supreme Court further explained, "the example of [innocent] employees who are discharged on false charges would or might have a deterrent effect on other employees." *Id.* at 23. *Accord Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1222 (6th Cir 1990); *Allied Industrial Wkrs., AFL-CIO Local Union No 289 v. NLRB*, 476 F.2d 868, 880 (D.C. Cir. 1973).

Where an employer discharges an employee for alleged misconduct that arises out of protected activity, "the employer has the burden of showing that it held an honest belief that the employee engaged in serious misconduct." *Pepsi-Cola Co.*, 330 NLRB 474, 474 (2000). *Accord Burnup & Sims*, 379 U.S. at 23.

Once the employer establishes that it had such an honest belief, the burden shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur. *See Pepsi-Cola Co.*, 330 NLRB at 474. In short, "even if the employer honestly believes that the employee[s] engaged in misconduct, the employer still violates the Act if the Board proves that the employees were innocent." *Teledyne Indus., Inc. v. NLRB*, 911 F.2d at 1222. *Accord Burnup & Sims*, 379 U.S. at 23.

B. The Credited Testimony Shows that Employee Jackson Did Not Threaten Employee Jewell that She Would Be Hurt if She Refused to Join the Walkout

As shown above, employee Jackson and other employees came back to work on August 16, in response to the Company's August 9 letter offering to allow them to return. The Company immediately suspended Jackson and then discharged her a week later, accusing her of engaging in walkout-related misconduct. As we now show, the Board reasonably found that the Company's treatment of Jackson was unlawful under *Burnup & Sims*.

In the first place, as just shown, Jackson and the other employees engaged in a protected walkout and the Company was well aware that the walkout was protected. Indeed, in its August 9 letter, the Company admitted that it was clear that the employees had gone "on strike" over their working conditions. (D&O 16, A 22; GCX 5, A 71.) The Company contends (Br 20-22), however, that Jackson approached employee Jewell shortly before the walkout and directly threatened

her that she would get her "ass kicked" if she did not walk out with the other employees. The Company concedes (Br 20-22) that it suspended and discharged Jackson for allegedly making that threat. But, as the credited testimony shows, Jackson never made any such threat.

Thus, the administrative law judge credited the testimony of both Jackson and Jewell, who explicitly denied that Jackson made any such threat during their two conversations on the day of the walkout. (D&O 13, 16, A 19, 22 ; Tr 94, A 177 (Jackson), Tr 560-61, A 269-70 (Jewell).) The judge also credited the testimony of employees Stephanie Brown and Toni Ehrnschwender, who testified that they overheard Jackson and Jewell and that Jackson made no such threat. (D&O 16, A 22; Tr 198-99, A 196-97 (S. Brown), Tr 213-14, A 199-200 (Ehrnschwender).) Rather, as Jackson and Stephanie Brown both credibly testified, Jackson simply reassured Jewell that she did not have to join the walkout and that it was her decision whether to do so. (D&O 12, 17, A 18, 23; Tr 80-81, 92-93, A 171-72, 175-76 (Jackson), Tr 196-98, A 194-96 (S. Brown).)

Given the credited testimony of those four employees, the Board had ample reason to find that Jackson never made the alleged threat that prompted her suspension and discharge. Accordingly, the Board reasonably found that Jackson's suspension and discharge violated the Act, regardless of whether the Company honestly believed that she made the threat. *See Burnup & Sims*, 379

U.S. at 23 (employer unlawfully discharged employees for allegedly making threats during an organizing campaign, when in fact the employees did not make the alleged threats); *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1222 (6th Cir. 1990) (employer unlawfully discharged two employees for allegedly engaging in strike misconduct that did not in fact occur).

C. The Company Has Shown No Basis for Overturning the Administrative Law Judge's Credibility Resolutions

The Company's challenge (Br 20-22) to the Board's finding amounts to nothing more than an attack on the judge's credibility resolutions. As we now show, however, the judge thoroughly explained her credibility resolutions, and the Company has provided no basis for overturning them.

First, the Company attacks Jewell's credited denial that Jackson threatened her, pointing out (Br 20-22) that Jewell signed a company-drafted statement on August 9 that alleged that Jackson had made such a threat. The judge, however, carefully reviewed Jewell's version of the sequence of events and reasonably found (D&O 10, 17-18, A 16, 23-24) that the Company pressured Jewell into signing the statement even though it was, in fact, false.

Thus, as the judge found (D&O 9, A 15), Jewell told Powers immediately after the walkout that she was nervous because she did not want to join the other protestors, that she just wanted to pay her bills, and that she did not want to get her

"ass kicked." Jewell, however, did not say that Jackson, or anyone else for that matter, had made such a threat to her. (D&O 9, 13, A 15, 19.) About two weeks after the walkout, as the judge also found (D&O 18, 19, A 24, 25), Powers approached Jewell and asked, "[D]idn't you say that Tammy Jackson had threatened to kick your ass?" Jewell initially denied that Jackson had done so, but, as the judge found (D&O 9, 18, A 15, 24), Powers pressed her for a different answer. Jewell then relented and said that Jackson had made the threat.

On August 9, as the judge also observed (D&O 10, 17-18, A 16, 23-24), the Company increased the pressure on Jewell by requiring her to meet with Powers, Fernandez, and the Company's attorney shortly before her probationary period was scheduled to expire. When the attorney asked Jewell to describe her conversation with Jackson on the day of the walkout, Jewell initially said that she did not know what the attorney was talking about. As the judge pointed out (D&O 10, 18, A 16, 24), Powers then prompted Jewell by reminding her of Jackson's alleged threat that she would get her "ass kicked." Believing that the Company was "coaching" her, as the judge found (D&O 10, 18, A 16, 24), Jewell relented again, said that Jackson had threatened her, and signed the statement drafted by the Company's attorney, even though she knew that the statement was false. Having weighed all of those circumstances, the judge decided to credit Jewell's testimony and to

discount the written statement. That carefully reasoned credibility resolution should not be disturbed.

Nevertheless, the Company continues its attack, claiming (Br 21-22) that the judge should have credited Powers' testimony that, immediately after the walkout, Jewell voluntarily admitted to her that Jackson had made the threat. The judge, however, had ample reason to credit Jewell's denial that she made any such allegation in her conversation with Powers. As the judge pointed out (D&O 9, 13, A 15, 19), Jewell explained that she was "afraid" and "nervous" on the day of the walkout and that she had a general fear that she would "get [her] ass kicked" if she did not join the other protestors. As Jewell explained (D&O 9, 13, A 15, 19), she told Powers about that general fear, but she did not tell Powers that Jackson had threatened her. Impressed with Jewell's demeanor, the judge credited (D&O 9, 19, A 15, 25) her testimony. As this Court has long recognized, such demeanor-based credibility resolutions are entitled to considerable weight. *See Roadway Express, Inc. v. NLRB*, 831 F.2d 1285, 1289 (1987) (court ordinarily will not disturb credibility resolutions by judge who observed witnesses' demeanor).

Moreover, the judge had good reason to be skeptical about Powers' claim that Jewell attributed the threat to Jackson immediately after the walkout. According to Powers' testimony, as the judge observed (D&O 9, 17, A 15, 23), Jewell claimed that Jackson made the threat to coerce her into signing the

employees' letter asking the Company to meet with them. As the judge also observed (D&O 17, A 23), however, Powers did not raise any questions when Jewell's written statement claimed that Jackson made the threat for a different purpose -- that is, to coerce Jewell into joining the walkout. The judge reasonably weighed that discrepancy in deciding to discredit Powers and to credit Jewell.

Equally misplaced is the Company's reliance (Br 21) on employee Marie McGlothin's testimony that Jewell told her that Jackson had made a threat. McGlothin's testimony does not establish precisely when Jewell made that statement to her. Accordingly, as the judge pointed out (D&O 17, A 23), Jewell may have made the statement after the Company had coached her into signing the false statement on August 9. Moreover, McGlothin did not claim that Jewell described the precise language that Jackson allegedly used; rather, she simply testified that Jewell alleged generally that Jackson had threatened her. (Tr 612-14, A 277-79, (McGlothin).) Given McGlothin's imprecise testimony, the judge reasonably found (D&O 17, A 23) that it did not impeach Jewell's credibility.

The Company's further claim (Br 21-22) -- that it had an "honest belief" that Jackson made the threat -- is simply beside the point. The Board explicitly found it "unnecessary to pass" on that issue, given its well-grounded finding that Jackson did not in fact make the threat. (D&O 1, A 7 .) *See Teledyne Indus., Inc. v. NLRB*,

911 F.2d at 1222 (regardless of employer's honest belief, employer violates Act if employee was in fact innocent of alleged misconduct).

The Company is equally misguided in claiming (Br 23-26) that its treatment of Jackson did not violate Section 8(a)(4) of the Act (29 U.S.C. § 158(a)(4)). Given its finding that Jackson's suspension and discharge were unlawful under *Burnup & Sims*, the Board found it "unnecessary to pass" on the judge's conclusion that the Company's actions also violated Section 8(a)(4). (D&O 2 n.6, A 8 n.6.) Moreover, even if the Court were to overturn the Board's finding under the *Burnup & Sims* theory, the Court would not be entitled to decide the Section 8(a)(4) issue on its own. Rather, the Court would be required to remand the proceeding to the Board to decide that issue as an initial matter. *See South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800, 806 (1976) (a reviewing court, having set aside a Board finding, may not resolve a question the Board did not reach; rather, it must remand the proceeding).

CONCLUSION

For the foregoing reasons, the Board respectfully submits that judgment should enter enforcing the Board's order in full.

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July 2002

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