

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**DICKENS, INC.**

**and**

**WENQUING LIN, an Individual**

**Case Nos. 29-CA-29080  
29-CA-29198  
29-CA-29254**

*Henry Powell, Esq.* Counsel for the  
General Counsel  
*James Chou*, for the Respondent

**DECISION**

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Brooklyn, New York on February 18, 19, 20, 26 and 27 and March 23, 2009. These charges were filed by Wenquing Lin on July 14, September 26 and October 31, 2008. The Consolidated Complaint was issued by the Regional Director on December 17, 2008. It alleged as follows:

1. That on or about June 9, 2008, the Respondent by James Chou, its owner, (a) belittled and threatened employee Wenquing Lin with reprisals, (b) threatened to impose more onerous working conditions on him by assigning him to clean the warehouse, (c) subjected him to closer supervision, (d) accused him of stealing and (e) calling the police and falsely accusing him of threatening Chou with a box cutter.

2. That on or about June 12, 2008, the Respondent by Chou, harassed Lin for taking his lunch at noon.

3. That on or about July 3, 2008, the Respondent by Chou physically assaulted Lin and summoned the police.

4. That on or about July 3, 2008, the Respondent for discriminatory reasons, laid off Lin and Miaona Wu. More specifically, the General Counsel alleges that (a) the Respondent laid these individuals off because Lin had previously prevailed in a prior unfair labor practice proceeding and (b) that it laid off Wu because she had cooperated with the Board in the investigation of the prior unfair labor practice. Among other things, Mrs. Wu gave an affidavit to the Board's Regional Office. As to Lin, it is alleged that the Respondent violated Section 8(a)(1) of the Act. As to Wu, it is alleged that the Respondent violated Section 8(a)(1) and (4) of the Act.

I note that the General Counsel's theory is that Lin and Wu were discriminatorily selected for layoff. He concedes that the Company's business was slow and he therefore is not contending that some layoffs were unwarranted by business conditions.

On the entire record,<sup>1</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

## Findings and Conclusions

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### I. Jurisdiction

There is no dispute and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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### II. The Alleged Unfair Labor Practice

#### a. Background

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The Respondent is small enterprise located in Commack, New York where it is engaged in the wholesale distribution of greeting cards and social stationary. Its owner is James Chou. He has a number of relatives employed in the business including his mother. The Company employs a group of office people, all or most of whom are of Chinese ancestry. It also has a warehouse where it employees a number of people, some of whom are Hispanic and some, including the alleged discriminatees, are Chinese. This results in a diversity of languages spoken at the company including English, Spanish, Mandarin and Cantonese.<sup>2</sup>

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Wenquing Lin has been employed by the Respondent as a warehouse employee since August 1, 1998.<sup>3</sup> Miaona (Anna) Wu has also been employed in the warehouse since 2000.

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<sup>1</sup> After the hearing closed there was a set of e-mails and letters between Mr. Chou, Mr. Powell, the Reporting Service and myself regarding corrections of the transcript. For one thing, Mr. Chou made a Motion that I order the Reporting Service to furnish him with copies of the audio files from which the transcript was typed. I rejected that Motion. Nevertheless, based on these communications, the following is noted:

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On May 14, 2009, Burke Reporting LLC sent a revised transcript of the fourth day of the hearing and put in a page 504A to reflect a change that was made after listening to the recording of that day's hearing.

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The General Counsel did not object to Mr. Chou's suggested change to page 456, line 11 and this should now read: "Embarrassing to you, not me."

The General Counsel did not object to Mr. Chou's suggested change to page 690, line 1 and this is changed to read: "You swallowed the other page or you wiped your ass with that page?"

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After reviewing the exchange of letters regarding the General Counsel's proposed changes I make the following correction. On page 287, the transcript should read that Mr. Chou stated: "I am a very hyper person."

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On page 435, "Paul" should be changed to "Powell." But on the same page where I am being quoted as saying, "I expected Mr. [Powell] to email you all your records and he, I guess, didn't" I am not going to change the word "didn't" to "did." In this regard, I note that whether or not the proposed change is granted, it is of no consequence to the outcome of this case.

<sup>2</sup> In a letter to the EEOC dated April 16, 2007, Mr. Chou stated that at that time he had more than 40 people in the company.

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<sup>3</sup> In 2002, there was a brief break in Lin's employment. According to Chou in his testimony in a prior case, he discharged Lin and only rehired him upon the urging of Lin's wife. Lin's version was that when he was out sick, Chou did not want to take him back and wanted to hire a younger worker. Lin agrees that he was rehired when his wife interceded with Chou. In the

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Among other things, these employees have been assigned to pick orders and to place them into boxes that later are prepared for shipment.

5 Lin was discharged on October 2, 2006 and this was the subject of a proceeding before the NLRB in Case No 29-CA-28229 that Lin filed on March 21, 2007.<sup>4</sup> In this regard, a Complaint was issued on July 17, 2007 and a hearing was held before Administrative Law Judge Steven Fish on August 21 and 22, 2007.

10 On December 4, 2007, Judge Fish issued a Decision wherein he concluded that the Respondent violated Section 8(a)(1) of the Act by discharging Lin because of his protected concerted activity. In essence, he concluded that Lin, along with Wu, had concertedly complained about their bonuses on September 29, 2007 and that Chou discharged Lin because of this activity.

15 It is noted that in the investigation of the prior case, an affidavit was taken from Wu and that Judge Fish relied on this affidavit in concluding that on September 29, 2007, she and Lin had concertedly complained to Chou about their earnings.

20 While not relevant to that case, Wu's affidavit contained a paragraph that she crossed out and which seems to have incensed Chou when he became aware of it after the trial concluded in August 2007. In pertinent part, this paragraph stated:

25 Sometime after we moved to a new office, around August 2005, James stopped allowing all of the Chinese workers, including Liu, Lin and me, to eat at the big tables in the break room.

30 In an e-mail to the Regional office of the NLRB dated August 27, 2007, (*five days after the hearing*), Mr. Chou stated that he was very angry and humiliated by the allegation that he had threatened employees with discharge if they requested improvements in their pay. Chou stated that his "anger came back" when he got around to reading Mrs. Wu affidavit, wherein she stated that she did not remember Chou telling Lin that that he would be fired if he discussed his pay and benefits with other employees. Mr. Chou further stated that Mrs. Wu told him that some of the contents of her affidavit were never asked or discussed by her in her interview with the NLRB. He asserted that Mrs. Wu told him that she signed the affidavit without reading it and that she was willing to tell this to the people who interviewed her or to testify about this in court.

35 As noted above, Judge Fish concluded that Wu's affidavit was reliable and that it should be relied upon to show that she and Lin had complained about their bonus pay on September 29, 2006. Based on her affidavit, taken together with the testimony of Lin, Judge Fish concluded that the Respondent had discharged Lin because of his concerted protected activity. Judge Fish also concluded, based on Chou's own testimony, that it was the events of September 29, 2006 that were the cause of Lin's discharge.<sup>5</sup>

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present proceeding, Mr. Chou sought to subpoena and examine Ms. Lin about the 2002 incident. I ruled that this would be irrelevant to the present case.

<sup>4</sup> Lin also filed a charge with the EEOC and the related New York agency on February 20, 2007 alleging that the Company had discriminated against him on account of his age.

50 <sup>5</sup> I note that in the earlier case, Mr. Chou had contended that Mr. Lin, during this transaction, had questioned his truthfulness. Chou also contended, but Judge Fish rejected his assertion that Lin's actions on September 29 were unprotected.

In his exceptions to Judge Fish’s decision, Mr. Chou, at page 23 of his Brief, talked about the statements in Wu’s affidavit dealing with lunch and begins to obsess about their supposed significance. This reads as follows:

5            **Absurd Remarks in Wu’s Affidavit, such as “James stopped allowing all the Chinese workers, including Liu, Lin and me, to eat at the big tables in the break room.”**

10            “James stopped allowing all the Chinese workers, including Liu, Lin and me, to eat at the big table in the break room.”

15            This statement, crossed out on Wu’s May 22, 2007 Affidavit to the Board, appears on the last page with the signatures of Wu and the NLRB agent Jeffery Trigilio. If Judge Fish was not aware that Respondent’s brother, sister-in-law, cousin and his wife, nephew, son and mother are all working in Respondent’s office/warehouse and are all Chinese, at least Judge Fish should remember the Chinese employees, Liu, Lin, Wu, Chang and Rhee and the employer, respondent Chou, all of whom spent 2 days in court with him. If the Chinese employees were not allowed to eat in the break room, then who was allowed to eat there? Who created such a degrading and humiliating accusation? It should be obvious that somebody either fabricated this accusation, or distorted Wu’s words when preparing the Affidavit. How can Judge Fish then conclude in his Decision, “I find that the affidavit supplied by Wu to the Board to be more reliable than her testimony and I rely on said affidavit as substantive evidence.

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Why was this claimed crossed out and by whom?

- 30            1. If this accusation came directly from Wu, can her other statements in the Affidavit that are disadvantageous to Respondent be as “reliable” as Judge Fish claimed?
- 35            2. If this accusation was fabricated or influenced by somebody in the NLRB, can Judge Fish exclude the possibility that someone from the NLRB, who knows the intricacies of the law, planted one or two crucial, but untrue statements in Wu’s Affidavit, such as “I said, if it’s so busy, can you raise our bonus to .003 of the profits?”

40            **b. Lin Returns to Work**

Subsequent to the Order in the prior case, the Respondent made an offer of reinstatement to Lin.

45            Lin returned to work on June 9, 2008.

On the morning that Lin returned to work, Chou held a meeting in the warehouse and spoke to the employees in English and Chinese. <sup>6</sup>

50            <sup>6</sup> My factual conclusions regarding this meeting and subsequent meetings involving the various parties are based on the testimony of Wenqing Lin, Miaona Wu and a set of recordings

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At the outset of this meeting, Chou spoke to the employees in English about the unfair labor practice charge filed by Lin and the age discrimination claim he made at the EEOC. Chou then talked about the “assertion” that he did not allow the Chinese employees to eat in the break room. (Recall that this is the crossed out statement that was contained in Mrs. Wu’s affidavit).  
 5 Much of the remainder of this portion describes the history of his business and his competition with much larger companies. Chou stated that the company did not discriminate against Asians, Jews, black etc. and would not allow such discrimination. Chou stated that when Lin returned to work, he would be treated the same as the younger workers and would be given no special  
 10 treatment on account of his age. Chou again referenced the claim that he did not allow Chinese people to eat in the break room. At this point, Chou took the employees over to another section of the building where he posted the NLRB notice and asked all the employees to sign it.

Mr. Chou then spoke to the Chinese employees in Mandarin. During this portion of the  
 15 meeting, Chou said that he would make all of the court documents available to the employees. He said that he was still in the process of appealing the NLRB case and that “we have to trust each other; it is not like we sue you, you sue me.” At one point, Chou stated; “At a certain place there was a sign that says only dogs and certain people are not allowed to come into certain  
 20 areas, but in our company it says we won’t allow the Chinese worker to eat at some place. I won’t allow this to happen to our company.” Chou went on to say that he would not discriminate against anyone, that he would treat everyone the same, that he would not let older people do less work than the younger workers and that he would not give any special treatment to Chinese workers. This latter remark was directed to Mr. Lin who was asked if he understood. Lin  
 25 responded that he did.

Immediately thereafter, Chou called Lin into his office where they had a conversation in  
 Mandarin. This was recorded by Lin.<sup>7</sup> Initially Chou said that people had to be responsible for  
 whatever was said in the court and that the judgment was before the Court. Chou told Lin that  
 he would be the one to assign him his work every day. Chou then asked Lin if he had a  
 30 recorder on him and Lin asked if he had to take off his clothes and let Chou check him out. Lin asked if he had to report to Chou when he came to work each day and asserted that this was not returning to work in the same state that he had worked before. Chou said “just go sue.” Lin asked if Chou was welcoming him back to work and Chou said in a sarcastic manner; “I love  
 35 you, I want to kiss you.” At one point, Chou said that he would welcome Lin back “*but I’ll fuck you.*” Lin said that if Chou welcomed him back, he should act according to what the court says and that if he had to report to Chou every day, that would be different from what the court says. At this point, Chou started to make some odd noises whereupon Lin said “if you don’t welcome  
 40 me back, I can leave.” Chou replied “you are so important to me... I love you; I want you to come back to work.” Lin stated that Chou cursed at him four times and that he was going to report this to his attorney. (Referring to the Board attorney). At the end of this meeting, Nina

made by Lin. With respect to the recordings, Mr. Chou has asserted and continues to assert  
 45 that Mr. Lin, his daughter and the General Counsel have conspired to “cut and paste” them to his detriment. Notwithstanding that claim, Mr. Chou has not offered, by way of his own testimony or the testimony of anyone else, any alternative version of the conversations.

<sup>7</sup> All of the recordings were played in the court room on February 26, 2009. Some of the  
 50 conversations recorded were in English and some were marred by extraneous noises. Those portions that were in Chinese were translated by the official interpreter while the recording was being played and a separate transcript was made of the translation. I note that as this was a simultaneous translation, I don’t think that it captured the entirety of the each transaction. But the essential parts are there.

appeared and Chou told Nina that she should have Lin clean the entire warehouse for the rest of the day.

5 In fact, Lin was not assigned to clean the warehouse either on this or any other day. And despite the assertion, on this single occasion, that Lin would have to report to Chou each day, this did not happen thereafter and Lin reported to Nina. Moreover, Nina thereafter, mainly had him do order picking and other duties that he had done before his previous discharge. In this regard, I do not think that the evidence sufficiently supports the General Counsel's allegation that the Respondent either threatened to impose more onerous working conditions on Lin or that  
10 it, in fact, subjected him to closer supervision.

15 According to Lin, and not denied by Chou, at around 11:30 a.m., Chou came over to where he was opening boxes and essentially accused Lin of stealing some greeting cards. Lin denied that he had taken any of the cards. At this point, Chou additionally said that Lin should be careful about the way he was cutting open the boxes. Lin responded that he had worked there for many years and knew how to open the boxes. Lin states that he then stood up, put down the box cutter that he was using, and told Chou to stop harassing him. Chou responded by saying, "You can cheat," and that he could file a complaint at the Labor Board. Lin stated that if Chou continued harassing him, he would have to stop working. Lin testified that another  
20 employee named Reina was present. He also testified that he did not wave the box cutter at Chou or make any threatening gestures or statements.

25 At around 2:00 p.m., two policemen came to the facility, approached Lin and made him put up his hands. These officers were called by Chou and they questioned Lin to the extent that they could. When Lin asked Chou what this was all about, Chou claimed that Lin had threatened him with a box cutter. At the end of this process, the officers left without arresting or giving a summons to Lin. And Lin, after being told by Chou to end his work day, waited for a ride to take him home.

30 Lin stayed at home for the next two days and returned to work on June 11, 2008.

35 On or about June 17, Lin went into the kitchen at about 12 noon to have his lunch. According to Lin, when he entered, Chou was having a meeting with some customers and told Lin that he was too early for lunch. After this, having taken offense, Lin told Nina that he would take his lunch at 1:00 p.m. The General Counsel alleges that the Respondent violated Section 8(a)(1) by harassing Lin for taking his lunch at noon. Based on Lin's testimony, I reject this contention as it seems to me that at most, Chou, being involved in a meeting with customers, rudely told Lin to leave the room.

40 On July 3, 2008, the Respondent laid off Lin and Wu. As noted above, the General Counsel, having reviewed some of the company's business records, concedes that business conditions were sufficiently poor so that some layoffs could be justified.<sup>8</sup> His theory is that even if layoffs were justified based on business conditions, the selection of Wu and Lin for layoffs was motivated by illegal and discriminatory reasons.  
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50 <sup>8</sup> Also the testimony of the General Counsel's witnesses suggests that business began to slow down in 2007 and 2008. For example, Mrs. Wu testified that at some point, the employees were told that the company would no longer be able to afford to give paid holidays and vacations.

5 After being told that he was being laid off, Lin got really upset and followed Chou into his office demanding to know why he was being laid off. Chou, in turn told Lin to leave his office and when Lin refused, Chou pushed him. After some shouting and cursing, Lin left the office. Some time later, police officers were called and escorted Chou out of the plant. (They gave Lin and Wu a ride home).

10 Based on the testimony of Mr. Lin, it is obvious that Chou reluctantly reinstated Lin after being ordered to do so by the Board. Indeed on the first day of his return, Chou, in effect, told Lin that he was going to “fuck” him every day that he came to work. I also conclude that Chou falsely accused Lin of stealing and that he brought in the police for no purpose other than to harass Lin to the point that Lin would quit his job.

15 As to Mrs. Wu, the evidence shows that Chou became obsessed with the fact that in an affidavit that she gave to the Board, she stated, (but then crossed out), that Chou did not allow the Chinese workers to eat in the break room. This seems to have festered in his imagination and was specifically brought up by him, no fewer than three times during the first day that Lin returned to work. Moreover, I conclude that Chou intensely resented that Judge Fish relied on Wu’s affidavit in finding that Wu and Lin had engaged in protected concerted activities. I therefore conclude that the General Counsel has made out a prima facie case that the Respondent chose Wu for layoff because Chou harbored resentment for the fact that she cooperated with the Board during the prior case and gave an affidavit to the Board which was relied upon to find him guilty of an unfair labor practice.

25 This brings us to some unusual happenings at the hearing.

30 Mr. Chou chose to represent himself at this hearing. At the beginning of the hearing, he indicated that he wanted to produce evidence that related to the prior case and I told him that I was not going to relitigate that case. By the second day of the hearing, and while “cross examining” Mrs. Wu, it was apparent to me that Chou, although highly intelligent, was not realistically capable of conducting a defense.

By the third day of the hearing, while Mr. Chou was attempting to cross examine Mr. Lin, it became even more apparent to me that the hearing was not going well.

35 On the fourth day of the trial, (held the following week), and after having ordered the General Counsel to turn over *all* recordings made by Mr. Lin, these recordings were played in Court and a simultaneous translation was made of the Mandarin portions into English. One reason that I decided to play the recording, using the original recording device used by Mr. Lin, was that there was some difficulty in transferring the audio files from his device into an electronic file playable on a PC or a McIntosh computer.<sup>9</sup> At the end of this day, I told Mr. Chou that for next hearing day, which was going to be on February 26, I wanted him to tell me under oath his version of the events in this case. He stated that he did not want to do this.

45 A week later, on February 26, 2009, I told Chou that I was going to interrupt his cross examination of Lin and that I was going to require him to give me his version of these events. He refused. I told him that I wanted him to do this because I wanted to know what if any facts

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50 <sup>9</sup> Eventually, and with the aid of the help desk in Washington D.C., the electronic files on Mr. Lin’s recorder were translated into a form that could be put on a CD and played on both the General Counsel’s and the Respondent’s computers.

were in dispute. He again refused. I told him that if he did not comply, I would close the hearing. Mr. Chou changed his mind.

5 I told Mr. Chou that I would give him three hours to testify without any interruption by me or the General Counsel. <sup>10</sup> I also told him if he needed more time at the end of three hours, I would extend the time. I told Chou that I thought he should focus on the events of June 9, when Lin returned to work, including the alleged box cutter incident; the incident that took place with Lin in the lunchroom; and all of the events that took place on July 3, 2008. I told him that he should talk about why he laid off Wu and Lin and describe what business conditions were like at the time. I finally told him that he could say anything he liked and that no one would interrupt him.

15 Except for a lunch break, Mr. Chou spoke for four hours. Apart from a largely incomprehensible monologue, Mr. Chou simply did not address any of the issues in this case and did not deny any of the testimony given by Wu or Lin. Nor did he offer any alternative version of what we all heard on the recordings. In short, Mr. Chou did not controvert any of the evidence adduced by the General Counsel and did not offer any reasons for why he chose Wu and Lin for layoffs on July 3, 2008.

20 At the end of the day, I asked Mr. Chou if he had any other witnesses and he replied that he had plenty. I asked who they were and what he intended to have them testify about. He told me that he intended to subpoena Mr. Lin's wife and daughter. When asked what he expected them to say, Chou notified me that he would ask Mr. Lin's wife about an incident in 2002 when she asked him to rehire Lin. I told him that this subject had been discussed by Judge Fish in the prior case and that in any event, it would not be relevant here because of its remoteness to the events in the present case. When asked what he would ask Mr. Lin's daughter, Mr. Chou stated that he wanted to show that she edited the recordings. I advised Mr. Chou that I would be sending him a letter asking him to tell me who his witnesses were going to be and what they would be testifying about.

30 By letter dated March 3, 2009, I advised Mr. that I wanted to know what witnesses he intended to call and what each person would be testifying about. I also advised him that he did not need to turn over any names to the General Counsel until we resumed the trial on March 23, 2009.

35 By communication dated March 16, 2009, Mr. Chou requested of Mr. Powell a group of subpoenas. Mr. Powell responded that the Judge needed to approve them. By e-mail dated March 18, I notified Powell that I was approving the issuance of the subpoenas and that he should send nine subpoenas duces tecum and nine subpoenas ad testificandum to the Respondent.

40 By letter dated March 17, 2009, Mr. Chou sent to "so called Judge Green" some kind of summary of what he considered to be the conspiracy to do him in.

45 By letter dated March 18, 2009, Mr. Chou sent me a letter which, among other things, included a list of questions that he wanted to ask of Sherry Lin, who is Mr. Lin's daughter. All of these related to her role in the recordings.

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50 <sup>10</sup> I instructed the General Counsel to take notes and to make any objections after Mr. Chou finished. I also told the General Counsel that he could not interrupt while Chou was testifying.

By letter dated March 22, 2009, Mr. Chou sent me a letter, (received on Monday March 23), setting forth the names of the other witnesses that he intended to call and a list of the questions he intended to ask them.

5           Finally, we all were gathered together to resume the hearing on Monday, March 23, 2009.

10           At the opening, I told Mr. Chou that his proposed questions to Sherry Lin were irrelevant because he neither controverted the testimony of Mr. Lin or Mrs. Wu and he did not offer any alternative version of the recordings or of their testimony. I ruled that any evidence that Ms. Lin could offer about how the recordings were made, edited and/or transmitted would not be relevant to this case and that I would not permit Chou to call her as a witness.

15           I then had an opportunity to review a document submitted to me that morning regarding who Chou intended to call as his witnesses and the questions that he proposed to ask them. I ruled that he could call any employees or persons and ask them certain questions that I considered to be relevant to the case at hand. For example I ruled that Chou could call Jay Levitt, who allegedly was present in the lunch room when Lin came in on June 17, 2008. I ruled that he could call any person who was present during June 9 or July 3 to testify about the events that occurred on those days. In the same vein, I ruled that he could call the police officers that came to the plant on those days and ask them to testify about what happened. I ruled that he could call Nina the warehouse manager to testify about what happened on June 9 and whether she had expressed any concern about talking to or supervising Mr. Lin. I ruled that he could call Steve Shih to testify about what he heard or saw on July 3, when he apparently acted as a translator for Mr. Lin when the police arrived. I ruled that he could ask any employees about what work they did and what work they observed being done by Mr. Lin before and after his return to work on June 9.

25           Mr. Chou insisted that he had not been given all of the materials from Mr. Powell. As Mr. Powell had turned over all statements produceable under Section 102.118 of the Board Rules and Regulations and further turned over recordings and a translation, I don't know what Mr. Chou means. He also insisted that he wanted to first cross examine Mr. Lin before calling any of his own witnesses. I told Mr. Chou that as he did not controvert any of Mr. Lin's testimony, (or the recordings), there was no point in further cross examination him and that he was finished.

30           Finally, I told Mr. Chou that it was his time to call witnesses. At 10:50 a.m. I advised Mr. Chou that he had until 11:10 a.m. to make up his mind and that if he did not call any witnesses I was going to close the hearing. At 11:10, when asked if he was ready to call a witness, Mr. Chou said "yes" and "no." This not being a sufficient answer, I noted that the police officers were in the room and asked Officer Carbone to come to the witness stand. Mr. Chou objected and reasserted that his legal rights were being undermined. I asked again if he wanted to ask Officer Carbone any questions and Chou responded with some kind of rant. At this point, I closed the hearing.

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### **Analysis**

50           As noted above, I have concluded that the evidence presented by the General Counsel, establishes that he has made out a prima facie showing that the Respondent selected Mr. Lin for termination on July 3, 2008 because of Lin's protected activity that occurred in the prior case. It has been demonstrated to me that Mr. Chou reluctantly reinstated Lin and that he sought to force Mr. Lin leave as soon as possible.

5 By the same token I have concluded that the General Counsel has made out a prima facie showing that the Respondent selected Mrs. Wu for termination on July 3, 2008 because Mr. Chou objected to and was obsessed by the fact that she gave an affidavit in the previous case; that this affidavit was used to conclude that he had violated the Act; and that the affidavit had the crossed out statement, that Chou did not allow the Chinese employees to eat in the lunch room.

10 Having established a prima facie case, the burden shifts to the Respondent to establish that it would have laid off or terminated these employees for legitimate reasons, separate and apart from their protected concerted activities. (Or in the case of Wu, because she had cooperated with the Board in the investigation of the prior case). *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

15 As the Respondent has not presented or was unwilling to present evidence showing a legitimate business reason for its decision to lay off these employees on July 3, 2008, I conclude that it violated Section 8(a)(1) of the Act in the case of Wenquing Lin and Section 8(a)(1) & (4) of the Act in the case of Miaona Wu.

20 I also conclude that the Respondent violated the Act by falsely accusing Lin of attacking him and of stealing greeting cards and by calling the police on June 9, 2008.

25 As to the contention that on June 9, Chou threatened to impose more onerous working conditions on Lin and subjected him to closer supervision, I don't think that the evidence is sufficient to support these particular allegations. While it is correct that Chou told Lin that he should spend the rest of the day cleaning the warehouse, this was not carried out and in fact, Lin was assigned to open boxes of greeting cards, a task that he had done prior to his return to work. I also do not think that the evidence is sufficient to support the contention that Lin was subjected to closer supervision. Again, it is correct that Chou told Lin that he would have to report each day to Chou. But, when things settled down a bit, Lin essentially reported to work each day and received his instructions from Nina, the warehouse manager.

30 The General Counsel alleges that the Respondent harassed Lin for taking his lunch at noon. This incident involved a situation where Lin went into the lunch room at or around noon and was told by Chou to leave. At the time, Chou was having a meeting in the room with some customers. As such, I do not view his instruction to Chou to leave as being discriminatorily motivated or otherwise unlawful under this Act.

35 The General Counsel further alleges that on July 3, 2009, the Respondent violated the Act by physically assaulting Lin and summoning the police. These events occurred after Lin had been told of his termination and after Lin and Chou became embroiled in a confrontation in the latter's office. Obviously, the entire transaction was provoked by what I have construed to be an illegal termination. But the evidence shows that Lin followed Chou back to his office and insisted on remaining there when Chou demanded that he leave. At most, Lin testified that Chou shoved him, and it seems that this was an attempt by Chou to have Lin leave his office. In any event, I do not think that the shove was particularly forceful. (Mr. Lin, a somewhat aged man, did not fall down or suffer any injury). Further, when Lin refused to go, Chou asked for the assistance of the local police and two officers came to the facility where they convinced Lin to leave. Based on this set of facts, and notwithstanding that I have concluded that the terminations of Lin and Wu violated the Act, I do not conclude that the General Counsel should prevail on these particular allegations.

### Conclusions of Law

5           1. By discharging Wenqing Lin because of his protected concerted activities, the Respondent has violated Section 8(a)(1) of the Act.

10           2. By discharging Miaona Wu because of she gave an affidavit to and cooperated with the National Labor Relations Board in a prior proceeding, the Respondent has violated Section 8(a)(1) & (4) of the Act.

15           3. By threatening to have Wenqing Lin arrested and by falsely accusing him of stealing and assault, because of Lin's protected concerted activities, the Respondent has violated Section 8(a)(1) of the Act.

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

25           5. Except as specifically found herein, I recommend that the other unfair labor practices allegations be dismissed.

### Remedy

30           Having found that the Respondent has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

35           In view of the above, I shall recommend that the Respondent, having discriminatorily discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the dates of discharge to the date of proper offers of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (2987).

40           The Respondent, having violated the Act on a previous occasion, I conclude that a broad remedy is appropriate.

45           As a significant percentage of the Respondent's employees are Chinese speaking, it is recommended that the Notices be in Chinese and English.

50           On these findings of fact and conclusions of law and on the entire record, I issue the following recommended <sup>11</sup>

### ORDER

55           The Respondent, Dickens Inc., its officers, agents, and representatives, shall

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50           <sup>11</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Discharging employees because of their protected concerted activity of seeking higher wages or better terms and conditions of employment.

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(b) Discharging employees because they cooperate with the National Labor Relations Board or by furnishing affidavits to Board agents during its proceedings.

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(c) Harassing employees, falsely accusing them of theft or assault, or threatening to have them arrested because of their protected concerted activity.

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

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

(a) Within 14 days from the date of this Order, offer Wenqing Lin and Miaona Wu, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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(b) Make Wenqing Lin and Miaona Wu whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this Decision.

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(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against Wenqing Lin and Miaona Wu and within three days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

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

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(e) Within 14 days after service by the Region, post at its facilities in Commack, New York, copies of the attached notice marked "Appendix."<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all

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<sup>12</sup> If this Order is enforced by a Judgment of the 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."

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current employees and former employees employed by the Respondent at any time since June 9, 2008.

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

10 **IT IS FURTHER ORDERED** that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., June 8, 2009.

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Raymond P. Green  
Administrative Law Judge

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**APPENDIX**

**NOTICE TO EMPLOYEES**

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

**WE WILL NOT** discharge employees because of their protected concerted activity of seeking better pay or better working conditions.

**WE WILL NOT** discharge employees because they cooperate with the National Labor Relations Board or furnish affidavits to the Board's agents during its proceedings.

**WE WILL NOT** harass employees, falsely accuse them of theft or assault, or threaten to have them arrested because of their protected concerted activity.

**WE WILL NOT** in any other manner interfere with, restrain or coerce employees in the rights guaranteed to them by Section 7 of the Act.

**WE WILL** reinstate Wenqing Lin and Miaona Wu to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

**WE WILL** remove from our files any reference to the unlawful discharges of Wenquing Lin and Miaona Wu and notify them, in writing, that this has been done and that these actions will not be used against them in any way.

**DICKENS, INC.**

\_\_\_\_\_  
**(Employer)**

**Dated** \_\_\_\_\_

**By** \_\_\_\_\_

**(Representative)**

**(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

Two MetroTech Center, Jay Street and Myrtle Avenue, 5<sup>th</sup> Floor

Brooklyn, New York 11201-3838

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.