

**Sherwood Ford, Inc. and Carmen Sgroi Ray. Case  
14-CA-15254**

September 30, 1982

**DECISION AND ORDER**

**BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN**

On April 15, 1982, Administrative Law Judge James M. Fitzpatrick issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Sherwood Ford, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and re-letter the subsequent paragraphs accordingly:

“(b) Expunge from its files any references to the discharge of employee Ray on July 10, 1981, and notify her in writing that this has been done and that evidence of this unlawful disciplinary action will not be used as a basis for future discipline against her.”

2. Substitute the attached notice for that of the Administrative Law Judge.

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> Member Zimmerman agrees with the Administrative Law Judge's conclusion that the timely filed unfair labor practice charge in this proceeding supports the complaint allegation that Respondent violated Sec. 8(a)(1) of the Act by discharging employee Ray for engaging in protected concerted activities. He finds it unnecessary to decide, however, whether the pre-printed allegation of the charge form is, by itself, adequate to support any complaint allegation of an independent 8(a)(1) violation. Here, both the charge and the complaint allege forms of discrimination by Respondent with respect to the same subject matter; i.e., employees' protected concerted claims to holiday pay.

**APPENDIX**

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT discharge employees for engaging in such activities.

WE WILL NOT discharge employees for protesting wages, holiday pay, or other terms and conditions of employment, or for engaging in other protected concerted activities.

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

WE WILL offer Carmen Sgroi Ray immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and WE WILL make her whole for any loss of earnings she may have suffered, plus interest.

WE WILL expunge from our files any references to the discharge of employee Ray on July 10, 1981, and will notify her in writing that this has been done and that evidence of this unlawful disciplinary action will not be used as a basis for future discipline against her.

**SHERWOOD FORD, INC.**

**DECISION**

**STATEMENT OF THE CASE**

JAMES M. FITZPATRICK, Administrative Law Judge: In this case an office employee was fired because, in protesting to the office manager about the Company not paying office employees for the Fourth of July, she told

him she was tired of being lied to. I find her conduct legally protected and her discharge unlawful.

This case arises out of unfair labor practice charges filed August 11, 1981, by Carmen Sgroi (now Carmen Sgroi Ray)<sup>1</sup> against Sherwood Ford, Inc. (Respondent). Based on these charges, a complaint issued September 14 alleging that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), when it discharged Ray on July 10, and thereafter did not reinstate her, because she engaged in concerted activities for the purpose of collective bargaining or other mutual aid and protection of employees. Respondent answered the complaint, admitting the jurisdictional allegations and also that it discharged Ray on July 10 and did not thereafter reinstate her, but denying that it did so because she engaged in protected concerted activities.

The issues as framed by the pleadings were heard before me at St. Louis, Missouri, on January 12, 1982. At the start of the hearing and again in its post-hearing brief, Respondent moved to dismiss the complaint on the ground that the charge was technically inadequate to support the complaint which issued, and, therefore, no appropriate charge exists in the instant proceeding and the complaint may not stand. Respondent points to Section 10(b) of the Act which in pertinent part provides, "Whenever it is charged that any person has engaged in . . . any such unfair labor practice, the Board . . . shall . . . issue and cause to be served upon such person a complaint stating the charges in that respect . . ." Thus, the authority to issue a complaint is contingent upon the existence of a charge which has some relationship to the complaint and without which a complaint may not issue, the Board not having authority to initiate its own proceedings. *N.L.R.B. v. National Licorice Company*, 104 F.2d 655 (2d Cir. 1939), *aff'd*, 309 U.S. 350 (1940).

In the instant matter, the charge, a copy of which is attached hereto as Appendix A [omitted from publication], is on a printed form with blanks filled in with typewritten information. The printed portion of subsection h of the form reads:

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and \_\_\_\_\_ of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

The blank is filled in with a typewritten (3). Thus, in blanket terms that portion of the charge asserts that the employer has committed violations of Section 8(a)(1) and (3) of the Act. Section 2 of the printed form provides space and instructions for the "Basis of the Charge (Be specific as to facts, names, addresses, plants involved,

<sup>1</sup> All dates herein are in 1981 unless otherwise indicated. Carmen Sgroi, unmarried at the time of the events involved herein, later acquired the name Ray through marriage. In the record she is frequently referred to as Carmen, but for convenience will be referred to in the Decision as Ray.

dates, places, etc.)" The typewritten information filled in in this portion is as follows:

The above-named Employer by its officers, agents and representatives discriminated in regard to hire, tenure and other conditions of employment against employees Carmen Sgroi, Shari Jarvis and Janet Becker on or about July 4, 1981, and at all times thereafter has continued to discriminate against Carmen Sgroi, Shari Jarvis and Janet Becker by not paying them holiday pay for July 4, 1981, because they are not members of a labor organization.

Section 2 of the charge concludes with the following printed language:

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

At the bottom, of course, the charge is signed and dated by the Charging Party.

From the above it is apparent that the charge asserts violations by Respondent of Section 8(a)(1) and (3) of the Act by not paying the three office employees holiday pay for July 4, 1981, because they were not members of a labor organization and thereby unlawfully discriminated against them. The complaint, on the other hand, alleges that Respondent violated only Section 8(a)(1) of the Act, making no mention of Section 8(a)(3). The gravamen of the complaint is that Respondent unlawfully discharged Ray on July 10 because she engaged in protected concerted activities for the purpose of collective bargaining or other mutual aid and protection. In support of its motion Respondent cites *Hunter Saw Division of Asko, Inc.*, 202 NLRB 330 (1973); and *Allied Industrial Workers of America, AFL-CIO, and its Local Union No. 594 (Warren Molded Plastic, Incorporated)*, 227 NLRB 1541 (1977).

The General Counsel opposes Respondent's motion and contends that the function of a charge is only to initiate the investigatory processes of the Board, that the general language of the instant charge asserts that by the specific acts referred to in the charge and by other acts Respondent interfered with, restrained, and coerced employees respecting their Section 7 rights, and that there exists a "sufficient relationship" between the charge and the complaint herein so that the charge is adequate to support the complaint. The General Counsel relies on *Connecticut Distributors, Inc.*, 255 NLRB 1255 (1981), and *Olympic Medical Corporation*, 236 NLRB 1117 (1978). I find these to be more persuasive precedents for this case than *Hunter Saw* and *Allied Industrial* referred to by counsel for Respondent.

At the hearing I denied Respondent's motion on the ground that the charge is adequate to support the allegations of the complaint. I adhere to that position in now denying Respondent's renewed motion. In so ruling I give equal emphasis to the printed portions of the charge containing general language as well as to the more specific portions typed in. The charge as a whole alleges a form of discrimination against three employees. The

complaint also alleges a form of discrimination, but against only one of those three employees. Both charge and complaint assert a violation of Section 8(a)(1) of the Act. Although the charge asserts additionally that Section 8(a)(3) was violated while the complaint does not, the omission of such an allegation from the complaint is of no moment because Section 8(a)(1) is broad enough to include some forms of discrimination, including the type alleged in the complaint. It is also true that read *in vacuo* the two documents appear to deal with distinct, unrelated subjects, the charge referring to discrimination by not paying holiday pay for July 4 because the employees were not members of a labor organization while the complaint refers only to the discharge of Ray on July 10 because she engaged in concerted activities. It would, however, honor form over substance to judge the adequacy of the charge solely on the bare bones wording of the complaint in a case such as this where the record fleshes out the complaint's allegations by demonstrating that the events of July 10 referred to in the complaint, including the discharge and the reasons therefore, are directly related to, and the consequence of, Respondent's failure to pay the holiday pay for July 4 referred to in the charge. Thus, in reality, the complaint deals with the same events as the charge, although such is not apparent from the two documents, and the only real difference between them is the legal conclusions drawn on each from those events. Respondent makes no contention of being misled either factually or legally by the apparent differences between the charge and the complaint, the motion being aimed only at the technical adequacy of the charge, and the record demonstrates that all parties had full opportunity to litigate the issues. *Connecticut Distributors* and *Olympic Medical*, cited by counsel for the General Counsel, support her contention of the sufficiency of the relationship between the charge and the complaint in the present matter. In addition, counsel cites *Baton Rouge Water Works Company*, 246 NLRB 995 (1979), to support the conclusion that a charge is adequate if it relates to the same event as the complaint. In *Baton Rouge*, the charge asserted that an employee was discharged in violation of Section 8(a)(3) while the complaint alleged a violation of Section 8(a)(1) in the employer's refusing to allow a union representative to be present at an interview and thereafter proceeding with the interview without a union representative. The present matter falls within the teaching of that case. In *Pet Incorporated, Dairy Group*, 229 NLRB 1241 (1977), the printed portion of the charge asserted a violation of Section 8(a)(1) with Section 8(a)(3) being filled in the appropriate blank. Thereafter, the 8(a)(3) aspects of the charge were withdrawn and a complaint issued alleging four violations of Section 8(a)(1). The Board there found the charge adequate for the complaint, relying in part on the printed portion of the form to the effect that the employer "By the above and other acts . . . interfered with, restrained, and coerced employees in the exercise of their Section 7 rights." The situation in *Pet* is analogous to the present one and supports the conclusion that the motion to dismiss should be denied.

Based on the entire record, including my observation of the witnesses and consideration of the briefs of the General Counsel and Respondent, I make the following:

#### FINDINGS OF FACT

##### I. THE EMPLOYER

Respondent, a Missouri corporation, is engaged at St. Louis, Missouri, in the operation of a Ford dealership for the retail sale, distribution, and servicing of new and used motor vehicles. During the calendar year ending August 31, a period representative of its operations, Respondent derived gross revenue from this business exceeding \$500,000 and received at its premises in St. Louis directly from points outside Missouri goods and materials, including motor vehicles, valued over \$50,000. Respondent is an employer engaged in commerce within the meaning of the Act.

Respondent is owned by its president, Kenneth Berdos, who also owns another dealership in Arizona. At the time of the events involved in this case, Robert Nicks was Respondent's office manager and Ray's immediate supervisor. During the frequent absences of Berdos, Nicks was in charge. The regular office staff consisted of bookkeeper and assistant office manager Janet Becker, who had been with the Company since early December 1980, the switchboard operator and bookkeeper Sharon Jarvis, an employee for over 10 years, and bookkeeper and general office worker Ray, who began working for Respondent in October 1979. Although there was some overlapping of duties, office functions normally were divided as follows: Becker handled bank deposits, the payroll, sales summaries of parts and accessories, accounts receivable, miscellaneous reports, and assisted in preparing the month-end analysis; Jarvis operated the telephone switchboard, prepared bills, handled the warrantee register, and acted as service department cashier; Ray handled the paper work for "car deals," the sales journals connected therewith, the purchase journal, cash disbursements records, and relieved Jarvis on the switchboard. There is no contention here that Becker was a supervisor.

Respondent also employs sales personnel, as well as service employees (mechanics) and parts personnel, each covered by separate collective-bargaining agreements.<sup>2</sup> The office employees are unrepresented.

##### II. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. Background

Walter Lockhart was Nicks' predecessor as office manager. The staff liked working for him and, in fact, subsequent to the events here involved, all three of them, Becker, Jarvis, and Ray, went to work for him at Lynch Cadillac where he became office manager after leaving Respondent.

<sup>2</sup> Respondent's service employees are represented by Teamsters Local 777, parts employees and porters are represented by Teamsters Local 618. The salesmen are represented by a salesmen's union, the name thereof not being apparent in the record.

Lockhart left Respondent's employment for reasons which are not apparent in the record. But in anticipation thereof, Berdos sought a replacement and hired Nicks to take over from Lockhart on May 18. Nicks, whose previous experience had been with a General Motors dealership in Des Moines, was unfamiliar with the details of managing a Ford dealership. To assist in the transition, Lockhart stayed on for 3 days after Nicks' arrival. On May 21 he left permanently and thereafter Nicks was on his own.

When on April 26 Berdos had interviewed Nicks for the job, and again when Nicks reported on May 18, the two discussed Respondent's business, including the office staff. Berdos told him about Lockhart's close working relationship with the office staff, mentioning that probably one or two, Jarvis and possibly Ray, might leave and follow him. Berdos also mentioned that Ray had an attitude problem and that for that reason he could not anticipate what would happen when Nicks came into the operation. Berdos described her as "surly" because she did not always respond to his greeting when he passed through the office. Thus, from the beginning of Nicks' tenure, the management attitude respecting the office staff, particularly Jarvis and Ray, was adversely tilted against them. This helps explain why, on his third day on the job and even before Lockhart left, Nicks started making notes, a sort of diary, of his relations with the office staff. The tension which developed between him and the women in the office was undoubtedly exacerbated by the fact that as a manager he was stricter than Lockhart and by the manner in which he asked them to carry out his instructions. All three women became increasingly apprehensive to the point that by mid-June they all expected to be fired. During Lockhart's tenure there had been considerable conversation in the office, a relatively confined area.<sup>3</sup> But there was little conversation after Nicks arrived. In contrast with the atmosphere during Lockhart's regime, the women talked very little with Nicks unless they were questioned by him, nor did they talk much among themselves. Becker testified that when she gave notice on June 19 that she was going to leave Respondent's employ, she did so because she did not like working with Nicks, and in a pretrial affidavit to a Board investigator, Ray stated that she was not interested in working again for Respondent as long as Nicks worked there also. Nicks was unable to bridge this gap between himself and the staff. Both he and Berdos took note of this and in their testimony characterized the feelings of the staff toward management as an attitude problem. They applied this label particularly to Jarvis and Ray. Their failure to specifically apply it to Becker was, I infer, due to her efforts toward cordiality in respecting the amenities even though she too disliked Nicks and was the first to take action by giving notice, and because from management's point of view she was the most valuable of the three staffers, being the one they could least afford to lose.

What Berdos and Nicks objected to in the demeanor of Jarvis and Ray was their failure to extend to the man-

<sup>3</sup> Respondent's office space consists of a private office for Berdos and an outer office, 15x25 feet, occupied by Becker, Jarvis, Carmen, and Nicks. When Berdos was absent, Nicks used his office.

agers what they considered to be normal courtesies due fellow members of a group working closely together. They noticed this in their failure to affirmatively greet them when they came into the office and, in the case of Nicks, his not being included in any social conversations. With Ray some of this coolness may be attributable to her introspective personality and her quiet voice, but the weight of the evidence shows convincingly that both she and Jarvis did nothing more than their job, making no effort whatsoever to improve personal relations with either Nicks or Berdos. On June 4, Nicks made an effort to overcome the problem by calling a staff meeting at which he mentioned that he was new to the Ford accounting system, having previously worked with the General Motors system, and needed their assistance, and that he had to rely on them in such ways as answering questions or locating materials for him. He told them he was disappointed with their attitude toward him, that he expected from them the same cooperation they had given Lockhart.

And on June 8, Berdos involved himself in the problem by calling Ray into the office for a talk, and would have called in Jarvis also had she been at work that day. According to Berdos, he told Ray she had a very bad attitude problem, that she could at least say good morning to him since he was the owner of the Company. She recalled that he said that if she did not like working there any more she could let him know; that if she was not happy she could leave. She replied that she was happy working there. Berdos also said that as long as he signed the paychecks he expected her to be courteous and cooperative. His warning had an effect on her, but it was limited. The next morning she greeted him, as she described it, with a happy tone in her voice but did not know what expression she had on her face. Her pre-trial affidavit given to the Board investigator, however, stated that she had a "smirk on her face" and that she did not think Berdos liked it. This and her testimony generally indicate that she had not totally acceded to her employer's conditions in that she was still tilting with him. Nevertheless, her demeanor softened for the balance of the week. Thereafter, according to Nicks, she reverted to her previous habit of not acknowledging the presence of Berdos as the owner or Nicks as her supervisor.

Jarvis as well as Ray shared this chip-on-the-shoulder attitude toward management and, if anything, was the more belligerent of the two. With Ray, however, there was an additional dimension, as shown by the notes and the testimony of Nicks, in that she did not show respect for the Company and in office discussions made derogatory remarks about the way the Company was run.<sup>4</sup> On occasion Nicks considered her insubordinate. Thus, on May 28, she answered an incoming telephone call for Berdos, who was out of the office, and after telling the caller that, "Mr. Berdos is not here," and hanging up, she commented, "He's not here, who cares." On June 2, she made comments downgrading the service department for its prices and for overcharging customers. The next day she commented, "All that managers do is make mis-

<sup>4</sup> There is no evidence of derogatory comments outside the office or to customers or competitors.

takes." The day after that, June 4, when Nicks asked her a question about the new- and used-car stockbook, she failed to answer him. She testified that she did not recall this incident. On the other hand, she did not specifically deny it, her testimony being that she "usually" answered Nicks' direct questions with a yes or no. Considering the ample evidence of her animosity toward the Company and Nicks in particular, and even though she testified that she never failed to respond, I find that on that occasion she chose not to respond.

On June 18, according to Nicks, Ray became involved in a controversy with a salesman named Beech over the computation of his commission on a car sale. Later the salesman complained to Nicks, apparently telling him that he had asked Ray to refigure his commission and that she became "bull headed" and refused. Nicks testified that he then refigured the deal and corrected the error. Ray admitted the controversy with Beech, explaining that in her computation she used the base figures which Nicks had provided. Beech, thinking he should receive a larger commission, asked her to recheck it which she did using the same base figures. According to her, she told Beech she had rechecked it and came up with the same result. She then in effect told him that if there was a problem it had to be with the figures for which Nicks was responsible and that that was a matter which Nicks handled. She seems thus to have referred Beech to Nicks. Beech did not testify. In spite of the differences between these accounts, I find that together and in their entirety they support the proposition for which Nicks cited the incident; namely, Ray's uncooperative attitude. In an office operation involving only four persons, it is inconceivable that a person charged with the responsibility for figuring commissions for salesmen would not follow up on such a loose end, which Ray herself pointed out, even if the office manager was responsible for the crucial figures, instead of forcing the salesman to apply directly to the office manager for an adjustment.

Early in the forenoon of July 1, Nicks instructed Ray to hold the car deal sales journal open until noon of that day, the usual practice having been to close the journal whenever all of the car deals for the prior months were in. Nicks testified that during the morning, Ray, in spite of his instruction, asked Respondent's finance manager who is neither her superior nor in charge of the sales journal, whether she could close her books. Nicks considered she was circumventing his supervisory authority. But this was a strained conclusion. In testifying about the incident Ray was not as lucid as she might have been. She did not deny that Nicks had told her to keep the journal open until noon. She recalled him saying, ". . . to hold the sales . . . books open because there were more deliveries. So, I was just confirming with the finance manager. That's all I was doing if he—and he probably told me there was no more deals. I wasn't going against Mr. Nicks, I was just confirming with the sales department, which is what books I was being held open." If there had been sales of parts, she would of course need that information for her journal. The thrust of her testimony is that she was inquiring for any such available data rather than seeking early approval to close her journal from someone with no authority to grant it.

That is the more reasonable explanation of what occurred and I so find. Nicks simply misjudged the situation.

Considering all the evidence relating to the office situation, I find that Nicks was a difficult man to work under. This explains the unanimous resentment of his subordinates even though it does not justify the failure of Jarvis and Ray to fully cooperate. Neither Berdos nor Nicks had any quarrel with the quality of Ray's work. It was her attitude to which they took exception. And the record amply demonstrates the general validity of this assessment.

When Lockhart left, Berdos expected that the entire staff might follow him. With that in mind he placed a classified advertisement in a local suburban newspaper on June 3 for an "Auto office clerical—experienced in accounting and file procedure." This produced no results, so 2 weeks later, on June 17, another classified advertisement was placed in a metropolitan newspaper with larger circulation for a "Bookkeeper—experienced in all phases of auto office procedure. Ford experience preferred or we will train qualified individual. Excellent pay plan." Nicks testified that the purpose of both advertisements was to find a replacement for Ray. I do not credit him in this respect because it is not consistent with the testimony of Berdos. I find the purpose was to find a replacement for whomever had to be replaced including Ray, Jarvis, or even Becker. By this I do not suggest that Nicks was not more dissatisfied with Ray than with the others because there is no doubt that he was.

On June 19, 2 days after the second classified advertisement appeared, Becker gave Nicks notice that she would quit in 2 weeks. On June 23, he hired Lisa Toppmeyer who had answered the second advertisement. When she reported for work the next day, Nicks told her she would be trained to handle car deals, the purchase journal, cash disbursements, and the switchboard (a description of Ray's job) and further told her that, when she felt she had adequate training, to inform him and he would dismiss the person presently in that job. He also told her that he hoped she would not pick up any of the bad habits of that individual, whom he did not name. Finally, he told her their talk was to be kept confidential. I find that by then Nicks had decided to discharge Ray at a convenient time but was keeping his options open. He introduced Toppmeyer to her, directing Ray to train her in the work that Ray as well as Jarvis performed. Nicks also had Toppmeyer work with Becker who was responsible for the payroll and for billing. Ray specifically asked Toppmeyer if she was replacing her, to which Toppmeyer replied that she would be working with all of them. She told Jarvis she was hired to replace girls going on vacation. Toppmeyer stayed only 2 weeks, quitting before Ray was discharged.

The same day that Toppmeyer began working for Respondent, June 24, Berdos called Becker into his office to ask why she was leaving. She told him it was because of Nicks. Two days later, June 26, he asked her when she was leaving (she having given her 2 weeks' notice on June 19). He was planning to be away the following week of Monday, June 29, which would include Friday,

July 3, the last day of her 2-week notice period. The record does not reflect her response, but in fact she remained beyond her 2 weeks' notice until July 10, the day that Ray was discharged. At that time another replacement, Marianne Stock, began working. She became the permanent replacement for Becker. The vacancy created by the discharge of Ray, on the other hand, remained unfilled for 2 months thereafter because, as Nicks testified, replacing Becker was a greater priority. In the meantime Nicks himself performed the work which Ray would have done had she not been discharged.

### B. *The Holiday Pay Issue*

#### 1. Past practice

The controversy resulting in the discharge of Ray involved the question of whether office employees should be paid for Saturday, July 4. In the past Respondent has followed the practice of paying office employees for holidays. Thus, Jarvis, who had worked for Respondent since January 1971, testified without contradiction that office employees were always paid for holidays, and that during the instant controversy she told her fellow employees that on a prior occasion when July 4 fell on a Saturday, they were paid, and for that reason she thought they might be paid on this occasion. Respondent's normal workweek was Monday through Friday for all employees except salesmen. The salesmen also worked Saturdays, but no one worked Sundays. Becker testified without contradiction that in practice, office employees received holiday pay when the mechanics did. On the last previous holiday, Memorial Day, which fell on Monday, May 25, the mechanics, parts employees, and porters, as well as the office employees, were paid although they did not work. Becker, who was the one most familiar with the union contracts,<sup>5</sup> testified that they provided for July 4 pay for service employees. From this I infer they were contractually entitled to pay for July 4 even though that year it did not fall on a workday. In view of this past practice, the office employees had a reasonable expectation of receiving pay for July 4.

#### 2. Initial inquiry about pay for the Fourth of July

Respondent's regular payday was on Friday for the week ending that day. Becker, who was responsible for making up the payroll, prepared the paychecks the day before payday. On Thursday, July 2, in the presence of Becker (Ray was out that day and Berdos was away), Jarvis asked Nicks if Respondent would be closed on Friday, July 3, in view of the Fourth of July holiday.<sup>6</sup> Jarvis stated she would like to have her July 4 pay that Friday so she could buy fireworks for her son. It was thus implicit in her question and her comment that she expected to receive holiday pay for July 4. According to Nicks, he was embarrassed because he had not thought of the question and did not know the answer, so he did

<sup>5</sup> None of the collective-bargaining agreements were offered in evidence.

<sup>6</sup> Nicks places his conversation on July 1. I find other witnesses correctly place it on Thursday, July 2, the normal day for Becker to prepare the paychecks.

not respond directly to Jarvis. Instead he turned to Becker, who was familiar with the union contracts, and asked her to look at them. She did so immediately, reporting to Nicks in the hearing of Jarvis the holiday provisions of at least one of them.<sup>7</sup> They discussed the contract provisions, and during the conversation Nicks reminded Becker of a frequent contract provision requiring employees to work the day before and the day after a holiday in order to receive pay for the holiday. But, according to Nicks, whom I credit in this respect, he did not specifically tell Jarvis and Becker whether the staff would or would not receive pay for July 4 because he did not know, not having spoken to Berdos about it. But he did tell Becker in the presence of Jarvis that there would be no holiday pay included in the paycheck on July 3 because the Fourth of July holiday fell outside that pay period and also that, in order for employees covered by the collective-bargaining agreement to be eligible for the holiday pay, they would have to work the day before and the day after the holiday. At that point Jarvis knew she would not have the holiday pay in time to buy fireworks, but it was still possible it would be included in the next pay period. As it turned out, the employees covered by the collective-bargaining agreements did receive pay for the Fourth of July holiday on the next payday. From this I find that the contract provided that they be paid. I further infer that this was apparent to all present when the contract was examined at Nicks' request on July 2. On Friday, July 3, Ray was in the office, and Jarvis told her about the conversation the day before. As Ray recalled it, Jarvis told her that Nicks said that they had to work the day before and the day after the holiday to receive holiday pay. They subsequently worked that Friday and the following Monday. She therefore believed they had fulfilled Nicks' requirement. She suggested to Jarvis on July 3 that they wait until the next payday to see what happened.

#### 3. Discussion in the parking lot

Unlike the regime of Lockhart when the office staff engaged in considerable conversation within the office, after Nicks arrived they did very little of this, saving their conversation for times when he was away or they were out of the office. Thus, on Friday, July 3, when the three women left together at the end of the day, they talked in the company parking lot about what they would do if they did not receive Fourth of July holiday pay on their July 10 payday. They decided that in that event they would seek help from the Board.<sup>8</sup>

#### 4. Management's decision on pay for the Fourth of July

On July 2 Berdos was away and did not know the office staff was talking about receiving holiday pay. When he returned the next week, he learned of their

<sup>7</sup> Although the evidence does not specifically identify the contract, I infer it was the one covering service employees because that is the one referred to generally throughout the record.

<sup>8</sup> This finding is based on the uncontradicted testimony of Ray. Becker did not recall discussing what they would do if they were not paid for the holiday.

complaint from Nicks when Nicks asked him on July 8 whether they should be paid for the holiday. According to Nicks, Berdos decided: ". . . we would not be paying the office personnel, that we would only pay those people that were covered under union contracts where it was stipulated that they be paid." Nicks instructed Becker, who was preparing the payroll, that there would not be any additional pay as such for office personnel since they had not lost a day's work, that they had been paid in full for the previous week, and there would be no additional pay for the Fourth of July holiday. Becker in turn told Jarvis and Ray that there would be no pay for the Fourth of July.

#### 5. July 10 payday

That Friday, July 10, when Nicks handed out the paychecks which did not include pay for the Fourth of July, the three office employees fell silent. Only Ray spoke up, protesting the omission. In the course of her discussion with Nicks she used the word lied or lies. Although she did not directly call him a liar, he was by implication tarred with that brush because of his position in management and by his participation in the earlier discussion and in the final outcome of the holiday pay question. He took her comment as a personal affront. All those present on July 10 testified and, although the details vary, their accounts are the same in substance. Becker testified that after Ray looked at her check she said, "It's not any larger. If we worked the day before and the day after the holiday, we would get paid. You lied to us." Jarvis testified that as the checks were handed out, ". . . it was kind of quiet. And Carmen (Ray) spoke up and asked what happened to the pay we were supposed to receive." She further testified, "Well, Carmen [Ray] said, you told us if we would work the Friday before and the Monday after then we would get it. And now you're telling us we're not. Then she said she was tired of being lied to around there." Ray testified about the incident as follows:

Well, I asked where our—our pay for the pay for the holiday was and he said we weren't getting it. And, I asked him why, because he told us the week before that we had to work the day before the holiday and the day after, which we all did, and he said this was not his decision, it was Mr. Berdos' decision. So, in the end of my conversation I had just stated that I was tired of being lied to.

She also told him that she had had no problems until he got there. She testified she felt that he did lie to her.

According to Nicks, Ray said, "I thought we were going to get paid for the Fourth of July holiday." Nicks told her it was not his decision but that of Berdos and that she should talk to him; that she said "that she was tired of all the lies," and muttered something under her breath which he did not understand. He recalled that he explained the reason for their not being paid as follows, "I told her that in view of the fact that they hadn't lost a day's work, they would not be paid a—receive an additional day's pay for the holiday."

It is clear that in making her protest Ray repeatedly used the first person pronouns "we" and "us," thus indicating she was speaking to the topic as one common to all three women and, by implication since she was doing so in the presence of all, on behalf of all. I also find, based on the testimony of Jarvis and Ray who corroborate each other in this respect, that the words of Ray to which Nicks objected were that she was "tired of being lied to."

According to Jarvis, Nicks seemed upset by the discussion. He left the group to go into Berdos' office. As planned, Ray immediately called the Board's Regional Office to arrange for charge forms to be used in filing the charges herein on behalf of all three office employees. There is no evidence that Respondent knew Ray had contacted the Board prior to the time the charge was served on Respondent.

#### 6. Discharge of Ray

As Nicks went into Berdos' office after his encounter with Ray, Berdos was about to leave for the bank. According to Berdos, Nicks was upset. He told Berdos that Ray had called him a liar and he thought it would be best if they got rid of her. He volunteered to do her work himself. Berdos told him to fire her and immediately left for the bank. Berdos did not know, and Nicks did not tell him, that the confrontation with Ray involved a protest over the Company's failure to pay for the Fourth of July holiday.

A few minutes later, Nicks asked Becker whether Ray had any money coming. Becker said she was entitled to vacation pay. Nicks again left Becker, returning in a half hour to instruct her to make out Ray's check. He then called Ray into Berdos' office and told her she was terminated because she seemed to be very unhappy with the organization, particularly Berdos and Nicks, and Nicks felt she would be happier elsewhere. She asked if she was being fired. He replied yes, that she should clean out her desk and leave.

At the time of discharge Nicks had no replacement for her. He testified he fired her "for calling me a liar," plus her bad attitude which had built up to that point. According to him, he had been planning to replace her since early June. Nicks in effect denied that her protest of the Company's failure to pay the holiday pay played any part in the decision to discharge her.

#### C. Discussion

The dispositive issue on the merits is whether Ray was discharged because she engaged in protected concerted activities. This involves consideration of whether her activities were concerted in nature and also whether her discharge resulted therefrom.

The confrontation on July 10 which precipitated the decision to discharge her involved wages, a topic of common concern to all three office employees. When Ray spoke out on that topic she was engaged in concerted protected activity. *Music City Services, Inc.*, 258 NLRB 1361 (1981); *Bucyrus Erie Company*, 247 NLRB 519, 523-524 (1980); *Sencore, Inc.*, 223 NLRB 113, 119-120 (1976), enfd. 558 F.2d 433, 434 (8th Cir. 1977); *Air*

*Surrey Corporation*, 229 NLRB 1064 (1977), enforcement denied 601 F.2d 256 (6th Cir. 1979). Accordingly, even if Ray had acted alone in speaking up to Nicks about the failure to pay holiday pay, thus appearing to be protecting her own interests, she was nevertheless engaged in protected concerted activity since her complaint dealt with a subject common to the other employees in the office.

Beyond that, however, there is other evidence in the record that all three office employees were in concert with respect to the holiday pay. Jarvis had initially raised the issue with Nicks on July 2 in the presence of Becker and then Nicks had further involved Becker in the problem by having her examine the collective-bargaining agreements. This request, in the light of past practice of granting holiday pay for office employees when service employees were so entitled under their contract, was some indication that the practice would continue. Further, in pointing out that the holiday would occur after the end of the current pay period and the payday on which Jarvis desired the holiday pay, Nicks implied that it might be included in the next pay period. On July 3 Jarvis told Ray that the holiday pay would not be included in the July 3 paycheck. At the end of the day all three women discussed the matter in the parking lot, concluding they would take a wait-and-see attitude before applying to the Board for help. The next week when the holiday pay was not included in the July 10 paychecks, Ray protested to Nicks in the presence of the other two women. In view of their common concern, Ray clearly was speaking on their behalf as well as her own, and their failure to disavow her remarks in the circumstances was some indication to Nicks of their support for her position. In this connection I note that when Nicks handed them the checks, they all fell silent until Ray spoke up.

When the issue of holiday pay was first raised with Nicks on July 2, it was apparent that the issue was one of common interest to all and he so treated the matter. When Berdos returned the next week, Nicks put the question before him, not in terms of whether Jarvis as an individual should receive the holiday pay, but whether all of them should and Berdos rejected the proposition as to all of them. They were similarly treated as a class when Nicks instructed Becker to prepare the checks for July 10 omitting holiday pay for all office employees. In this context there can be no doubt that when Ray verbally protested the omission on July 10 she was understood by all, including Nicks, to be speaking for the group. As in *Air Surrey*, *supra* at 1070, the employer knew of the concerted nature of the complaint at the time of discharge of the complaining employee. See also *The Barnsider, Inc.*, 195 NLRB 754 (1972); *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975); *Hugh H. Wilson Corporation*, 171 NLRB 1040 (1968), *enfd.* 414 F.2d 1345 (3d Cir. 1969); *Carbet Corporation*, 191 NLRB 892 (1971); *G.V.R., Inc.*, 201 NLRB 147 (1973); *Fairmont Hotel Company*, 230 NLRB 874 (1977); *Hansen Chevrolet*, 237 NLRB 584 (1978). The concerted nature of the activity is further demonstrated by Ray's immediate effort, then unknown to Nicks or Berdos, to contact the Board's Regional Office for assistance to all three office employees on the

issue of holiday pay. In so doing she was carrying out their agreed plan to wait and see if the holiday pay would be forthcoming on July 10 and, if not, to contact the Board for assistance. Ray's outburst to Nicks on July 10 was an integral part of that game plan or, as counsel for the General Counsel characterizes it, part of the *res gestae*. In this respect the fact situation here is distinguishable from that in *Ontario Knife Company v. N.L.R.B.*, 637 F.2d 840 (2d Cir. 1980), relied on by Respondent for the proposition that Ray's outburst, not being joined in affirmatively by Becker and Jarvis, did not constitute concerted activity. Moreover, in its decision in *Ontario Knife* (247 NLRB 1288), the Board, unlike the court of appeals, found the individual employee's protesting conduct amounted to concerted activity under the Act. With all due respect to the court, it is the Board's rule which binds me. *Iowa Beef Packers, Inc.*, 144 NLRB 615 (1963), modified 331 F.2d 176 (8th Cir. 1964). In its brief, Respondent similarly relies on decisions of various courts of appeal which disagree with the Board's interpretation of concerted activity. These include *Aro, Inc. v. N.L.R.B.*, 596 F.2d 713 (6th Cir. 1979); *N.L.R.B. v. Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973); *N.L.R.B. v. Northern Metal Company*, 440 F.2d 881 (3d Cir. 1971); *Krispy Kreme Doughnut Corp. v. N.L.R.B.*, 635 F.2d 304 (4th Cir. 1980); and *Leo G. Kohls v. N.L.R.B.*, 629 F.2d 173 (D.C. Cir. 1980). However, as with the Second Circuit's decision in *Ontario Knife, supra*, it is the Board's rule and not the differing views of the courts of appeal that apply. Additionally, the *Krispy Kreme Doughnut* case and the *Kohls* case are distinguishable from the present matter. In the former there was no evidence of intended or contemplated group activity or evidence suggesting that the individual employee was acting on behalf of others. And in the latter the complaining employee did not assert an interest on behalf of anyone other than himself.

While admitting that protests need not be meritorious to be protected under the Act, Respondent argues that Ray's protest was "a manifestly frivolous claim" which brings into question her "good faith" within the meaning of the Board's decision in *Youngstown Sheet and Tube Company*, 235 NLRB 572, 576 (1978), in that, so Respondent argues, her July 10 complaint was merely part of her continuing conflict with Nicks rather than a good-faith attempt to clarify the holiday pay question. I find no merit in this contention because the evidence amply demonstrates the involvement of all three office employees in the holiday pay question and it is impossible to separate Ray's involvement from the others on that question.

Relying on the testimony of Nicks and Berdos that Ray was discharged because of the language she used and not because she protested the omission of the vacation pay, Respondent contends that she was discharged for cause rather than for engaging in protected activity. It is true that Ray's language precipitated her discharge. But Respondent's reliance on this segment of the evidence is misplaced in that the contention fails to take account of the fact that Ray's language was part and parcel of the concerted activity. As such, the use of even objec-

tionable language is covered by the protective umbrella of the Act unless it amounts to flagrant and egregious conduct. That is not the case here, firstly because the reversal in Respondent's position from its past practice and from that which was apparent from Nicks' words and conduct on July 2 to the diametrically opposite position the following week, gave Ray a reasonable basis for accusing management of lying. Secondly, her language on July 10 was not so strong as to remove the Act's protection. She did not directly accuse Nicks of personally lying although he was included by implication in the accusation. In similar cases the Board has found the use of like language to be protected conduct. See *Faith Garment Company, Division of Dunhall Pharmaceutical, Inc.*, 246 NLRB 299 (1979); *Firch Baking Company*, 232 NLRB 772 (1977); and *Fall River Savings Bank*, 247 NLRB 631 (1980). In *Faith Garment* the complaining employee stated in a meeting that the plant manager had lied. In *Firch Baking* the employee in effect told his supervisor that he was "an ass." In *Fall River Savings* the employee told her supervisor that the employee's attitude was none of the supervisor's business. Cf. *Atlantic Steel Company*, 245 NLRB 814 (1979), where the employee called his foreman a "lying son of a bitch." I conclude that Ray's language was not so inaccurate or offensive as to remove her from the Act's protection of concerted activity.

Accordingly, I find that because Ray was discharged for using language which was part and parcel of protected concerted activity, she was discharged in violation of Section 8(a)(1) of the Act.

### III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of Respondent set forth in section II, above, occurring in connection with the operations described in section I, above, have a close and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### CONCLUSIONS OF LAW

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

2. Carmen Sgroi Ray is an employee within the meaning of Sections 2(3), 7, and 8(a)(1) of the Act.

3. By discharging Carmen Sgroi Ray on July 10, 1981, because of her protected concerted activity and thereafter failing to reinstate her, Respondent committed unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent engaged in unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. I do not recommend what is commonly

referred to as a broad order because Respondent is not shown to have a proclivity for violating the Act nor has it engaged in egregious or widespread misconduct demonstrating general disregard of employee statutory rights. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). I recommend that Respondent be ordered to offer Carmen Sgroi Ray immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other benefits and privileges, and that she be made whole for any loss of earnings incurred as a result of being discharged on July 10, 1981, with backpay to be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977). I further recommend that Respondent be required to preserve and make available to Board agents, upon request, all pertinent records and data necessary to analyze and determine whatever backpay may be due. I also recommend that Respondent be required to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>9</sup>

The Respondent, Sherwood Ford, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees for protesting wages, holiday pay, or other terms and conditions of employment, or for engaging in other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist a labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer to Carmen Sgroi Ray immediate and full reinstatement to her former position or, if that position is not available, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records necessary to analyze the amount of backpay due under the terms hereof.

<sup>9</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Post at its St. Louis, Missouri, dealership copies of the attached notice marked "Appendix B."<sup>10</sup> Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by its authorized representative, shall be posted by Respondent immediate-

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<sup>10</sup> In the event that 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."

ly upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.