

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

WAL-MART STORES, INC.

and

THE ORGANIZATION UNITED FOR
RESPECT AT WAL-MART (OUR WALMART)

Cases: 12-CA-121109
12-CA-124847
16-CA-124905
20-CA-126824

and

UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO AND
THE ORGANIZATION UNITED FOR RESPECT AT
WALMART (OUR WALMART)

20-CA-138553
32-CA-153782

**GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S
PARTIAL MOTION TO DISMISS**

I. Introduction

As alleged throughout the First-Amended Consolidated Complaint and Notice of Hearing dated November 1, 2016 (the Complaint), this case is about a number of strikes and related activities conducted by Respondent's employees over a two-year period from 2013 through 2014, and Respondent's retaliation against those employees in order to undermine their collective efforts and to discourage other employees from joining those efforts. How do we

know this? The First-Amended Charge in Case 20-CA-138553, filed on February 4, 2015,¹ tells us so: “Within the last six months immediately preceding the filing of this charge the above named employer, by and through its officers and/or agents, violated Section 8(a)(1) of the Act by retaliating against employees because they engaged in unfair labor practice strikes.” The Original Charge in Case 20-CA-138533, filed on October 9, 2014 (Original Charge), mirrored that language, but used the term “discriminating” instead of “retaliating.”²

The strike activities were organized by the Organization United for Respect at Walmart (OUR Walmart), an organization consisting of a number of Respondent’s employees working in conjunction with the United Food & Commercial Workers International Union, AFL-CIO (UFCW). The strike activities involved Respondent’s employees from all over the country, and took place at Respondent’s various stores, its headquarters, and one of its owner’s residences. The strike activities shared a common purpose: to publicize and protest what the participants viewed as Respondent’s retaliation against and attempts to silence employees who spoke out for better wages hours, and other working conditions, and its refusal to meet with groups of employees to address their mutual concerns about certain working conditions (the OUR Walmart Campaign). In turn, Respondent planned and executed a common, centralized response to the strike activities from its headquarters and through its Labor Relations Department.

In its Motion to Dismiss, Respondent attempts to narrowly define “retaliation” as applying only to adverse attendance-related actions in an effort to have a number of allegations pertaining to threats, interrogation, surveillance, denied access, and prohibitions against wearing union insignia dismissed. However, neither the language in the First-Amended Charge in Case

¹ See Respondent’s Partial Motion to Dismiss and Request for Expedited Consideration dated December 14, 2016 (Motion to Dismiss), Exhibit 11.

² See Motion to Dismiss, Exhibit 11.

20-CA-138553,³ nor the word “retaliation” itself, limits retaliation to adverse attendance-related actions. Rather, Respondent’s retaliation against strikers and would-be strikers took various forms that went beyond issuing employees unexcused absences, discipline, and discharge, and included threatening and interrogating employees; engaging in surveillance of employees; prohibiting employees from wearing union insignia; interfering with employees’ strike activity; and denying off-duty employees access to its stores. The term “discrimination,” used in the Original Charge, can be similarly read to encompass the same unlawful conduct.

Further, Complaint Paragraph 8 of the Complaint, which is not part of Respondent’s Motion to Dismiss, alleges other instances of threats, surveillance, and interrogations by one of Respondent’s managers during about November 2013, and is based on the timely-filed Charge in Case 16-CA-124905, filed on March 20, 2014, and amended on April 11, 2014.⁴ Similarly, the First-Amended Charge in Case 20-CA-126824, filed on May 8, 2014, alleged that Respondent had engaged in unspecified surveillance, threats, and interrogated employees about their protected, concerted activities, although that language was subsequently removed by the Second-Amended Charge in Case 20-CA-126824, filed on August 28, 2014.⁵

As will be seen below, each Complaint allegation that Respondent seeks to have dismissed occurred within six months of one of those timely-filed charges and is “closely related” to the allegations in those charges. Therefore, Section 10(b) of the Act poses no

³ Contrary to Respondent’s assertion on page 10 of its Motion to Dismiss, the First-Amended Charge is broad and does not specifically state that “*every* Charge at issue in this case alleges solely and only that Walmart imposed an adverse attendance-related action on various associates *because* (and *after*) they participated in a ‘strike.’” (italics in the original).

⁴ See Motion to Dismiss, Exhibits 5 & 6.

⁵ See Motion to Dismiss, Exhibits 8 & 9. Although the surveillance, threats, and interrogation allegations were subsequently removed from the Charge, Your Honor may still rely on it for purposes of establishing jurisdiction under Section 10(b) of the Act. See *Carney Hospital*, 350 NLRB at 630, fn 11 (The Board agrees with the D.C. Circuit’s holding in *Drug Plastics & Glass Co. v. NLRB*, 44 F.3d 1017, 1020 (D.C. Circuit 1995), that an otherwise untimely allegation may be found timely under *Redd-I* even if the timely allegation to which it is closely related is ultimately held to be without merit).

obstacle to the Board's jurisdiction over the allegations. *See generally NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959); *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350 (1940). The General Counsel urges Your Honor to find that the twenty-two (22) allegations of the Amended Complaint Respondent seeks to have dismissed either allege predicate facts to an unfair labor practice (such as an alleged discriminatee's protected, concerted activities), allege legal conclusions, or are closely related to the other timely-filed charges, and asks that you deny Respondent's Motion to Dismiss.

II. Legal Standards

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made..."

Notwithstanding the literal language, the Supreme Court long ago held that Section 10(b) allows the litigation of unfair labor practices even where the allegations are not specifically set forth in an otherwise timely charge:

A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. *National Labor Relations Board v. I. & M. Electric Co.*, 318 U.S. 9, 18. The responsibility for making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstructions to interstate commerce, as this Court has recognized from the beginning. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1.

Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge... Here we hold only that the Board is not precluded from 'dealing adequately with unfair labor practices which are

related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.” *National Licorice v. N.L.R.B.*, 309 U.S. 350, at 369.

N.L.R.B. v. Fant Milling Co., 360 U.S. 301, at 307-308 (1959).

The Board subsequently set forth a three-prong test for determining whether otherwise untimely allegations are “closely related” to a timely filed charge, commonly referred to as the *Redd-I* test. Under that test, the Board: (1) considers whether the timely and the untimely allegations involve the same legal theory; (2) considers whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) “may look” at whether a respondent would raise the same or similar defenses to both the timely and untimely allegations. *The Carney Hospital*, 350 NLRB 627, 628 (2007). *Nickles Bakery*, 296 NLRB 927, 928 (1989); *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

While true that, in and of itself, a “chronological coincidence during a union's campaign does not warrant the implication that all challenged employer actions are related to one another as part of a planned response to that campaign,” the Board has held that where “two sets of allegations demonstrate similar conduct, usually during the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity, we will find that the second prong of the *Redd-I* test has been satisfied.” *The Carney Hospital* at p. 630 (internal quotations omitted). *Carney Hospital* also clarified that, while Prongs 1 and 2 must be met, “[p]rong three, as indicated by its language (“may”, not “must”), is not a mandatory aspect of the *Redd-I* test.” *Id.* at p. 628, n. 8.

The Board has previously rejected arguments similar to those raised in Respondent’s Motion to Dismiss, and has found that a charge alleging a violation of Section 8(a)(1) in general

terms is sufficient to support a complaint alleging a particularized violation of Section 8(a)(1). *Embassy Suites Resort*, 309 NLRB 1313 (1992), *enf. denied* 32 F.3d 588 (D.C. Cir. 1994), citing *Brookville Glove Co.*, 116 NLRB 1282 (1956); *Columbia University*, 250 NLRB 1220 fn. 2 (1980). In *Embassy Suites Resort*, the charge stated that the employer, within the last 6 months, had discriminated against employees, and had interfered with, restrained, and coerced employees in the exercise of their Section 7 rights. *Id.* at 1313. The Regional Director issued a complaint alleging that the respondent employer violated Section 8(a)(1) of the Act by: (1) implying that the union was preventing it from granting a wage increase; (2) creating an impression of surveillance; (3) threatening to reduce employee amenities if the union won an election; and (4) impliedly promised a wage increase if the union lost the election. *Id.* at 1313-1314. The Board rejected the respondent's argument that the complaint was barred by Section 10(b) and held that the charge, which was timely filed, was sufficient to support the allegations of the complaint.

III. Analysis

A. Respondent Was Afforded Due Process and Responded to the Allegations It Seeks To Have Dismissed During the Investigation

All of the Amended Complaint allegations Respondent seeks to dismiss were investigated in Case 20-CA-138553.⁶ As Respondent acknowledges throughout its Motion to Dismiss, it was afforded complete due process and given the opportunity to respond to each allegation in the Amended Complaint in the form of letters from the investigating Board Agent describing the allegations Respondent now seeks to dismiss.⁷ While Respondent asserted during the investigation that many of these same allegations were outside the scope of the charges, as it

⁶ Counsel for the General Counsel does not take the position that the allegations Respondent seeks to dismiss are encompassed by the "box dropping" charge. See pages 10-11 of Respondent's Motion to Dismiss.

⁷ See Motion to Dismiss, Exhibits 19-37 (letters from the investigating Board agent requesting evidence on the allegations Respondent seeks to have dismissed).

does here, it nevertheless provided substantive responses to those allegations.⁸ The Charges in Cases 16-CA-124905 and 20-CA-126824 also put Respondent on notice that threats, surveillance, and interrogation were at issue in these cases. Thus, any argument that Respondent was not afforded due process with respect to the allegations it seeks to have dismissed lack merit and should be rejected.⁹

B. There Is No Grounds To Dismiss the Allegations That Serve as Factual Predicates or Legal Conclusions to the Unfair Labor Practice Allegations

A number of the allegations that Respondent seeks to have dismissed are merely factual predicates that are not alleged as unfair labor practices,¹⁰ or they are legal conclusions related to individuals who were allegedly disciplined or discharged for discriminatory reasons.¹¹ As these are not independent unfair labor practice allegations, Section 10(b) of the Act does not apply and Respondent has raised no other grounds for dismissing them. Respondent's request that Your Honor dismiss these factual predicates and legal conclusions should be denied.

⁸ See Motion to Dismiss, Exhibit 38 and fn.2, 39 and fn. 4, 40 and fn. 4, and 41 and fn. 4 (excerpts from Respondent's various position statements responding to requests for evidence on the allegations is now seeks to have dismissed). Respondent neglected to include in those Exhibits the excerpts from those position statements showing its substantive responses, but as noted in those footnotes and acknowledged by Respondent in its Motion to Dismiss, it did provide substantive responses. Because there is no apparent dispute over whether Respondent was given the opportunity to respond to these allegations it seeks to dismiss and did so substantively, the General Counsel will not further burden the record by attaching those excerpts as exhibits here, but can provide them at Your Honor's request.

⁹ Compare *Regional Construction Corp.*, 333 NLRB 313, 313 FN 1 (2001) (respondent's response to the charge revealed that the respondent knew precisely what the charging party had alleged in its charge) with *NC-DSH, LLP d/b/a Desert Springs Hospital Medical Center*, 363 NLRB No. 185 (2016) (allegations were not closely related because there was no evidence that respondent was provided with any specifics of the unplead allegations against them).

¹⁰ See Complaint subparagraphs 11(a)(i)(describing part of alleged discriminatee Kiana Howard's protected, concerted activity); 14(a)(ii)(describing part of alleged discriminatee Tyfani Faulkner's protected, concerted activity); 15(a)(i), 15(a)(iii), 15(a)(iv), and 15(a)(v) (describing part of alleged discriminatee Evelin Cruz's protected, concerted activity); and 21(a)(ii)(describing part of alleged discriminatee Cantare Davunt's protected, concerted activity).

¹¹ See Complaint subparagraphs 11(d)(legal conclusion that Respondent's conduct toward alleged discriminatee Kiana Howard was because of her protected, concerted activities and to discourage employees from engaging in these or other concerted activities), 14(d)(same for alleged discriminatee Victoria Martinez), 15(d) (same for alleged discriminatee Evelin Cruz), and 21(e) (same for alleged discriminatee Cantare Davunt).

C. The Remaining Allegations That Respondent Seeks to Have Dismissed Are Closely Related to the Timely Charges

Putting aside the subparagraphs that are either factual predicates or the legal conclusions, all of the remaining allegations that Respondent seeks to dismiss are closely related, as they involve the same legal theory and arise from the same factual situation and sequence of events as the Charges in Cases 20-CA-138553, 16-CA-124905, and/or 20-CA-126824, thereby satisfying Prongs 1 and 2 of the *Redd-I* test. Further, to the extent they do not involve similar defenses, Prong 3 need not be satisfied in order to find that they are closely related. Therefore, the Board has jurisdiction to decide whether the allegations Respondent seeks to have dismissed were unlawful, and Respondent's Motion to Dismiss should be denied.

1. The Allegations Involve the Same Legal Theory and Arise From the Same Factual Situation and Sequence of Events (*Redd-I* Prongs 1 & 2)

As set forth below, each remaining allegation in the Complaint directly relates to the OUR Walmart Campaign and the strike activity at issue here, involves the same legal theory, and arises from the same factual situation and sequence of events, thereby satisfying Prongs 1 and 2 of the *Redd-I* test. This section begins with the General Counsel's legal theory and a demonstration of how the allegations arise from the same factual situation and sequence of events generally, followed by the specifics of the allegations that Respondent seeks to have dismissed.

The General Counsel's primary legal theory is that Respondent's employees engaged in a number of protected strikes and related actions in furtherance of those strikes, and that Respondent retaliated against them because they did so, and in order to discourage other employees from doing so. Respondent's retaliation against its striking employees took many forms, from issuing unexcused absences and various forms of discipline to them, to

interrogating, threatening , surveilling, and calling the police on them, to prohibiting them from wearing union insignia. All of these examples of retaliation directly stemmed from the OUR Walmart Campaign, one tactic of which was striking.

Respondent argues that the strikes that were at issue in the preceding case, *Walmart Stores, Inc.*, Cases 16-CA-096240, et al., JD—03—16 (Slip Op. dated January 21, 2016) (*Walmart I*), and alleged here in Complaint Paragraph 7, arose from a common plan or strategy to exert pressure on Respondent in furtherance of the OUR Walmart Campaign, which it will certainly argue supports its defense that the strikes were unprotected intermittent work stoppages. (*See* Motion to Dismiss at 13). Indeed, the General Counsel acknowledges that the common purpose of the strikes was to publicize and protest what the participants viewed as Respondent’s retaliation against and attempts to silence employees who spoke out for better wages, hours, and other working conditions, and its refusal to meet with groups of employees to address their mutual concerns about certain working conditions, as found by the administrative law judge in *Walmart I*. *See Walmart I*, slip op. at 19-20.¹²

Just as the strikes had a common plan and purpose, so too did Respondent’s response to the strikes, which was to retaliate against strikers or would-be strikers with a nationwide campaign of not only issuing unexcused absences and discipline, but also using interrogation, threats, surveillance, denial of access to off-duty employees, and the prohibition against wearing union insignia, all conduct that violates Section 8(a)(1) of the Act. All of the allegations Respondent seeks to have dismissed are part of the same organized response plan that emanated from Respondent’s headquarters and was designed to undermine the OUR Walmart Campaign, to retaliate against employees who participate in the strikes and discourage other employees from

¹² The General Counsel is filing a separate Motion in Limine for the admission of the undisputed factual findings of the administrative law judge in *Walmart I*.

doing so, and to prevent the public from hearing the OUR Walmart Campaign's message about working conditions at Wal-Mart. Accordingly, because all of the allegations that Respondent seeks to dismiss center around a common legal theory—protected strikes and retaliation for those protected strikes—Prong 1 of the *Redd-I* test is met.

Prong 2 of the *Redd-I* test is also satisfied here. All of the allegations Respondent seeks to dismiss not only share a chronological relationship to the Complaint and the underlying charges, they also arise from the same factual situation and sequence of events, namely, the OUR Walmart Campaign, the strike activities employees engaged in to further that campaign, and Respondent's centralized and coordinated response thereto.

The following provides more detail regarding the remaining allegations to show how they closely relate to the allegations of the Charges in Cases 16-CA-124905, 20-CA-126824, and/or 20-CA-138553, as set forth below:

Complaint Subparagraphs 9(a) and (b): Subparagraphs 9(a) and (b) allege that Respondent engaged in two incidents of surveillance of employees engaged in protected activities between September and October 2014. First, this conduct occurred within six months of the First-Amended Charge in Case 20-CA-135883, filed on February 4, 2015, and after the Charges in 16-CA-124905 and 20-CA-126824. Second, for paragraph 9(a), Respondent photographed employees who were delivering a petition requesting an employee's personnel file to determine if the employee had been disciplined for going on strike. Third, for paragraph 9(b), Respondent took pictures of employees who attempted to speak with store management about its recent retaliatory discharge of a well-known OUR Walmart supporter. Thus, the allegations in paragraphs 9(a) and 9(b) involve the same legal theory and factual circumstances and sequence of events as the other timely allegations in the Complaint and the underlying charges.

Complaint Subparagraphs 12(a) and (b): These two subparagraphs allege unlawful threats took place about November 22, 2014, and February 15, 2015. First, this conduct occurred within six months of the First-Amended Charge in Case 20-CA-135883, filed on February 4, 2015, and after the Charges in 16-CA-124905 and 20-CA-126824. Second, the November 22, 2014, threat was made to employees regarding their participation in the 2014 Black Friday Strike, a strike alleged as protected in Complaint Paragraph 7. The threat made on February 15, 2015, was made to employees who had already engaged in strikes alleged in Complaint Paragraph 7 and who had received unexcused absences for participating in such strikes. Respondent made this threat to employees in anticipation that those who had participated in past strikes would likely participate in future strikes. These two threat allegations directly stem from the protected strikes described in Complaint Paragraph 7 and involve Respondent's unlawful retaliation and response to its employees participating in those strikes. Thus, these allegations involve the same legal theory and factual circumstances and sequence of events as the other timely allegations in the Complaint and underlying charges.

Complaint Subparagraph 17(d): This subparagraph alleges that on January 3 and 14, 2015, Respondent interrogated employees about their protected concerted activities. First, this conduct occurred within six months of the First-Amended Charge in Case 20-CA-135883, filed on February 4, 2015, and after the Charges in 16-CA-124905 and 20-CA-126824. Second, the January 3, 2015, interrogation occurred during the meeting in which alleged discriminatee Lyle Skeen (Skeen) was issued his Third Written Coaching, which was based, in part, on the unexcused absence he received for participating in the Black Friday 2014 Strike. His manager interrogated him specifically about his support for OUR Walmart. The Third Written Coaching, as well as his termination on January 19, 2015, are alleged as unfair labor practices in Complaint

subparagraphs 17(a)-(c) and (e)-(f), which are not subjects of Respondent's Motion to Dismiss. Third, the January 14, 2015 interrogation involved a manager interrogating Skeen about his support for OUR Walmart when Skeen requested a document he had signed pertaining to his absence for participating in the Black Friday 2014 Strike, an absence which ultimately led to his termination. Thus, this allegation involves the same legal theory and arises from the same factual circumstances and sequence of events as the other allegations in the Complaint and underlying charges.

Complaint Paragraph 24: This paragraph alleges that about May 31, 2014, Respondent told employees they could not chant, speak to customers, or hand out flyers while they engaged in protected concerted activities outside the store. First, this conduct occurred within six months of the Original Charge in Case 20-CA-138553, filed on October 9, 2014, and after the charges in Case 16-CA-124905 and the Second-Amended Charge in Case 20-CA-126824. Second, Respondent told this to employees as they were participating in the June 2014 Strike and distributing flyers announcing the strike and describing the issues in the nationwide OUR Walmart Campaign. Thus, this allegation involves the same legal theory and factual circumstances and sequence of events as the other timely allegations in the Complaint and the underlying charges.

Complaint Paragraph 25: This paragraph alleges that in October and November 2014, just weeks before the Black Friday 2014 Strike, Respondent prohibited employees from wearing union insignia while allowing employees to wear other insignia. First, this conduct occurred within six months of the First-Amended Charge in Case 20-CA-138553, filed on February 4, 2015, and after the charges in Cases 16-CA-124905 and 20-CA-126824. Second, in the weeks leading up to the Black Friday 2014 Strike, employees at Respondent's stores tried to wear

stickers that said, “Ask Me Why the Lines Are So Long,” which was a theme used in the OUR Walmart Campaign’s to publicize the protest for improved wages and working conditions, particularly Respondent’s staffing levels and the reduction in hours available to employees. Thus, this allegation directly stems from the protected strikes alleged in Complaint Paragraph 7, and involves the same legal theory and factual circumstances and sequence of events as the other timely allegations in the Complaint and the underlying charges.

Complaint Paragraph 26: This paragraph alleges that about May 2014, Respondent interrogated employees about their protected activity. First, this conduct occurred within six months of the Original Charge in Case 20-CA-138553, filed on October 9, 2014, after the charges in Case 16-CA-124905, and around the same time as the First-Amended Charge in Case 20-CA-126824. Second, the allegation pertains to Respondent questioning employees about whether and when they intended to go on strike over the following weeks. Thus, this allegation involves the same legal theory and factual circumstances and sequence of events as the other timely allegations in the Complaint and the underlying charges.

Complaint Subparagraph 27(a): This subparagraph alleges that, about June 4, 2014, Respondent denied off-duty employees access to the Apple Valley store. First, this conduct occurred within six months of the Original Charge in Case 20-CA-138553, filed on October 9, 2014, and after the charges in Cases 16-CA-124905 and 20-CA-126824. Second, Respondent denied access to employees who were at the time attempting to deliver their strike notice to Respondent for the June 2014 Strike. Thus, the conduct alleged in Paragraph 27(a) was directly part of the progression of events leading to the June 2014 Strike, and involves the same legal theory and factual circumstances and sequence of events as the other timely allegations in the Complaint and the underlying charges.

Complaint Subparagraph 27(b): This subparagraph alleges that in August 2014, Respondent threatened to call the police on employees engaged in protected concerted activities. First, this occurred within six months of the First-Amended Charge in Case 20-CA-133853 filed on February 4, 2015, and after the charges in Cases 16-CA-124905 and 20-CA-126824. Second, the employees whom Respondent threatened with police action were attempting to deliver a petition protesting their working conditions, with signatures of Respondent's employees from all over the country. This event occurred just weeks after the June 2014 Strikes and weeks before the 2014 Black Friday Strike. The petition had as its central purpose the same purpose of the earlier strikes - - to protest wages and working conditions. Again, this allegation involves the same legal theory and factual circumstances and sequence of events as the other timely allegations in the Complaint and the underlying charges.

Complaint Subparagraph 27(c): This subparagraph alleges that about November 15, 2014, Respondent prohibited employees from wearing union insignia while permitting employees to wear other insignia. First, this allegation falls within six months of the First-Amended Charge filed on February 4, 2015, and after the charges in 16-CA-124905 and 20-CA-126824. Second, just before the 2014 Black Friday Strike, the employees attempted to wear stickers requesting full-time employment and \$15 per hour, two of the chief complaints of the OUR Walmart Campaign and the strikes. Therefore, it involves the same legal theory and factual circumstances and sequence of events as the other timely allegations in the Complaint and the underlying charges.

2. The Allegations Involve Similar Possible Defenses

Respondent focuses most of its argument in support of its Motion to Dismiss on its claim that the complaint allegations in question must be dismissed because they do not relate to its defense that the strikes are unprotected intermittent work stoppages. However, as noted above, the Board in *Carney Hospital*¹³ held that while the Board “may look” at whether respondent would raise the same or similar defenses to a timely-filed charge, that prong is not a mandatory aspect of the *Redd-I* test. Accordingly, whether Respondent could or would raise the same or similar defenses is not a requirement of the test at all, and does not serve as a basis for granting the Motion to Dismiss.

IV. Conclusion

The Complaint allegations that Respondent claims are outside the scope of the charges all fall within the 10(b) period of the timely-filed charges in Cases 20-CA-138553, 16-CA-124905, and/or 20-CA-126824, and are closely related to the allegations raised in those charges. Therefore, Counsel for the General Counsel respectfully requests that Your Honor deny Respondent’s Motion to Dismiss in its entirety.

RESPECTFULLY SUBMITTED this 4th day of January, 2017.

/s/ Matthew C. Peterson

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¹³ *Supra* at 628, footnote 8.