

**Viewlex Packaging, Inc. and George F. Kurtz. Case
29-CA-3310**

December 10, 1973

DECISION AND ORDER

**BY MEMBERS JENKINS, KENNEDY, AND
PENELLO**

On July 31, 1973, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed an answering brief in support of the Administrative Law Judge's decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint herein alleges, *inter alia*, and the Administrative Law Judge concluded, that Respondent violated Section 8(a)(1) of the Act by warning its employees to refrain from engaging in concerted activity and by discharging employee Kurtz, the Charging Party, because he engaged in protected concerted activity. We find merit in the Respondent's exceptions to those findings.

The facts are fully set forth in the attached Decision. Briefly, Kurtz was employed by Respondent for several years in several jobs. During the year preceding his discharge on March 8, 1973, he worked in the paper cutting department under the supervision of James Doherty. Kurtz and Doherty had become social friends, and Doherty had arranged with Plant Manager Rothberg for Kurtz to transfer into that department. Rothberg at that time told Doherty that Kurtz had not given a full performance as an employee in a previous position.

Several months after Kurtz' transfer to the paper cutting department Doherty admonished him about his low production and failure to perform up to his capability. Thereafter Kurtz' performance improved but subsequently deteriorated. Around November or December 1972, Doherty delivered a stern warning to Kurtz concerning his high absenteeism and low production. It is clear that Doherty told him his job was in jeopardy and that Kurtz understood this. Although Kurtz' production improved and appears to have remained at an acceptable level after this

warning, Doherty continued to believe that Kurtz was not working up to his level of ability. During early February 1973 Doherty permitted Kurtz to absent himself from work for a trip out of the local area that Kurtz said would require that he miss 2 workdays. Kurtz returned to work after missing 4 workdays without further contact with Doherty.

Because of a decline in business, it became necessary for an employee to take a 1-week vacation, and Doherty, on February 27, 1973,¹ asked employee Kaiser to decide with employees Gallelli and Kurtz which one of them would volunteer. The three employees discussed this during lunch that day and decided to see Plant Manager Rothberg because they did not like the way Doherty had handled the matter and did not understand why the fourth employee in the department had not been included. Kaiser told Doherty they wanted to see Rothberg, and Doherty told him to go ahead. They met with Rothberg, who explained the situation to them, and as a result Gallelli volunteered to take the week off starting the next day.

On March 2 Kurtz did not report to work on time. About 30 minutes after the 8 a.m. reporting time, Doherty told Kaiser that he understood that he and Kurtz had gone out drinking the night before and that if Kaiser could come to work, Kurtz should be able to do so. Doherty advised Kaiser to call Kurtz and tell him to come to work. Kaiser made the call, and Kurtz reported about an hour later.

On Sunday evening, March 4, Kurtz telephoned Doherty to tell him that he was going to the hospital with an illness, would not be at work the next day, and was worried about his job. Doherty told him to take care of his health first and asked to be kept informed as to his condition.

On the morning of March 7 Kurtz was released from the hospital and he tried to telephone Doherty at the plant. Because Doherty was not there, Kurtz spoke to Gallelli and asked the latter to tell Doherty that Kurtz had called and would try to reach him later but in any event would be at work the next day. Kurtz then met Gallelli and Kaiser for lunch at a place located about 1 mile from the plant. Gallelli delivered Kurtz' message to Doherty after lunch and also told him about having had lunch with Kurtz.

The following morning Doherty called the employees of his department together, with the exception of Kurtz who had not reported, and informed them of his decision to discharge Kurtz and his reasons therefor. These reasons included poor production, absenteeism, and being a troublemaker. Doherty did not elaborate on the latter reason but did say that he hoped Kurtz' termination would bring harmony to

¹ Unless otherwise noted, all dates hereinafter refer to 1973.

the department. At the hearing in the instant proceeding, Doherty testified without contradiction that another employee in the department had complained to him that he let Kurtz get away with too much. In addition, Doherty testified that a significant factor in his decision to discharge Kurtz was his belief that Kurtz had taken advantage of their friendship and thereby made Doherty look bad to his superiors. Only Gallelli, who said that Kurtz would go to the Labor Board, voiced disagreement with Doherty's decision. The latter replied that his decision had nothing to do with any union and that he thought it was justified. Later that morning Kurtz came to the plant and Doherty informed him of his decision to terminate him.

The Administrative Law Judge concluded, as the General Counsel contended, that Respondent, through Doherty, discharged Kurtz because of his participation in protected concerted activity in February, i.e., the group protest of the way Doherty handled the forced 1-week vacation, and that a threat of reprisal for engaging in protected concerted activity was conveyed by Doherty to the employees in his department by reason of his discussion with them concerning his decision to terminate Kurtz. We do not agree.

The record herein is devoid of any evidence or indication that the February group protest by employees Gallelli, Kaiser, and Kurtz was ever mentioned again by anyone after the day on which it occurred. When Kaiser told Doherty that the employees wanted to see Rothberg, he offered no protest of any sort, and there is no credited evidence that Doherty gave any appearance of being annoyed or disturbed by this at any time. There was no reference to this matter in Doherty's discussion with the employees of his department concerning his decision to terminate Kurtz, in his conversation with Kurtz about the discharge, or in Kurtz' subsequent conversations with Rothberg. Similarly, there is no evidence that either of the other two employees involved in this protest received any indication from Doherty that he resented their conduct or, indeed, that he attached any particular significance to it. We also note that only Kaiser informed Doherty of the decision to take this matter to Rothberg and there is no evidence that Kurtz either initiated this decision or that Doherty was led to believe that he had.

The Administrative Law Judge concluded that Doherty's testimony concerning Kurtz' having made him look bad to his superiors had reference to Kurtz' participation in the protest of the manner in which Doherty had handled the 1-week forced vacation. However, Doherty's explanation of his decision to discharge Kurtz is not inherently implausible or unsupported by credible evidence, and his testimony

is equally susceptible of interpretation as referring to Kurtz' taking advantage of his friendship in other respects. It is quite clear that Kurtz was far from a model employee in either performance or attendance and that Doherty had done much to befriend him. Clearly, too, Doherty had given Kurtz a strong warning concerning his production and attendance in November or December 1972, subsequent absences occurred, and Doherty did not believe Kurtz was working up to his level of capability. In addition, it is undisputed that another employee under Doherty's supervision had complained to him that he let Kurtz get away with too much. That Kurtz knew his job was in jeopardy is demonstrated by his calling Doherty before going to the hospital to inform him of his illness and express concern about his job. We also note the absence of any evidence of unfavorable, disparate treatment to Kurtz. Under these circumstances, assuming, *arguendo*, that Doherty's remark about Kurtz making him look bad is subject to the interpretation that the Administrative Law Judge attached to it, we are unwilling so to interpret it in the absence of any evidence supporting such an interpretation or any indication that Doherty was at all disturbed by either the group protest or Kurtz' participation in it. In short, there is no evidence of a nexus between this instance of protected concerted activity and Kurtz' discharge. Consequently, General Counsel has not met his burden of proof to show that the reason Kurtz was discharged was an unlawful one.

The Administrative Law Judge also concluded that Doherty conveyed a threat of reprisal for engaging in protected concerted activity to the employees in his department by reason of his discussion with them of his decision to terminate Kurtz. Doherty testified that the purpose of his discussing this matter with the employees was to explain his decision so there would be no misunderstanding about the reasons for it. None of the participants in this conversation made any reference to the group protest. We can find no basis for reasonably concluding that Doherty conveyed a threat of reprisal for engaging in protected concerted activity to these employees either by his explicit remarks or by reason of his discussion of Kurtz' termination with them. Accordingly, we find that Respondent did not violate Section 8(a)(1) of the Act, and we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

III. THE UNFAIR LABOR PRACTICES

A. *Preliminary Issues*Supervisory Status²

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was tried pursuant to due notice on June 11, 1973, at Brooklyn, New York.

The charge was filed on March 13, 1973. The complaint in this matter was issued on April 25, 1973. The issues concern whether Respondent violated (1) Section 8(a)(1) of the Act by warning and directing employees to refrain from becoming or remaining members of the Union and to refrain from engaging in protected concerted activity and (2) Section 8(a)(3) and (1) of the Act by discharging Kurtz because of his union or protected concerted activity.

All parties were afforded full opportunity to participate in the proceeding. A brief has been filed by the General Counsel and has been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:

Sani Rothberg, director of fabrication, and James Doherty, supervisor, are, and have been at all times material herein, agents of Respondent, acting on its behalf, and supervisors thereof within the meaning of Section 2(11) of the Act.

B. *The Unfair Labor Practice Issues*

The facts relating to the unfair labor practice issues may be summarized as follows:³

1. George F. Kurtz was initially employed by the Respondent in 1968 and worked in the shipping department until around September 1971. Thereafter and until around March 1972, Kurtz worked in the poster department; and from around March 1972 until March 8, 1973, Kurtz worked in the cutting department.

2. The facts relative to Kurtz' work in the shipping department and the poster department are not particularly significant with respect to the issues in this case. Kurtz had some type of a personal conflict with another employee or supervisor in the shipping department, but this had no bearing upon his transfer from the shipping department to the poster department. Plant Manager Rothberg's credited testimony clearly reveals that the Respondent did not attribute blame to Kurtz for such difficulty. The facts are clear that Kurtz' transfers out of the shipping department and poster departments were because business slowed up in such departments.

3. Kurtz, as indicated, was transferred into the cutting department around March 1972. Prior to this time, Kurtz and Doherty, supervisor of the cutting department, and their families had become social friends. When it was noticeable that the work was getting slow in the poster department, Kurtz and Doherty had discussed Kurtz' transfer into the cutting department and his learning the cutting trade.

Rothberg, plant manager, testified credibly to the effect that Respondent's management-employee relations had been good and on a basically sound, close, and personal interest basis. Rothberg testified credibly to the effect that he basically gave great discretion to his supervisors in their handling of their men and work. Rothberg credibly testified to the effect that prior to Kurtz' transfer to the cutting department that he had discussed with Doherty the latter's desire to transfer Kurtz into the cutting department and had told Doherty that Kurtz had not been giving a 100-percent performance as an employee.

4. Kurtz commenced working in the cutting department around March 1972. Doherty trained Kurtz for his work as a cutter. There is a dispute between the testimony of Doherty and Kurtz as to the number of discussions that occurred between Kurtz and Doherty as to Kurtz' performance.

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Viewlex Packaging, Inc., the Respondent, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York. At all times material herein, Respondent has maintained its principal office and place of business at Gilpin Avenue, Cardinal Industrial Park, in the City of Hauppauge, and State of New York, where it is, and has been at all times material herein, engaged in the manufacture, sale, and distribution of phonograph album covers and related products.

During a 1-year period representative of its annual operations generally, Respondent, in the course and conduct of its business operations, manufactured, sold, and distributed at its Hauppauge place of business products valued in excess of \$50,000, of which products valued in excess of \$50,000 were shipped from said place of business in interstate commerce directly to States of the United States other than the State in which it is located.

As conceded by Respondent and based upon the foregoing, it is concluded and found that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Graphic Arts International Union, Local 119B, New York, AFL-CIO, formerly known as New York Paper Cutters and Bookbinders Union No. 119, International Brotherhood of Bookbinders & Lithographers & Engravers, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.¹

¹ Referred to in this proceeding at times simply as Local 119B or Local 119.

² The facts are based upon the pleadings and admissions thereon.

³ The facts are based upon a composite of the credited aspects of the testimony of Kurtz, Galleli, Kaiser, Rothberg, and Doherty, and upon stipulations.

Considering the totality of the evidence, the logical consistency thereof, and the demeanor of the witnesses, I am persuaded that the true picture of the events and significance of the facts lies between the two versions. Thus, I am convinced from all the facts that Doherty did speak to Kurtz on several occasions about production and absenteeism. The clearly friendly relationship between Doherty and Kurtz and Doherty's treatment of Kurtz revealed a tolerant attitude by Doherty toward Kurtz. Kurtz' demeanor and manner of answering questions persuade me that his testimony underplayed the incidents. On the other hand, Doherty's overall testimony and the inconsistent reasons advanced for Kurtz' discharge persuade me that his remarks about Kurtz' performance were a pretextuous rationalization for such discharge. I find the facts as set forth following:

Around June or July 1972, Doherty spoke to Kurtz and told him in effect that he was not performing up to his capabilities. Kurtz' performance appeared to improve for a while. In Doherty's opinion, however, Kurtz performance slipped back later. Around November or December 1972, Doherty again talked to Kurtz, told him in effect that he was letting him down, that his absenteeism was bad, and that he had low production. Doherty told Kurtz in effect that it was not a question of Kurtz' inability to do the work, that Kurtz was not putting out, that he didn't want to have to drop a bomb on a guy (fire him), that the job was his, that if he wanted it, to just get to work.

Kurtz' job performance picked up, but a month or two later went down again. Kurtz had an absenteeism problem. The sum effect of Kurtz' job performance did not reveal the basis for serious complaint but did reveal, in Doherty's opinion, that Kurtz was performing below par for his ability.

I have considered the facts of Kurtz' and other employees' union activities involving Local 119B and the timing of such events as compared to Doherty's discussions with Kurtz in November and December 1972 as regards his job performance. The union activity, discussed later herein, occurred in October 1972. The facts clearly reveal that, excepting for the disputed issues of what occurred in March 1973, there is only slight evidence of union animus by Respondent.⁴ The facts reveal that Supervisor Doherty indicated to employees that he was not opposed to Local 119B. I am persuaded from all of the facts that the union activity of Kurtz and others had no bearing upon Doherty's motivation in speaking to Kurtz about his job performance in November and December 1972. In addition to the facts set forth above revealing lack of significant union animus, Doherty's conduct toward Kurtz in February 1973 and thereafter reveals that he was not acting with hostility. Thus, in February 1973, as set forth later herein, Doherty exhibited an understanding attitude as to Kurtz' Cleveland trip. And on March 2, 1973, as regards one instance of Kurtz' lateness or potential absence from work, Doherty certainly did not reveal himself as opposed to Kurtz.

5. Around October 1972, Kurtz learned of a union

⁴ Doherty in his testimony, as to why he spoke to Gallelli and others as to why he was discharging Kurtz, alluded to the fact that he was concerned as to whether the employees would think he was discharging a union

meeting to be held by Local 119B, told five or six employees about such meeting, attended one or two union meetings, and signed a union card.

6. The Employer and Teamsters Local 875 had a collective-bargaining agreement which expired on January 9, 1973.

7. In late January or early February 1973, Kurtz found it necessary to move some equipment from Brooklyn, New York, to Cleveland, Ohio. This movement of equipment apparently resulted from the previous death of Kurtz' father and Kurtz' involvement in disposing of his father's business.

Kurtz spoke to Supervisor Doherty about his planned trip and the need to take time off. Doherty suggested that it might be better to have the equipment moved by a commercial van. Kurtz indicated that it would be substantially cheaper for him to do the moving himself. Kurtz' and Doherty's discussion envisioned that Doherty would be away from work only 2 or 3 days. Doherty told Kurtz to tell anyone, if asked, that he was out with the flu. Kurtz was away from work for a day or two longer than had been anticipated in the discussion with Doherty. Kurtz received sick pay for such days that he was away from work. When Kurtz returned to work, Doherty did not say anything to Kurtz about the Cleveland trip. Later, at some unspecified time, Doherty told Kurtz that he was aware that there was something "wrong" about the Cleveland trip.

8. Kurtz, Kaiser, Gallelli, and McCort were employed at Respondent as papercutters. These four employees used machines in their papercutting described as "guillotine" cutting machines. These four employees were under the supervision of Doherty. Respondent also had an old-type guillotine machine in another area of the plant. The old guillotine machine was used by an employee named Aparicio for jacket-cutting. In early February 1973, Aparicio quit his job. Aparicio was not under the supervision of Doherty.

Since business was slow, Doherty persuaded other supervisors and management to let him have Kurtz do the jacket-cutting on Kurtz' machine. From February 1973 to the date of his discharge on March 8, 1973, when Kurtz worked, Kurtz spent approximately 30 of his 40-hour week on jacket-cutting and approximately 10 hours a week on paper-cutting.

The slowness of the business was to such a degree that around the last of February 1973, Respondent decided to utilize volunteer vacations of 1 week in duration by some of the papercutters under Doherty.

Supervisor Doherty spoke to employee Kaiser on February 27, 1973, and told him that business was slow and that he was going to have an employee to take a 1-week vacation, that one of the three, Kaiser, Gallelli, or Kurtz, would have to take a 1-week vacation, that McCort was not included among the ones for the "vacation" because he did layout work, that he thought it fairest if Kaiser, Gallelli, and Kurtz decided which one of them would take the 1-week vacation. Doherty told Kaiser that

ringleader. This reveals that Respondent considered Kurtz as one of the Union's ringleaders. In my opinion, such thought process reveals animus, whether acted on or not.

he (Doherty) did not want to make the decision, that it would be fairer if the three made the decision.⁵

Kaiser spoke to fellow employees Kurtz and Gallelli at lunch and told them that Supervisor Doherty had asked him to tell them about the need for one of them to go on a vacation. Kaiser's relation to his fellow employees was substantially in accord with the thrust of what Doherty had told him. It was not, however, a totally accurate relation of what Doherty had told him. As in many instances of such type of communications, Kaiser's relation of what was said changed slightly. Kaiser told his fellow employees what Doherty had said about the slowness of business and the need to have one of the three to take a vacation. Kaiser's relation of the events or his fellow employees' interpretation thereof was to the effect that there would be consecutive 1-week vacations with the employees deciding who would take the 1-week vacation first and who would take the vacations on the week following. Kaiser either did not recall the reason why McCort was not being included in the vacation plans, did not understand the reasons given him by Doherty, or, if he related the reasons given him by Doherty, such was not understood or accepted by Gallelli and Kurtz.

In the discussion between Kaiser, Kurtz, and Gallelli, the three indicated to each other that they were not happy with the way that the "vacation" was being handled. Gallelli expressed dissatisfaction with the fact that Kurtz, who had the lowest seniority, had not been selected for the first 1-week vacation. Gallelli and the other two employees also did not like the fact that McCort was not being included in the "vacation" layoff plans. The three employees also expressed dissatisfaction with the fact that Doherty was putting the responsibility upon them to make a decision as to who took the "vacation" layoffs. The three employees decided that they would see Plant Manager Rothberg about the problem.

Kaiser saw Supervisor Doherty and told him that the three employees were going to see Production Manager Rothberg. Doherty told Kaiser to go ahead to see Rothberg.⁶

Kaiser, Gallelli, and Kurtz went to see Plant Manager Rothberg and discussed the "voluntary" 1-week layoff problem. The employees asked Rothberg to tell them why McCort was not included in the plans for a 1-week vacation layoff and why Doherty had not decided who was to be laid off. Rothberg's overall testimony and the testimony of all the witnesses revealed Rothberg to be a man of tact and diplomacy. Rothberg told the employees in effect that he did not know why Doherty had handled the matter as he had but that he left such matters up to his supervisors, that business was slow and that there had to be a vacation-type layoff, and that McCort was not included in such plans because of the type of work that McCort was doing.

Kurtz volunteered to be the first one to take the week vacation layoff. However, Gallelli volunteered to take a

week layoff if he could go the next day. As a result, Gallelli took a week "vacation" layoff.

9. On March 2, 1973, Kurtz did not report to work on time. Around 8:30 a.m., Doherty spoke to employee Kaiser. Doherty told Kaiser that he knew that Kaiser and Kurtz had gone out drinking the night before, and if Kaiser could come to work, Kurtz should be able to do so, that if Kaiser were a friend of Kurtz, he should call him and tell him to come to work. Kurtz reported to work about an hour later. Supervisor Doherty did not speak to Kurtz about his failure to report to work on time.

10. On Sunday, March 4, 1973, Kurtz became ill and had to go to a hospital. Around 9:30 or 10 p.m., Kurtz and his wife spoke to Doherty. What occurred is revealed by the following credited excerpts from Doherty's testimony.

Q. Did you have a phone conversation with the Kurtz' on Sunday, the 4th?

A. Yes.

Q. What was the nature?

A. I don't know whether it was Buzz or Adrienne had called me, one of them did, and I believe it was Adrienne, Mrs. Kurtz, and Mrs. Kurtz called me and I—she told me that Buzz was very ill, they didn't know what was wrong with him. They would probably be going to the hospital.

I told Mrs. Kurtz that can I help, is it necessary, you know, if you have nobody there, I'll come down. It's twenty miles between the houses. And help take him to the hospital.

At this period Buzz got on the phone himself, and I could tell the man was, you know, in some sort of pain. He told me that he was very ill, that he didn't need the help, two friends were coming to take him to the hospital, but he just wanted to tell me that—what the circumstances were. He would not be at work in the morning, and he just didn't know any further at that point.

I informed him—He told me he was worried about his job.

I told him listen, you don't worry about your job at this point here, you worry about your health, and get to the hospital as soon as you can.

And that was about it with that conversation.

Doherty later called the hospital to ascertain whether or not Kurtz was there.

On March 5, 1973, Doherty spoke to Mrs. Kurtz and inquired about Kurtz. What occurred is revealed by the following credited excerpts from Doherty's testimony.

Q. Did you next have a—When did you next talk to one of the Kurtz'?

A. The following morning, Monday, before I went to work. About eight o'clock. I stopped in at Buzz' house, he was not home. I saw his wife and I asked her,

between Kaiser and Rothberg. It is not clear whether Gallelli was present when Kaiser spoke to Doherty. There is a slight difference between Kurtz' version of what Doherty said to Kaiser. I discredit Kurtz' version to the extent it is inconsistent with the testimony of other witnesses. I found Kurtz to appear to be prone to present his case in the light he considered favorable to himself.

⁵ Doherty's and Kaiser's testimony was substantially similar. As to any difference in their testimonial version of the event, I credit Doherty. Kaiser as a witness revealed that he had difficulty in understanding some of the questions. I am persuaded that Doherty's recall is more accurate than that of Kaiser.

⁶ Kaiser, Gallelli, Kurtz, and Doherty testified as to the conversation

you know, what was the news, how was he doing. And she said at that point she had no information, she had nothing to say.

She hadn't seen him since the previous night and that was about the end of it, other than my saying, well, Adrienne, please keep me informed as to what his condition is, as to when he'd be able to return to work. She said she certainly would. That was that.

11. Kurtz was discharged from the hospital on the morning of March 7, 1973. On the morning of March 7, 1973, Kurtz telephoned the plant in an attempt to speak to Supervisor Doherty. Unable to get Doherty, Kurtz spoke to Gallelli and asked Gallelli to tell Doherty that he had called and would try to reach him later but in any event would be in the next day.

Kurtz met Gallelli and Kaiser at lunchtime at a place about a mile away from the plant.⁷

After lunch, Gallelli saw Supervisor Doherty and told him about having had lunch with Kurtz and about Kurtz' morning telephone call.

Kurtz did not see or speak to Supervisor Doherty on March 7, 1973.

12. During the evening of March 7, 1973, Supervisor Doherty determined that he was going to discharge Kurtz.

The Threat of Reprisal

13. On the morning of March 8, 1973, Kurtz did not report to work at the normal starting time. Around 8:30 a.m., Supervisor Doherty met with employees Gallelli, Kaiser, and McCort. Doherty told such employees of his decision to fire Kurtz. Doherty told the employees that Kurtz was a troublemaker and that he was firing him so that there would be harmony. Doherty told the employees that he was firing Kurtz because of his absenteeism and low production.⁸

Gallelli argued with Doherty about the proposed discharge of Kurtz. Gallelli told Doherty that Kurtz would go to the Labor Board. Doherty told Gallelli and the others in effect that he didn't care about the Labor Board or Union, that he considered that he was justified.

Doherty's testimony as to why he told the employees of his decision to discharge Kurtz is revealing of the atmosphere surrounding his remarks. Thus, Doherty testified that he was concerned as to the employees' thinking that he was discharging a union ringleader.

Considering all of the foregoing, I am persuaded that Doherty and the employees knew that his actions toward Kurtz reflected a changed attitude and that they would consider that he was engaging in an unjust act. Because of the close relationship of Doherty and all of the employees, I am not persuaded that he actually meant to be threatening the employees with reprisal. Rather, I am persuaded that he was trying to justify his actions. The question of whether his remarks constitute an illegal threat of reprisal depends, however, upon the remarks conveyed. All of the employees were aware of Doherty's friendly attitude toward Kurtz prior to the events of the forced

layoff and group protest that had happened several weeks earlier. Such employees were also aware that the immediate circumstances of Kurtz' hospitalization did not warrant a discharge. Accordingly, it is clear that the message to the employees was clear that Doherty's change of attitude toward Kurtz was caused by Kurtz' participation in the group's protest to Manager Rothberg about the way Doherty had handled the manner of selection of an employee for the forced 1-week vacation. The message was clear that Doherty was engaging in a reprisal against Kurtz because of Kurtz' engaging in protected concerted activity. This message similarly conveyed that similar reprisals would come to others who persisted in such protected concerted activity. Such conduct is violative of Section 8(a)(1) of the Act. I so conclude and find.

14. On March 8, 1973, as indicated beforehand, Doherty told employees Gallelli, McCort, and Kaiser that he was going to discharge Kurtz. Doherty also told Gallelli that he wished that they would not tell Kurtz until he had told Kurtz.

Gallelli telephoned Ruggerio of Local 119B and told him of Doherty's conversation about his plans to discharge Kurtz. Ruggerio thereafter telephoned Kurtz and told him what Gallelli had related to him. Kurtz then left home to go to see Doherty at the plant.

Mrs. Kurtz, who knew of Ruggerio's telephone call, telephoned Supervisor Doherty at the plant. What transpired during this conversation is revealed by the following credited excerpts from Mrs. Kurtz's testimony.

Q. Directing your attention to Thursday morning, March 8th, did you speak with Mr. Doherty on that morning?

A. No. The eighth, yes. Later in the morning I called him.

Q. Why did you call Mr. Doherty?

A. Because—I called him because my husband had received a phone call from Mr. Ruggerio, informing him that he had been fired. My husband left the house to go up to see Mr. Doherty, and I called him to find out what was happening.

Q. Now, I want you to tell us as best you can recall, exactly what the substance of that conversation was with Mr. Doherty?

What did you say and what did he say?

A. I asked him what was happening, and why—I told him—

Let me backtrack a little bit.

That my husband was going up to see him to find out what was happening.

He asked me why was he coming to see him.

I said, I don't know, that's what I'm trying to find out. And I asked him how could a Company fire my husband while he was in the hospital.

And Mr. Doherty said to me, you failed to keep me informed.

As indicated, after receiving the telephone call from Ruggerio, Kurtz went to the plant and saw Doherty. What

and Kaiser were more frank, truthful, and forthright witnesses as to this incident and credit their testimony where in conflict with Doherty's.

⁷ The three employees often met at this place for lunch.

⁸ Gallelli and Kaiser credibly testified to the facts as found. Doherty's testimony was generalized as to what was said. I am persuaded that Gallelli

occurred then is revealed by the following credited excerpts from Doherty's testimony.

A. He just come over to me and said, hi, what's up. And I took him on the side and I told him that, Buzz, I felt that I have to fire you. I don't mean that the company told me that I have to fire you, I have to fire you.

I told him why.

He said to me, he thinks I'm full of whatever, and I'm just looking for an excuse.

I tried to explain to him, he was a little upset, he wouldn't hear anything I had to say, after I told him I fired him.

I says, I'm sure that I can arrange for you to pick up your money right now in the office, if you want.

He went into the office to see Sani, I presume.

Q. After Kurtz left, was there a layoff in the plant?

A. Well, there was a layoff after, and there was a layoff before. None of it was surprising to anybody.

Kurtz then went to see Plant Manager Rothberg. What occurred is revealed by the following credited excerpts from Kurtz' testimony.

A. I went up to see Mr. Rothberg, and I asked him why, what the story was, and he said that he would not—he chose not to go over his supervisor's head. But that after some time, he said, take a week's pay now, and see if things cool down, or something like that, and to call him in a day or so.

* * * * *

Q. Did you call Mr. Rothberg the next day?

A. I did.

Q. What did Mr. Rothberg say?

A. He said that he hadn't had a chance to talk with Jim, but that, I believe he said come in Monday. Or see me on Monday, excuse me.

Q. Did you go in on Monday?

A. I did.

Q. What happened then? Who did you see?

A. I saw Jim Doherty first. And I said is anything new? And he said everything's as it was.

Q. What did you do next?

A. I went up to the office and again saw Mr. Rothberg, who asked me if I'd talked to Jim over the weekend.

Q. What did you say?

A. I said, no, I hadn't. He said it might have been a good idea, and I said, well, I didn't want to appear that I was begging for my job.

On or about March 19, 1973, Kurtz had another conversation with Rothberg. What occurred is revealed by the following credited excerpts from Kurtz' testimony.

A. There was a problem with unemployment. They didn't like the, or the grounds for my leaving the Company, they said it might be a hang up, or—In other words, they didn't like—I really I don't know what to say.

Q. What did Mr. Rothberg say to you, and what did you say to Mr. Rothberg?

A. I said to him there was a question about my eligibility to get unemployment, seeing that I was fired or—fired, in that way. He said he would get in touch with the unemployment and explain the situation to them. In other words, to release my eligibility for unemployment.

On March 29, 1973, Mrs. Kurtz spoke to Plant Manager Rothberg about her husband. What occurred is revealed by the following credited excerpts from her testimony.

Q. Why did you call Mr. Rothberg?

A. I called him because my husband had come home the day before and told me that he was not eligible for unemployment insurance because the Company had said that he had failed to notify when he was in the hospital.

So I called Mr. Rothberg to try and straighten this out, to tell him that I had called, and I had told him that Buzz was in the hospital.

* * * * *

Q. Now, what did—Did you describe what you described to me, to Mr. Rothberg?

A. Yes, the events that I just told you.

Q. What did Mr. Rothberg say?

A. He told me he was taking it all down, and that he would take it from there.

On April 3, 1973, Kurtz received a letter from the Respondent. Such letter is as follows:

April 3, 1973

Mr. George Kurtz
12 Chestnut Street
Central Islip, N.Y.

Dear Buzz:

As you will remember, the last time I saw you I said that we would take your case under review. The pressure of business and having to make some trips have delayed my responding to you. However we have made that review and in view of all the factors involved I have decided to change your discharge to a 2 week suspension. There is, however another problem, as you may know we had a lay off in many departments including the cutting department. As the lowest senior man in the department, you previously had been selected for that lay off. But the discharge occurred before we took action to lay you and the other people off.

Therefore, while you are now reinstated as an employee at Viewlex as of the end of the 2 week suspension, it will have to be in a lay off status for now. We hope to be recalling you soon. But that of course depends on our business picking up and the needs of the cutting department.

I notified the unemployment office about this situation, telling them that you are now in a lay off

status, so as to eliminate the problem on that score. If you want to discuss this with me please call.

Sincerely yours,

/s/ Sani Rothberg

Sani Rothberg

Sometime after April 4, 1973, Kurtz had a telephone conversation with Rothberg about the letter and when the suspension started. Kurtz' testimony was to the effect that he didn't get a definite answer as to when the suspension started. Rothberg did not testify on this point. Despite this, I am not persuaded that Kurtz' testimony is reliable to establish that this conversation has any meaning or bearing upon the issue. All of the facts would clearly indicate that the "layoff" would have been from March 8, 1973, and for 2 weeks. I am persuaded that at most there appears to have been a failure of communication and precise understanding. Perhaps Rothberg did not remember the precise date of Doherty's discharge of Kurtz on March 8, 1973.

After the discharge of Kurtz on March 8, 1973, Respondent utilized the services of another employee, who did not work for Doherty, on Kurtz' machine to do the jacket-cutting that Kurtz had done. The facts also show that Respondent had economic reasons for layoffs or cutbacks.

The General Counsel contends that the Respondent discharged Kurtz on March 8, 1973, because of his union or protected concerted activities. The Respondent contends that Doherty became upset because Kurtz did not do him the courtesy of seeing him (Doherty) on March 8, 1973, but instead saw his fellow employees at a bar, and that this and Kurtz' poor employment record as to absenteeism and production constituted the reasons for Kurtz' discharge. The Respondent argues that Doherty felt that he had been good to Kurtz and felt betrayed by Kurtz' failures as indicated.

Doherty asserted a number of reasons for Kurtz' discharge at the time of his discharge. Doherty also testified to reasons which were unasserted. It is sufficient to say that the totality of his asserted reasons do not reveal a truthful ring or a logical consistency. Thus, Doherty complained that Kurtz had not kept him advised concerning Kurtz' hospitalization. This is contrary to the facts. Further, Doherty testified that Kurtz made him look bad to his superiors because he was taking advantage of Doherty's friendship. The overall facts convince me that this had reference to Kurtz' joining in with the group protest about the 1-week vacation layoff and manner thereof. Further, the overall facts are convincing that Doherty did not consider Kurtz' production or absenteeism a real problem until after said group protest. Thus, I am persuaded that Kurtz' absenteeism and production constitute pretextuous reasons.⁹

Although Doherty's testimony reveals some slight union animus, the overall facts persuade me that it was Kurtz' involvement in the group protest and not his union activity that motivated Doherty in the discharge of Kurtz.

⁹ The message that comes through from Doherty and Rothberg, considering their demeanor and total testimony, is that there was not a

Respondent contends in effect that even if it discriminatorily discharged Kurtz on March 8, 1973, it nevertheless removed the continuing effect of discrimination by changing the discharge to that of "suspension." The Respondent asserts that the "suspension" was economically motivated. I reject these contentions. The overall facts reveal that Respondent's economic problems preceded the March 8, 1973, discharge of Kurtz and that, absent such discriminatory discharge, its economic problem would have been handled without a "layoff" of Kurtz.

Considering all of the facts and Doherty's asserted reasons and testimony as to his reasons for the discharge of Kurtz, I am persuaded that Respondent, by Doherty, discharged Kurtz because of his participation in protected concerted activity, a protest of the way Doherty handled the 1-week vacation layoff in February 1973. Such conduct is violative of Section 8(a)(1) of the Act. It is so concluded and found.

IV. THE REMEDY

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

It having been found that the Respondent discharged George F. Kurtz in violation of Section 8(a)(1) of the Act, the recommended Order will provide that Respondent offer him reinstatement to his job, and make him whole for loss of earnings within the meaning and in accord with the Board's decisions in *F. W. Woolworth Company*, 90 NLRB 289; *Isis Plumbing & Heating Co.*, 138 NLRB 716, except as specifically modified by the wording of such recommended Order.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that the Respondent cease and desist from in any other manner interfering with, restraining, and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Viewlex Packaging, Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Graphic Arts International Union, Local 119B, New York, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.
3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act. [Recommended Order omitted from publication.]

significant problem about Kurtz' job performance.