WGE Federal Credit Union *and* Local 1, Office and Professional Employees International Union, AFL–CIO. Case 25–CA–29101

April 25, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On August 10, 2005, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[1]

The judge found that Respondent WGE Federal Credit Union violated Section 8(a)(5) of the National Labor Relations Act by (1) unilaterally implementing a rule prohibiting employees from participating, in their capacity as employees, in the election of individuals to the Respondent's board of directors, and (2) discharging employee Diane Hartman pursuant to this unilaterally implemented rule. We affirm those findings.[2]

In contrast, we do not agree with the judge's additional finding that the Respondent violated Section 8(a)(1) of the Act by threatening employees with job loss and other adverse consequences if Local 1, Office and Professional Employees International Union, AFL–CIO (the Union) became the employees' bargaining representative. In finding this violation, the judge rejected the Respondent's defense that the underlying complaint allegation was time barred under Section 10(b) of the Act. Contrary to the judge, we find merit in the Respondent's 10(b) defense. For this reason, we reverse the judge's 8(a)(1) finding.

I. BACKGROUND

The judge found that on October 30, 2003, the Respondent's marketing director, Dana Baker, visited the Respondent's Kilgore branch office and told employees Lisa Ambrosetti and Janice Ferrell that if the Union won an upcoming representation election, changes could or would be made affecting staffing at their office, and one employee could or would lose her job.[3] At the time, the Union did not file an unfair labor practice charge over Baker's statements. The Union ultimately won the Board election and was certified as the bargaining representative of the Respondent's employees on November 21, 2003.

On March 23, 2004, the Union filed its first unfair labor practice charge in this case. The Union alleged that "[o]n or about March 18, 2004, the Employer unlawfully discharged Diane Hartman because of her Union and other protected concerted activities," in violation of Section 8(a)(3) of the Act. Again, the Union did not make any allegation regarding Baker's October 2003 statements.

Nearly 2 months later, on May 12, 2004, the Union amended its March 23 charge to allege, among other things, that Baker's October 2003 statements were unlawful.[4] The amended charge specifically alleged that "[i]n October 2003, the Employer threatened employees with closer supervision, loss of employment and other retaliation if they selected the Union as their collective bargaining representative."

Based on the amended charge, the General Counsel alleged in the complaint that, on about October 30, 2003, the Respondent, by Dana Baker: "(i) threatened its employees with adverse changes in their terms and conditions of employment if they selected the Union as their collective bargaining representative, and (ii) threatened its employees with the loss of jobs if they selected the Union as their collective bargaining representative." In its amended answers to the complaint and at the hearing, the Respondent asserted that the complaint allegations

[1] We have modified the judge's recommended Order to reflect the violations found and to more closely conform to the Board's standard remedial language, as well as to our decisions in *Ferguson Electric Co.*, 335 NLRB 142 (2001), *Excel Container, Inc.* 325 NLRB 17 (1997), and *Indian Hills Care Center*, 321 NLRB 144 (1996). We have also substituted a new notice to comport with these modifications.

[2] The Respondent argues that the judge's 8(a)(5) findings are inconsistent with the Board's decision in *Co-Op City*, 341 NLRB 255 (2004). We disagree. The only issue presented in *Co-Op City* was whether the employer violated Sec. 8(a)(1) by maintaining a rule that substantially limited its employees' participation in the employer's board-of-directors election. The Board concluded that the employer's "mere maintenance" of the rule was not unlawful under Sec. 8(a)(1) because employees generally have no Sec. 7 right to participate in the election of a company's board of directors. See *Co-Op City*, supra, 341 NLRB at 257. The present case, in contrast, does not present the question whether the Respondent's rule reasonably tends to interfere with, restrain, or coerce employees in the exercise of a right protected by Sec. 7 of the Act. Rather, the issue is whether, under Sec. 8(a)(5), the Respondent was free to unilaterally implement the rule, given that it established a ground for disciplinary action that potentially (and in employee Hartman's case, actually) affected employees' terms and conditions of employment. See *Edgar P. Benjamin Healthcare Center*, 322 NLRB 750, 751 (1996). *Co-Op City* does not address this issue. Member Walsh, who dissented in *Co-Op City*, agrees that it is distinguishable.

[3] In sec. E of his decision, the judge inadvertently indicated that the alleged statement was made on October 20, rather than October 30, 2003.

[4] In his statement of the case, the judge inadvertently indicated that the above-amended charge was filed in 2005, rather than 2004.

regarding Baker's October 2003 threats were untimely under Section 10(b) because the charge underlying the allegations was filed on May 12, 2004, more than 6 months after the threats allegedly occurred. The judge rejected this argument. He found that the threat allegations in the amended charge, though themselves untimely, "relate back" to the timely filed allegation that employee Hartman's discharge violated Section 8(a)(3). The judge therefore concluded that the complaint allegations regarding Baker's threats were timely for purposes of Section 10(b).

II. ANALYSIS

Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Notwithstanding the literal language of Section 10(b), the Board does not absolutely bar complaint allegations that are based on charges filed outside the 6-month 10(b) period. The Board has stated that "the timely filing of a charge tolls the time limitation of Section 10(b) as to matters subsequently alleged in an amended charge which are similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge. Amended charges containing such allegations, if filed outside the 6-month 10(b) period, are deemed, for 10(b) purposes, to relate back to the original charge." *Pankratz Forest Industries*, 269 NLRB 33, 36–37 (1984), enfd. mem. sub nom. *Kelly-Goodwin Hardwood Co. v. NLRB*, 762 F.2d 1018 (9th Cir. 1985).

In determining whether an amended charge relates back to an earlier charge for 10(b) purposes, the Board applies the three-prong "closely related" test set forth in *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). See *Peerless Pump Co.*, 345 NLRB 371, 374 (2005). The Board considers (1) whether the otherwise untimely allegations of the amended charge involve the same legal theory as the allegations in the timely charge; (2) whether the otherwise untimely allegations of the amended charge arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations. *Redd-I*, supra.

Applying these factors here, we are not persuaded that the otherwise untimely 8(a)(1) threat allegation in the Union's amended charge is "closely related" to the timely 8(a)(3) discharge allegation. With respect to the first *Redd-I* factor, the 8(a)(1) threat allegation rests on a legal theory of unlawful interference, restraint, and coercion with employee exercise of Section 7 rights. The legal theory of the 8(a)(3) discharge allegation, on the other hand, focuses on the discriminatory motivation of the Respondent.

With respect to the second *Redd-I* factor, there is no factual similarity between the two allegations. The untimely allegation involves a threat made by Baker against employees Lisa Ambrosetti and Janice Ferrell. None of these individuals is implicated in the timely charge allegation relating to employee Diane Hartman's discharge, which was carried out by the Respondent's president, Julie Eskew. Moreover, the untimely allegation involves a threat made during the course of the Union's organizing campaign. By contrast, the timely allegation involves a discharge that took place *after* the Union's organizing campaign had ended and the parties had begun bargaining. Given these circumstances, we cannot conclude that the untimely and timely allegations "arise from the same factual situation or sequence of events." *Redd-I*, supra.

With respect to the final *Redd-I* factor, it does not appear that the Respondent would "raise the same or similar defenses" to both allegations. Id. In addition to its 10(b) argument, the Respondent has defended against the 8(a)(1) threat allegation by arguing that Baker is not an agent of the Respondent and that, even if she were an agent, she did not make the statements attributed to her. Because the General Counsel chose not to issue a complaint on the charge allegation that Hartman's discharge violated Section 8(a)(3), we do not know for certain what defenses the Respondent would have raised, but they likely would have been very different from its defenses to the 8(a)(1) threat allegation. For example, the Respondent might have asserted that Hartman was not involved in union activity, that it did not know of her union activity, that it was not motivated by antiunion animus in discharging her, or that it would have discharged her regardless of her union activity. See generally *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). None of these defenses would similarly relieve the Respondent of liability for the 8(a)(1) threat alleged in the Union's amended charge.

Given the tenuous relationship between the legal theories underlying the two allegations, the different factual events underlying the allegations, and the absence of common or similar defenses to the allegations, we find, contrary to the judge, that the Union's untimely alleged 8(a)(1) threat does not "relate back" to the timely alleged 8(a)(3) discharge. Consequently, the 8(a)(1) threat allegation in the amended charge remains untimely, and the 8(a)(1) complaint allegation based on that charge is time barred under Section 10(b).

ORDER

The National Labor Relations Board orders that the Respondent, WGE Federal Credit Union, Muncie, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 1, Office and Professional Employees International Union, AFL–CIO (the Union) as the exclusive bargaining representative of Respondent's employees in the bargaining unit set forth below by unilaterally implementing a rule prohibiting employees from engaging in electioneering activities while acting in their capacity as employees of Respondent.

(b) Discharging its employees pursuant to the aforesaid unilaterally implemented rule.

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

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

(a) Rescind the unlawfully implemented rule against employee electioneering announced on February 24, 2004, and notify all employees in writing that this has been done.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time tellers, loan officers, loan writers, loan clerks, mortgage loan officers, member service representatives, receptionists, and bookkeepers employed by the Respondent at its Muncie, Indiana facilities, including its branches located at 3700 W. Bethel Avenue, 4018 N. Broadway, 3230 S. Madison Avenue, and 5401 Kilgore Avenue; BUT EXCLUDING all managerial employees, confidential employees, and guards and supervisors as defined in the Act.

(c) Within 14 days from the date of this Order, offer Diane Hartman full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Diane Hartman whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge, with interest, in the manner set forth in the remedy section of the judge's decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Diane Hartman, and within 3 days thereafter, notify her in writing that this has been done and that the unlawful discharge will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in Muncie, Indiana, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 25, 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 any of the facilities 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 that facility at any time since February 25, 2004.

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

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE 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.

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

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 refuse to bargain with Local 1, Office and Professional Employees International Union, AFL–CIO (the Union) as the exclusive bargaining representative of our employees, in the bargaining unit set forth below, by unilaterally implementing a rule prohibiting employees from engaging in electioneering activities while acting in their capacity as our employees.

WE WILL NOT discharge our employees pursuant to the aforesaid unilaterally implemented rule.

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

WE WILL rescind our unlawfully implemented rule against employee electioneering announced on February 24, 2004, and notify all of our employees in writing that this has been done.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All full-time and regular part-time tellers, loan officers, loan writers, loan clerks, mortgage loan officers, member service representatives, receptionists, and bookkeepers employed by the Respondent at its Muncie, Indiana facilities, including its branches located at 3700 W. Bethel Avenue, 4018 N. Broadway, 3230 S. Madison Avenue, and 5401 Kilgore Avenue; BUT EXCLUDING all managerial employees, confidential employees, and guards and supervisors as defined in the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Diane Hartman full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Diane Hartman whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Diane Hartman and, WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the unlawful discharge will not be used against her in any way.

WGE FEDERAL CREDIT UNION

Derek Johnson, Esq., for the General Counsel.
Kim F. Ebert, Esq., for the Respondent.
Barbara Baird, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This consolidated case was heard before me in Muncie, Indiana, on March 29, 2005, pursuant to a complaint issued by the Regional Director for Region 25 of the National Labor Relations Board (the Board) on January 21, 2005. The complaint alleges that WGE Federal Credit Union (the Respondent or the Credit Union) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The complaint is based on charges filed by Local 1, Office and Professional Employees International Union, AFL–CIO (the Charging Party or the Union). The original charge in this proceeding was filed by the Union on March 23, 2004. The first amended charge was filed by the Union on May 12, 2005. The second amended charge was filed by the Union on June 30, 2004. The complaint is joined by the amended answer of the Respondent wherein it denies the commission of any violations of the Act.

Upon consideration of the testimony of the witnesses, the exhibits admitted at the hearing and the positions of the parties as argued at the hearing and as set out in their briefs, I make the following

FINDINGS OF FACT

A. The Business of the Respondent

The complaint alleges, Respondent admits, and I find that at all times material the Respondent has been a not-for-profit financial cooperative, engaged in the extension of consumer credit and general banking business to its members at four branch facilities located in Muncie, Indiana, that during the past 12 months, the Respondent, in conducting its business operations described above, transferred funds in excess of $50,000, from its Muncie, Indiana facilities directly to financial institutions located outside the State of Indiana, that during the past 12 months, the Respondent, in conducting its business operations described above, derived gross revenues from investments and securities in excess of $1 million, and that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. The Labor Organization

The complaint alleges, Respondent admits and I find that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

C. The Appropriate Unit

The complaint alleges, Respondent admits and I find that at all times material the following employees of Respondent (the

unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time tellers, loan officers, loan writers, loan clerks, mortgage loan officers, member service representatives, receptionists, and bookkeepers employed by the Respondent at its Muncie, Indiana facilities, including its branches located at 3700 W. Bethel Avenue, 4018 N. Broadway, 3230 S. Madison Avenue, and 5401 Kilgore Avenue; BUT EXCLUDING all managerial employees, confidential employees, and guards and supervisors as defined in the Act.

On November 21, 2003, following an election won by the Union, it was certified as the exclusive collective-bargaining representative of the unit and at all times since that date, based upon Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

D. The Alleged 8(a)(5) Unilateral Implementation of the Nonelectioneering Rule and the Discharge of Diane Hartman Pursuant to the Rule

Facts

Respondent WGE is a nonprofit financial cooperative (a credit union) established for the benefit of members to whom it provides financial services. Its bylaws state its purpose is "to promote thrift among its members by affording them an opportunity to accumulate their savings and to create for them a source of credit . . . ." Its mission statement is to "be the primary financial institution . . . by offering high quality, innovative services while maintaining financial strength . . . ." Its customers are called members and include employees from companies called Select Employee Groups (SEGs) as well as many of Respondent's own employees. Respondent is controlled by a seven-person board of directors, each of whom is elected by the membership to a staggered, 3-year term. Julie Eskew is the president and chief operating officer (CEO) of Respondent. She reports to the board of directors. Eskew has been CEO since January 2003, and prior to that held several positions during her 17-year employment with Respondent. In September 2003, the Union initiated a campaign to represent the employees. An election was held on November 13, 2003, and the Union was elected to serve as the exclusive bargaining agent on behalf of the unit employees. Respondent opposed the election of the Union. Following the certification of the Union on November 21, 2003, the parties commenced bargaining for an initial labor agreement on January 13, 2004. The Union promoted three candidates for the upcoming board of directors election for three positions which were up for election which was scheduled in early April, whom it deemed would be favorable to the employees' interest. The candidates gathered signatures and successfully petitioned to be placed on the ballot.

Prior to this occasion there had been only one contested election for the board of directors. This occurred in early 2001, when Respondent's vice president, Pat Perry, telephoned employee Cathy Creek and asked her about a nonemployee credit union member, Kathi Pickering, as a potential candidate for a position on the board of directors. Creek told Perry she thought that Pickering would be a good candidate and do a good job. Perry asked Creek to contact Pickering and ask if she would be interested in this position. Creek agreed to do so but told Perry that Pickering would inquire as to what she would need to do as a member of the board of directors. Perry told Creek to have Pickering call her and that she would explain what the position would entail. Creek contacted Pickering and Pickering ran for the position and was elected. The exchange between Perry, Creek, and Pickering took place during working time. Connie Lodde, former business development manager, who had been employed by the Respondent for 19 years, testified that in the 2001 board of directors contested election, which was the only other contested election, she was approached by Linda Gill, the director of lending, on worktime and told that there would be two ladies running in the spots of two seats which were up for election and that "we were all asked to get on board and help the two ladies to get elected." Gill made it clear that she could not head up the campaign because of her position as vice president of lending. On reflection Lodde testified there were actually three ladies running for election in the 2001 board of director's election. I credit the testimony of Creek and Lodde as set out above which was unrebutted as neither Perry or Gill were called to testify.

During the 2004 campaign for the board of directors, CEO Eskew held a meeting of Respondent's leadership group which is composed of various department heads and asked each manager and department head to contact three credit union members to encourage them to vote for the three incumbent Board members who were up for election and who were being opposed by the union sponsored candidates. Connie Lodde testified that some of the leadership group members questioned the professionalism and propriety of their becoming involved in the campaign and contacting other credit union members. Lodde asked Eskew what she should say and Eskew composed a script which she presented to them at a second meeting concerning this matter. At the hearing Eskew testified that on reflection she, herself, became concerned about the lack of professionalism and propriety that engaging in electioneering might entail.

On February 25, 2004, Eskew conducted an all-staff meeting, including both the hourly employees and management personnel. She testified that she had become concerned as it was reported to her that employees Lisa Ambrosetti and Janice Ferrell who were self-supervised at the Kilgore branch were telling members to take literature in support of the candidacy of the three union-sponsored candidates who were running in opposition to the three ladies who were incumbents on the Board. Additionally Eskew who had herself become concerned about the propriety of the management staff campaigning in the board of directors' election, testified she told the employees that they were not to campaign as employees of WGE and could not campaign on credit union time or use credit union facilities or property to do so. She followed this meeting up with an "e-" mail to all employees setting this out.

Subsequently Eskew learned that unit employee Diane Hartman, a loan officer, had delivered literature and ballots in support of the board of directors' candidacy to the Muncie Eye Clinic, which was one of the SEG employers, for distribution in their breakroom and that Hartman had attached her WGE business card to the literature and ballots and left a note telling the employees to contact her at home if there were any questions.

Eskew confronted Hartman about this on March 16, 2004, and discharged Hartman on March 19, 2004, for not following the instructions she had given to the employees at the February 25, 2004, all staff meeting and had confirmed in a follow up "e-mail" to all employees.

Contentions of the Parties

In its prehearing brief, the General Counsel contends as follows: Respondent unilaterally implemented a new rule prohibiting employees from campaigning in their capacity as employees, for the board of directors. He argues that it is well settled that work rules that can be grounds for discipline are mandatory subjects of bargaining, and an employer may not make or change them without notifying a union and giving it an opportunity to bargain, citing *King Soopers, Inc*., 340 NLRB 628, 629 fn. 7 (2003), where a rule requiring employees to use scanners at work was held to be a mandatory subject of bargaining because it established a new predicate for discipline. For purposes of determining if bargaining is mandatory, work rules should not be severed from their ensuing penalties, and an employer must bargain over the substance of the rules as well as the penalty, citing *Peerless Publications*, 283 NLRB 334–335 (1987), where the Board held that rules and their penalties should not be artificially severed because the attachment of penalties is what transforms the rules from expressions of opinion into terms and conditions of employment. In the instant case the Union had been certified as collective-bargaining representative of the unit employees when Respondent on February 25, 2004, unilaterally implemented the rule against electioneering, which vitally affects employees' terms and conditions of employment as a means of discipline. Thus, the rule is a mandatory subject of bargaining unless it falls within an exception to the mandatory bargaining requirement.

The General Counsel contends that Respondent cannot establish a viable "core purpose" defense. The Board in *Peerless*, supra, established a very narrow exception to the presumption that bargaining over work rules is mandatory. This exception covers rules that go to the "protection of the core purpose of the enterprise" and are narrowly tailored to meet that objective. Management has no duty to bargain over basic decisions concerning the enterprise, citing *American Electric Power Co*., 302 NLRB 1021 (1991). These kinds of decisions directly relate to the basic direction, scope or nature of the enterprises. In *Peerless,* the Board found that protecting the "editorial integrity of a newspaper is "at the core of publishing control" and to preserve editorial integrity, a news publication would not necessarily be required to bargain before implementing a code of ethics designed to ensure responsible journalists and the integrity of the publication. The General Counsel argues further that a rule based on general concerns such as the preservation of employer integrity is a goal of any enterprise and does not directly address any core purpose. The rule at issue in the instant case does not protect a "core purpose but purports to prohibit electioneering activity in order to "keep our reputation" as a "respected financial institution." Nor is Respondent's concern that Hartman's actions threatened Respondent's "competitiveness," a core purpose. All businesses have a legitimate interest in retaining respect, competitiveness and strong reputations. These interests apply no more to a credit union than to any other enterprises. Respondent may argue that "financial stability" is a core purpose of a credit union, an enterprise whose purpose is to "promote thrift among members," "accumulate their savings," and "create for them a source of credit," might have a greater interest in financial stability than other enterprises. Respondent's mission statement states it seeks to "maintain financial strength." However, it cannot demonstrate that the rule's subject matter was necessary to protect its core purposes of financial stability or promoting member's savings or providing sources of credit. The rule was not restricted to matters that would threaten the reliability or stability of Respondent's monetary product. Rather, the rule prohibits employees from discussing with other members, during worktime, views on candidates for the board of directors. Campaign statements such as that a particular candidate will help the credit union to remain "competitive" (as were involved in this case) do not threaten financial stability. Regulation of such statements is not a "core purpose" under *Peerless*, supra.

The General Counsel notes that Respondent may argue that Hartman's conduct was not protected by the Act, and that her discharge cannot therefore be a violation of the Act. Respondent argues Hartman's conduct is akin to unprotected picket line misconduct. However that kind of conduct is far distinguishable from Hartman's electioneering activity. Here only electioneering activity was prohibited, not violence, threats of violence, seizing an employer's plant "or other unlawful acts in order to force compliance with demands," *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), enfd. mem. 765 F.2d 148 (9th Cir. 1985), citing *Fanstell Metallurgical Corp v. NLRB*, 306 U.S. 240 (1939).

The General Counsel notes that Respondent also asserts that it merely retained the status quo, that it had never permitted employees to campaign for board of director candidates and thus previously had in effect an unwritten "informal" rule. However, the General Counsel contends the evidence showed that in 2001 Respondent not only allowed but encouraged employees to campaign for board of director candidates, even on Respondent's time. Further assuming arguendo that Respondent had a prior rule prohibiting electioneering, it had never been enforced against an employee. Thus Respondent either had no prior rule prohibiting electioneering nor modified any purported "informal rule" by adding a disciplinary element. See *Scepter Ingot Castings*, 331 NLRB 1509, 1516 (2000), enfd. 280 F.3d 1053 (D.C. Cir. 2002), where the Board found an 8(a)(5) violation where the employer, without bargaining with the union, formalized a rule by adding discipline to the rule, contrary to its past practice. The General Counsel concludes that Respondent unilaterally implemented a rule prohibiting employees from electioneering in their capacity as employees, for the board of director's election. The newly created rule does not advance a core purpose of Respondent and whether Hartman's conduct is protected is irrelevant. Thus Respondent thereby violated Section 8(a)(5) of the Act. The discharge of Diane Hartman pursuant to this unlawfully implemented rule was also a violation of Section 8(a)(5) of the Act and her discharge must be rescinded.

In his posthearing supplemental brief, the General Counsel makes the following points and arguments: As the certified

bargaining representative of Respondent's employees, the Union has the right to receive notice and be given an opportunity to bargain over any new employee work rules. From the evidence adduced at the hearing it is clear that Respondent had no rule prior to February 2004 concerning employees electioneering for the board of directors. During the 2001 board of director's election cycle, employee Cathy Creek was asked by Vice President Pat Perry to contact, while on worktime, one of Respondent's members to seek her candidacy for the board. Connie Lodde testified and President Julie Eskew confirmed that for the 2004 election each person on the leadership team was asked by Eskew (on company time and while using Respondent's e-mail system) to solicit the support of 100 members for the incumbent board candidates. Eskew went so far as to prepare and distribute a script during a leadership meeting to assist them with their solicitations according to the testimony of Lodde whom I credit. Eskew testified she could not recall distributing the script.

The General Counsel notes that when Eskew discovered that Lisa Ambrosetti and Janice Ferrell were actively encouraging members to sign a petition to place competing candidates on the ballot for the 2004 board election, no disciplinary action was taken against them, presumably because no rule against electioneering existed prior to February 25, 2004. Eskew confirmed that instructions concerning employee electioneering had not been given by her to employees prior to her meeting with Ambrosetti and Ferrell and that no written rule to that effect existed prior to February 25, and there is no evidence of the existence of an unwritten rule prior to this date. It is also clear that no bargaining occurred between Respondent and the Union concerning the implementation of a rule prohibiting employee electioneering. The General Counsel argues that Respondent has not established a "core purpose" defense as there was no evidence at the hearing to prove how its unilateral implementation of a rule against employee electioneering is related to any alleged core purpose. As discussed in *Peerless*, supra, any alleged such unilaterally implemented rule must be "narrowly tailored" to meet the objective of protecting the Respondent's core purpose. This rule is anything but narrowly tailored. Eskew agreed there was no way for her to enumerate all the different ways in which Respondent's unilaterally implemented prohibition against employee electioneering could be violated. As recently as February 2005, she indicated how broad this rule was to employee Cathy Creek through an e-mail where Eskew stated the rule as follows:

> There can be nothing associating you with the credit union because you are not representing the credit union. That would include no parking in the lots, passing out literature that insinuates it's endorsed by WGE employees, wearing WGE shirts, using credit union information, materials or supplies—basically anything that ties you to the credit union. *This list is a sample and can't possibly include all the scenarios* so if there is something specific you are unsure of, the best practice would be to ask me. [Emphasis added.]

The General Counsel notes that Respondent continues to argue that Diane Hartman was engaged in unprotected activity and therefore it had no obligation to bargain with the Union over the employee electioneering rule under which Hartman was discharged. However, the nature of Hartman's activity is irrelevant to these 8(a)(5) proceedings. The best analogy to demonstrate Respondent's fallacious reasoning is drug testing. The Board has long held that the implementation of a drug testing policy is a mandatory subject of bargaining, citing *Johnson-Batemann Co*., 295 NLRB 180, 182–184 (1989). This is true despite the fact that the underlying employee conduct is not only unprotected, but most often illegal. Thus regardless of whether Hartman's conduct was protected, as the duly designated bargaining representative, the Union had a right to notice the new rule and an opportunity to bargain with Respondent since the rule certainly impacts employees' terms and conditions of employment. No such notice was given here.

The General Counsel states that Respondent may attempt to argue for the first time that the Union has waived any right to bargain over its newly implemented employee electioneering policy. There is no evidence that the Union clearly and unmistakably waived its right to bargain over the new rule. The rule did not exist prior to February 2004, and was not put into writing until February 25, well after the Union's certification as bargaining representative. There is no evidence that notice of the proposed rule was given to the Union prior to its implementation. Respondent's actions here are a "fait accompli" which the Union cannot be expected to request bargaining over after the fact, citing *Scepter Ingot Castings*, supra. The newly created rule does not advance a core purpose and whether Hartman's conduct is protected is irrelevant. Hartman's discharge pursuant to the unlawfully implemented rule is an 8(a)(5) violation, as is the implementation of the rule.

The Charging Party's Contentions

The Charging Party in its pretrial memorandum makes similar arguments to those raised by counsel for the General Counsel in his submitted briefs, that WGE antielectioneering policy neither protects the "core purposes" of the Credit Union nor meets the particularity requirements set forth in *Peerless*. The "policy" has never been reduced to writing. WGE never had a policy against employee participation in campaigns for candidates for the board of directors until after the Union was certified. The policy was vague, ambiguous, and overbroad and involves matters that do not address the core purposes of the credit union. Accordingly WGE was obligated to notify and bargain with the Union before implementing the policy. Thus it violated its bargaining obligation and terminated Diane Hartman pursuant to the unlawfully implemented policy. The appropriate remedy is the reinstatement of Hartman with full backpay, seniority and benefits, rescission of the policy, and an order to bargain with the Union.

Respondent's Contentions

In its prehearing brief, Respondent contends it had no duty to bargain over the rule prohibiting employees from engaging in electioneering activities while acting in their capacity as employees of the Credit Union. The historic practice at the credit union has been that employees are free to campaign as individuals for candidates for the board of directors but such campaigning is not to be conducted on worktime or in any represen-

tative capacity as employees of WGE. The board of directors' elections were scheduled to take place in the first week of April 2004. President and CEO Julie Eskew received reports that some employees of WGE had been engaged in board of directors campaign activity with members during working time at the credit union. Eskew therefore made a point at a staff meeting on February 25, 2004, to reinforce the unwritten policy of WGE regarding campaign activity by WGE employees. As shown by notes of the meeting, employees were specifically told by Eskew, "Keep in mind that we need to keep this election separate from our duties at the credit union. While you are on working hours, we should not influence any members' decision how to vote. We are a respected financial institution and we want to keep our reputation as such."

Respondent notes that on about March 8, 2004, a representative of one of WGE's SEGs, the Muncie Eye Center, reported they had received campaign material from Diane Hartman. Eskew was provided with a copy of the campaign brochure that accompanied the handwritten note and business card of Hartman. Hartman violated the instruction not to campaign for board members as an employee of WGE. Hartman's handwritten note states: "We, hourly employees, know that we need a change at the credit union. The three gentlemen on this handbill will do a great job as new directors. If anyone has any questions, they may call me." She then aggravated the offense by attaching her WGE business card. The handbill states in part:

> The following nominees desire to have a seat on the board of directors of WGE Federal Credit Union: We, the hourly employees of WGE, support these men. We believe that they will give our board the direction needed to remain competitive for the future.

Hartman admitted to Eskew that she had used credit union information regarding the identity and address of select employee groups and had sent similar packages of campaign materials to a number of other SEGs for distribution to their employees. Hartman would not confirm or deny that she had used her business card in these other mailings nor would she specify the other SEGs to whom she had sent campaign material. Eskew initially suspended and then terminated Hartman for her admitted campaign activity.

Respondent contends that the activity in campaigning to influence the board of director's election was unprotected and thus Hartman was properly discharged, citing *Lutheran Social Service of Minnesota*, 250 NLRB 35 (1980), for the principle that the Act does not protect an employee's "efforts to affect the ultimate direction and managerial policies" of an employer's business quoted by *Co-Op City*, 341 NLRB 255 (2004). It also cites *Retail Clerks Local 770*, 208 NLRB 356, 357 (1974).

WGE also contends that the enforcement of the rule and the discharge of Hartman were lawful under the standards enunciated in the Board's discussion in *Peerless*, supra, where the employer had unilaterally implemented a code of ethics directed at protecting the journalistic integrity of the company. On remand from the D.C. Circuit, the Board acknowledged that an employer can lawfully refuse to bargain over a rule that goes to the protection of the "core purposes of the enterprises." While the Board accepted the "core purpose" principle, it stated that the employer must also establish that the rule on its face is "(1) narrowly tailored in terms of substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague or ambiguous; and (2) appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives." Utilizing this standard the Board found that the rule in *Peerless*, supra, was overly broad and, therefore, unenforceable without being bargained.

Respondent argues that by contrast, the rule announced at WGE and enforced with respect to Diane Hartman was quite narrow and directly tied to the "core purpose" that was of concern to the enterprise. The election for certain seats on the board of directors was pending. Eskew had received reports that certain tellers had been soliciting support for certain board candidates while serving certain credit union customers. This report triggered the agenda item at the February 25, 2004 staff meeting. As reflected in the notes previously provided, Eskew informed employees that "we need to keep this election separate from our duties at the credit union. While you are on working hours, we should not influence any member's decision on how to vote. We are a respected financial institution and we want to keep our reputation as such."

Respondent argues further that Hartman was terminated for conduct that occurred after this staff meeting in direct violation of the instructions that had been given her. She solicited support for board candidates with a flyer and at least on one proven occasion, a WGE business card. The flyer states in relevant part "We, the hourly employees of WGE, support these men. We believe they will give our board the direction needed to remain competitive for our future." The clear inference to be derived from this message was that the competitiveness of WGE was at risk. The record established that employees have never been allowed to campaign for or against candidates for the WGE board of directors, either during worktime or holding themselves out in any way as representatives of WGE. The weight of authority establishes that this conduct is not protected by the Act. As such it is at best a permissive subject of bargaining regarding which the employer is free to act unilaterally. *Allied Chemical & Alkali Workers Local 1 vs. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971).

In its posthearing brief, Respondent again argues that Hartman's activities were not protected by the Act and that as such, she could have been terminated for her electioneering activities without prior notice or recourse under the Act. Respondent notes that the General Counsel has declined to prosecute this case under Section 8(a)(3). WGE argues that the "unique instruction" against electioneering in this case does not fall within the scope of mandatory subjects for bargaining and thus could be given and enforced unilaterally without prior notice and bargaining.

Respondent asserts that while the General Counsel seeks to narrow the application of *Peerless*, supra, to the field of newspapers, a better analysis is to recognize that the instant case involves an analogous effort by WGE to protect "one" of the "core purposes" of its business, that is "*integrity of governance*," Respondent cites *California Newspaper Partnership*,

343 NLRB 564 (2004), for the principle that even under 8(a)(5) standards, an employer has the right to instruct employees not to engage in conduct that creates the appearance of a conflict of interest. Respondent argues that if WGE could have terminated Hartman for campaigning in the Board election without a rule, "how does the 'heads up' warning on February 25 change the analysis?"

Analysis

I find that the General Counsel has established a prima facie case of violations of Section 8(a)(5) and (1) of the Act by the unilateral implementation of the nonelectioneering rule and the discharge of Diane Hartman pursuant to the rule. I am persuaded by the position of the General Counsel and the Charging Party, as set out above, that the Respondent had an obligation under the Act to notify the Union as the exclusive collective-bargaining representative of the unit employees and to bargain with the Union prior to the unilateral implementation of the rule. I find that the nonelectioneering rule imposed unilaterally by Respondent was a mandatory subject of bargaining and that Respondent clearly bypassed the Union in acting unilaterally. I find as contended by the General Counsel and the Charging Party in their arguments as set out above that the Respondent violated Section 8(a)(5) and (1) of the Act by the unilateral implementation of the nonelectioneering rule and by the discharge of Diane Hartman pursuant to this rule.

E. The Alleged 8(a)(1) Threat

Facts

On October 20, 2003, Marketing Director Dana Baker visited the Kilgore branch office and spoke to the two employees (Lisa Ambrosetti and Janice Ferrell) who were the only employees assigned to this office and who were self-supervised. According to Ambrosetti and Ferrell, Baker told the two employees that if the Union won the election, changes could or would be made, as a manager would be assigned to their office and one employee "would" or "could" lose their job. Baker testified at the hearing that she only told these employees that she did not know what would happen in response to their inquiries as to what would happen if the Union won the election. Ambrosetti and Ferrell also both testified that Baker had never previously stopped in to see them to chat with them. I credit Ambrosetti's and Ferrell's version of this conversation and find that this was a threat of adverse changes in their terms and conditions of employment and the loss of their job. I do not find it determinative whether Baker said that one employee "could" or "would" lose their job as the use of either word constituted a threat. I thus find that by this threat Respondent violated Section 8(a)(1) of the Act.

The General Counsel notes that Respondent may argue that no violation can be found because Baker's conduct occurred outside the 10(b) period. The original charge in this matter was filed on March 23, 2004, starting the 6-month period at September 23, 2003. Although the initial charge did not allege this conduct by Baker as unlawful, the first amended charge did. The filing of a timely original charge tolls the 10(b) period and subsequent amendments are permitted, even outside the 10(b) period, so long as the new allegations are "closely related" to the original allegations, citing *Ross Stores, Inc*., 329 NLRB 573 (1999), enf. denied in part 235 F.3d 669 (D.C. Cir. 2001); *Nickles Bakery*, 296 NLRB 927 (1987); *Redd-I, Inc*., 290 NLRB 1115 (1988).

The General Counsel further notes that the original charge alleged Hartman's 8(a)(3) discharge for engaging in union activity and that the amendment alleges the 8(a)(1) threats occurred during the same organizing campaign and that both allegations share a common legal theory which is Respondent's union animus. The fact that different sections of the Act are involved, is not dispositve. Both allegations also share similar factual circumstances as they arose out of the same organizing campaign and Respondent's efforts to resist the Union.

The General Counsel in his posthearing brief contends that Baker is a Section 2(13) agent as "under all the circumstances, the employees would reasonably believe that the employee in question (alleged agent) was reflecting company policy and speaking and acting for management," citing *Great American Products*, 312 NLRB 962, 963 (1993) (quoting *Waterbed World*, 286 NLRB 425 (1987). I find Baker was a 2(13) agent of Respondent when she issued the threat to Ambrosetti and Ferrell.

Respondent contends that the allegations regarding Dana Baker are untimely as the original charge filed on March 23, 2004, does not satisfy the tolling deadline because it alleged only the discharge of Diane Hartman and does not imply any allegations of any unlawful threats of Dana Baker. Respondent contends there is no similarity between the alleged threats by Baker on October 30, 2003, and Hartman's discharge on March 18, 2004, so there can be no "relating back" for purposes of tolling the 10(b) deadline and that the amended charge is thus untimely and must be dismissed, citing *Speed Queen*, 192 NLRB 975, (1971); *Sunnen Products,* 189 NLRB 826 (1971). In its posthearing brief, Respondent contends that in response to questions by Ferrell and Ambrosetti, Dana Baker told them no one knew what would happen, she told them "it was all up to the bargaining."

Analysis

I find that Baker unlawfully threatened Ferrell and Ambrosetti with adverse consequences and the loss of a job if the Union won the election. I credit Ferrell's and Ambrosetti's testimony over that of Baker. I also find, for the reasons set out in General Counsel's brief that Baker was acting as a 2(13) agent of Respondent. I find that the allegations of the 8(a)(1) threat and the 8(a)(5) allegations relate back to the original charge and that the charge is timely. I thus find that Respondent violated Section 8(a)(1) of the Act by the threat made by Baker.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time tellers, loan officers, loan writers, loan clerks, mortgage loan officers, member service representatives, receptionists, and bookkeepers employed by the Respondent at its Muncie, Indiana facilities, including its branches located at 3700 W. Bethel Avenue, 4018 N. Broadway, 3230 S. Madison Avenue, and 5401 Kilgore Avenue; BUT EXCLUDING all managerial employees, confidential employees, and guards and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1) of the Act by threatening its employees with adverse changes in their terms and conditions of employment and with the loss of the job of one employee.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by the unilateral implementation and maintenance of a rule prohibiting employees from engaging in electioneering activities while acting in their capacity as employees of Respondent.

6. Respondent violated Section 8(a)(5) and (1) of the Act by discharging its employee Diane Hartman pursuant to the aforesaid rule.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in violations of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative actions to effectuate the purposes and policies of the Act and post the appropriate notices.

It is recommended that Respondent rescind the unlawful rule and offer immediate reinstatement to Diane Hartman to her former position or to a substantially equivalent position if her former position no longer exists. She shall be made whole for all loss of backpay and benefits sustained by her as a result of the unlawful discharge. Respondent shall also remove from its files all references to the unlawful discharge and advise her in writing that this has been done and that the unlawful discipline will not be used against her in any manner.

All backpay and benefits shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short term Federal Rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[Recommended Order omitted from publication.]