

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL

# Advice Memorandum

DATE: December 1, 2015

TO: Charles Posner, Regional Director  
Region 5

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Pritchard Industries  
Case 05-CA-152507

512-5012-0100-0000  
512-5036-6720-0000  
596-0420-0100-0000  
596-0420-8700-0000  
596-0420-8775-0000

The Region submitted this case for advice on whether the Employer violated the Act in terminating the Charging Party for seeking assistance from the Employer's customer about a disciplinary write-up. The case presents the questions of whether: (1) the Employer maintained an unlawful rule prohibiting employees from complaining to its customer regarding their terms and conditions of employment; (2) whether the Employer unlawfully terminated the Charging Party pursuant to the rule under *Continental Group, Inc.*<sup>1</sup> and (3) whether these allegations are barred by Section 10(b) of the Act.

We conclude that the Employer maintained an unlawful rule prohibiting employees from complaining to its customer regarding their terms and conditions of employment and that the Employer unlawfully terminated the Charging Party pursuant to the unlawful rule. We also conclude that these allegations are not barred by Section 10(b) of the Act. We therefore conclude that the Region should seek an amended charge alleging that the rule and termination pursuant to the rule were unlawful, and issue complaint, absent settlement, on those allegations.

## FACTS

Pritchard Industries, Inc. (Employer) performs janitorial and maintenance services to building owners and management agents in various cities in the United States. The Charging Party was employed by the Employer to work as a cleaner in a building in Washington, D.C. from approximately [REDACTED] until [REDACTED] was terminated on

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<sup>1</sup> 357 NLRB No. 39, slip op. at 4 (Aug. 11, 2011).

(b) (6), (b) (7)(C).<sup>2</sup> The Employer's employees are represented by SEIU 32BJ (Union).

The Charging Party was terminated briefly in 2010. (b) (6), (b) (7)(C) subsequently returned to work after the Union grieved and arbitrated (b) (6), (b) (7)(C) termination. The Charging Party asserts that since (b) (6), (b) (7)(C) return to work in 2010, (b) (6), (b) (7)(C) has received more onerous work assignments.<sup>3</sup>

On (b) (6), (b) (7)(C) the Charging Party's Lead asked (b) (6), (b) (7)(C) to sweep up some leaves pursuant to a request from the building's management. Such work was not part of the Charging Party's regular assignments. The Charging Party told (b) (6), (b) (7)(C) Lead that (b) (6), (b) (7)(C) was not going to sweep the leaves, that the Lead always had the Charging Party doing (b) (6), (b) (7)(C) work, and that the Lead had been giving the Charging Party additional work to do. The Charging Party told (b) (6), (b) (7)(C) Lead that (b) (6), (b) (7)(C) was playing (b) (6), (b) (7)(C) for a (b) (6), (b) (7)(C).<sup>4</sup>

Later that day, the Employer's Area Manager called the Charging Party into (b) (6), (b) (7)(C) office. According to the Area Manager, (b) (6), (b) (7)(C) spoke to the Charging Party about being disrespectful and not listening. The Charging Party told the Area Manager that certain things were not (b) (6), (b) (7)(C) responsibility and that (b) (6), (b) (7)(C) didn't have to do those things. The Area Manager issued the Charging Party a written disciplinary action report which stated, among other things, that the Charging Party was "very disrespectful" with (b) (6), (b) (7)(C) Lead, that (b) (6), (b) (7)(C) had a "very bad attitude," that (b) (6), (b) (7)(C) "did not follow [the Lead's] directions," and that (b) (6), (b) (7)(C) had been failing to clock in on time despite having been previously counseled regarding that issue. Additionally, the report stated that "there are rules to follow and respect." It also indicated that, during the meeting, the Charging Party had accused the Area Manager of wanting to fire (b) (6), (b) (7)(C) but that the Area Manager had never mentioned that. The type of violation selected on the report was "Company Rules" and "Other," and the action type selected was "documented verbal warning."

The next day, (b) (6), (b) (7)(C) the Charging Party went to see the Property Manager at (b) (6), (b) (7)(C) building.<sup>5</sup> (b) (6), (b) (7)(C) showed the Property Manager (b) (6), (b) (7)(C) disciplinary action report, complained about the tasks (b) (6), (b) (7)(C) had been assigned to do in the building, and

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<sup>2</sup> All dates are in 2014 unless otherwise indicated.

<sup>3</sup> The Region has found no merit to the allegation that the Employer unlawfully assigned the Charging Party more onerous working conditions.

<sup>4</sup> (b) (6), (b) (7)(C)

<sup>5</sup> The Property Manager is not employed by the Employer.

asked (b) (6), (b) (7)(C) to help (b) (6), (b) (7)(C) remove the report from (b) (6), (b) (7)(C) record. The Property Manager told the Charging Party to bring (b) (6), (b) (7)(C) complaint to the Union because (b) (6), (b) (7)(C) did not work for (b) (6), (b) (7)(C) directly.

Soon after, the Area Manager received a phone call from (b) (6), (b) (7)(C) boss. (b) (6), (b) (7)(C) boss told (b) (6), (b) (7)(C) that the Property Manager had called the Employer and reported that the Charging Party had come to (b) (6), (b) (7)(C) office to complain, that (b) (6), (b) (7)(C) had spoken loudly, that (b) (6), (b) (7)(C) wanted the Employer to handle the issue, and that (b) (6), (b) (7)(C) did not want the Charging Party in (b) (6), (b) (7)(C) office again. The Area Manager's boss told (b) (6), (b) (7)(C) that this was the final step with the Charging Party, as the Employer had already been trying to get (b) (6), (b) (7)(C) to do (b) (6), (b) (7)(C) work as assigned and follow rules and, in addition, (b) (6), (b) (7)(C) had gone to the management office to complain about (b) (6), (b) (7)(C) work assignments. The Area Manager's boss said that it was unacceptable for the Charging Party to continue complaining about the Employer and that this needed to be communicated to (b) (6), (b) (7)(C) even though the Area Manager had already discussed other misconduct with (b) (6), (b) (7)(C) at their (b) (6), (b) (7)(C) meeting.

The next day, (b) (6), (b) (7)(C), the Area Manager met with (b) (6), (b) (7)(C) boss in person. (b) (6), (b) (7)(C) boss said that the Employer needed to terminate the Charging Party because of (b) (6), (b) (7)(C) behavior, insubordination, and breaking company rules.

At the end of the Charging Party's shift, the Area Manager called the Charging Party into (b) (6), (b) (7)(C) office, where the Charging Party's Lead and a Union shop steward were present. According to the Area Manager, (b) (6), (b) (7)(C) told the Charging Party that it was unacceptable to go to the Property Manager to complain and speak loudly. The Area Manager also said that the Employer decided to terminate the Charging Party because of the incident with the Property Manager and other issues, which included breaking the rules by being late, not clocking in and out properly, and refusing to do (b) (6), (b) (7)(C) assigned work. According to the Charging Party, the Area Manager told (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) was receiving another warning because (b) (6), (b) (7)(C) went to talk to the Property Manager and that (b) (6), (b) (7)(C) called to the Employer's main office to tell them that (b) (6), (b) (7)(C) had complained. According to the Charging Party, that is why (b) (6), (b) (7)(C) was terminated that day; (b) (6), (b) (7)(C) account of the meeting did not include any discussion about breaking other rules.

The Area Manager issued the Charging Party a written disciplinary action report at the end of the meeting. The disciplinary action report stated that "the employee did not respect rules of the company and went to the management office to complain about the company." The type of violation selected was "Other," and the Area Manager wrote in "insubordination." The action type selected was "termination." After the termination, the Charging Party filed a grievance, which the Union declined to take to arbitration.

The Charging Party also filed an unfair labor practice charge on May 18, 2015, alleging that the Employer violated Sections 8(a)(1) and 8(a)(3). The charge states

that the Employer, “by assigning more onerous working conditions to [the Charging Party] and causing the termination of [the Charging Party,] has discriminated against [the Charging Party] because of [REDACTED] prior success in grievances.” On June 8, 2015, the Region sent the Employer a letter requesting evidence for its investigation of the charge. In this letter, the Region asked the Employer to respond to the allegation that it maintained an unlawful rule prohibiting employees from complaining about the company to members of external building management or managers outside the employees’ chain of command. The Region also asked the Employer to respond to the allegation that it terminated the Charging Party because [REDACTED] violated that rule.

The Employer responded that it has no rule prohibiting employees from complaining to customers. It further asserts that, though the Charging Party’s termination notice addresses [REDACTED] visit to the customer’s management office, [REDACTED] termination was not based on any complaints about terms and conditions of employment, but rather, “[REDACTED] insubordination and continued refusal to follow rules and [REDACTED] unruly conduct in the management office.”

### **ACTION**

We conclude that the Employer maintained an unlawful rule prohibiting employees from complaining to its customer regarding employees’ terms and conditions of employment and that the Employer unlawfully terminated the Charging Party pursuant to the unlawful rule.<sup>6</sup> We also conclude that these allegations are not barred by Section 10(b) of the Act. We therefore conclude that the Region should seek an amended charge alleging that the rule and termination pursuant to the rule were unlawful, and issue complaint, absent settlement, on those allegations.

### **The Employer Maintained an Unlawful Rule Against Complaining to the Customer and Discharged the Charging Party Pursuant to the Rule.**

The Board has consistently stated that discipline imposed pursuant to an unlawfully overbroad rule violates the Act.<sup>7</sup> In *Continental Group, Inc.*, the Board clarified that broad statement of the law and outlined limits to the application of this

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<sup>6</sup> The Region has determined that the Employer did not unlawfully terminate the Charging Party based on [REDACTED] filing of successful grievances, as stated in the charge, and that matter was not submitted for Advice.

<sup>7</sup> See *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3 (2004), *enforced*, 414 F.3d 1249 (10th Cir. 2005); *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001); *Opryland Hotel*, 323 NLRB 723, 724, 729 (1997); *A.T. & S.F. Memorial Hospitals*, 234 NLRB 436, 436 (1978); *Miller’s Discount Dept. Stores*, 198 NLRB 281, 281 (1972).

rule.<sup>8</sup> In examining the rule's underlying policy rationales, the Board stated that an overbroad work rule is unlawful because of its potential chill on employee exercise of Section 7 rights, and that it is reasonable to infer that discipline pursuant to such a rule would have a "similar, and perhaps even greater, chilling effect" on Section 7 activity.<sup>9</sup> The Board found that the "chilling effect" rationale would apply when an employee is disciplined for "conduct that is 'protected' but not 'concerted,'" but that there is no violation of the Act where the conduct for which the employee is disciplined is "wholly distinct" from activity that falls within the ambit of Section 7," such as sleeping on the employer's premises while off duty.<sup>10</sup> Accordingly, the Board concluded that discipline pursuant to an unlawfully overbroad rule violates the Act if the employee violated the rule by (1) engaging in protected conduct (e.g., concerted solicitation, distribution, or discussion of terms or conditions of employment) or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 (e.g., conduct that seeks higher wages) but is not protected by the Act because it is not concerted.<sup>11</sup> No violation will be found for discipline imposed pursuant to an overbroad rule, however, if the employer can establish that the employee's conduct interfered with the employer's production or operations and that the interference, rather than the rule, was the reason for the discharge.<sup>12</sup>

Here, the Employer contends that it has no rule—written or otherwise—that prohibits employees from complaining to the Property Manager and, therefore, that the Charging Party's discharge could not be found unlawful under *Continental Group*. For the reasons described below, we conclude that the Employer does maintain such an unlawful rule.

In *Philips Electronics North America Corp.*, the Board recently held that an employer maintained an unwritten confidentiality rule that was unlawful, despite the employer's denial of the existence of such a rule.<sup>13</sup> The Board based its conclusion on the totality of the evidence in the record, including a variety of circumstantial evidence that indicated that a rule existed, even if "only in the mind of

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<sup>8</sup> 357 NLRB No. 39 (Aug. 11, 2011).

<sup>9</sup> *Id.*, slip op. at 3.

<sup>10</sup> *Id.*, slip op. at 3-4.

<sup>11</sup> *Id.*, slip op. at 4.

<sup>12</sup> *Id.*

<sup>13</sup> 361 NLRB No. 16, slip op. at 1 (Aug. 14, 2014).

management.”<sup>14</sup> Specifically, the Board relied on the employer’s file notes, which stated that employees were “aware” that disciplinary forms were confidential, and that the employee was purposely sharing his disciplinary form which [REDACTED] “knew” was confidential.<sup>15</sup> The Board also relied on the employee’s discharge form, which stated that [REDACTED] had “shar[ed] confidential documentation and information during working hours.”<sup>16</sup> The Board explained that the employer would not have stated that employees were aware that disciplinary forms were confidential unless such a confidentiality rule existed. The Board further noted that it was “difficult to see how the [employer] can claim that such a rule did not exist and at the same time cite [the employee] for violating it.”<sup>17</sup>

Here, like in *Philips Electronics*, there is no written rule prohibiting employees from complaining to the Property Manager, and the Employer denies the existence of any such rule. However, like in *Philips Electronics*, the face of the discharge notice itself supports the conclusion that there was such a rule, even if unwritten. The discharge notice states that “the employee did not respect rules of the company and went to the management office to complain about the company.” Thus, the notice itself reflects an existing rule prohibiting the Charging Party’s conduct.

While the Employer may argue that its reference to rules only concerned the Charging Party’s conduct relating to the time clock and/or [REDACTED] failure to follow directions, the wording of the discharge notice itself belies that argument because it directly links the Charging Party’s failure to respect Company rules with [REDACTED] having gone to the management office to complain about the Company. The other evidence also undermines this argument. First, the Area Manager and [REDACTED] boss both described the Charging Party’s act of complaining to the Property Manager as unacceptable. Second, like in *Philips Electronics*, the Employer’s denial that such a rule existed is undermined by the act of terminating the Charging Party and specifically citing [REDACTED] for [REDACTED] conduct in the Property Manager’s office.<sup>18</sup> Third, the Charging Party’s account of the (b) (6), (b) (7)(C) meeting includes no discussion of violations of other rules; [REDACTED] visit with the Property Manager was the only cited reason for [REDACTED]

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<sup>14</sup> *Id.*, slip op. at 2 (citing *Jeanette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976) (enforcing the Board’s finding that an “unwritten policy apparently framed only in the minds of the company officials” was unlawful)).

<sup>15</sup> *Id.*, slip op. at 2-3.

<sup>16</sup> *Id.*, slip op. at 3.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

discharge. This bolsters the argument that the reference to rules on the face of the discharge related to the complaint to the Property Manager. As in *Philips Electronics*, the totality of the evidence in the record here supports the existence of a rule. We therefore conclude that the Employer maintained an unlawful rule prohibiting employees from speaking to customers about workplace complaints.<sup>19</sup>

We also conclude that the Employer terminated the Charging Party pursuant to the unlawful rule.<sup>20</sup> While the Employer has asserted that it terminated the Charging Party in part because of the conduct described in the disciplinary action report issued on (b) (6), (b) (7)(C), the Employer did not terminate the Charging Party following (b) (6), (b) (7)(C) conduct on (b) (6), (b) (7)(C). The Employer even noted on the (b) (6), (b) (7)(C) report that the Charging Party had accused the Area Manager of wanting to fire (b) (6), (b) (7)(C) but that the Area Manager had not mentioned that. Instead, the Employer terminated the Charging Party the day after (b) (6), (b) (7)(C) complained to the Property Manager about (b) (6), (b) (7)(C) disciplinary action report. Further, the Area Manager told the Charging Party that (b) (6), (b) (7)(C) was being terminated because (b) (6), (b) (7)(C) had complained to the Property Manager, and the Employer stated on the face of the (b) (6), (b) (7)(C) discharge notice that the Charging Party “went to the management office to complain about the company” as the reason for the termination.<sup>21</sup>

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<sup>19</sup> While the evidence tends to support the existence of such a rule under a *Philips Electronics*-based analysis, the Region should further investigate whether and to what extent the Charging Party and other employees have communicated with the Property Manager about workplace complaints in the past. If the Region discovers evidence that there was such activity, that the Employer knew of it, and that it went unpunished, the Region should contact the Division of Advice.

<sup>20</sup> It is well established that an employer rule prohibiting employees from communicating with its customers about terms and conditions of employment is unlawfully overbroad. *See, e.g., Guardsmark, LLC*, 344 NLRB 809, 809 (2005) (finding that rule prohibiting employees from registering complaints with employer’s client was unlawful, as employees have a Section 7 right to enlist the support of an employer’s clients or customers regarding complaints about terms and conditions of employment), *enforced in relevant part*, 475 F.3d 369 (D.C. Cir. 2007); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171-72 (1990) (finding rule prohibiting school employees from communicating with students’ parents about terms and conditions of employment and other subjects to be unlawful).

<sup>21</sup> *Cf. Asheville School*, 347 NLRB 877, 877 n.2 (2006) (finding lawful the discharge of an employee where the record failed to demonstrate a nexus between an unlawful rule and the employee’s conduct).

We further conclude that the discharge was unlawful under *Continental Group, Inc.* First, as described above, the Employer terminated the Charging Party pursuant to an unlawful rule. Second, although (b) (6), (b) (7)(C) may not have engaged in concerted activity, the Charging Party's appeal to the Property Manager for assistance regarding workplace discipline and work assignments is conduct that implicates the concerns underlying Section 7.<sup>22</sup> For example, employees who hear about the Charging Party's termination for requesting assistance from the Property Manager regarding (b) (6), (b) (7)(C) write-up could reasonably be chilled from making a concerted request to the Property Manager regarding employees' terms and conditions of employment or a labor dispute.<sup>23</sup> Finally, the Employer has not claimed that the employee's conduct interfered with the Employer's production or operations and that the interference, rather than the rule, was the reason for the discharge, nor does the evidence support that defense.<sup>24</sup>

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<sup>22</sup> *Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 4 & n.10 (describing a case involving an employee complaint to a client about an individual compensation issue as a "prime illustration" of the kind of conduct that is not concerted but nonetheless "touches the concerns animating Section 7").

<sup>23</sup> See, e.g., *Kitty Clover, Inc.*, 103 NLRB 1665, 1687 (1953) ("[S]trikers are free to publicize the story of their labor dispute and call upon their employer's customers for support if they wish."), *enforced*, 208 F.2d 212 (8th Cir. 1953).

<sup>24</sup> The Region should also determine whether the Property Manager is a statutory employee. If so, it can additionally argue that the Charging Party's request for assistance was protected concerted activity and therefore that (b) (6), (b) (7)(C) termination violated the Act independently of *Continental Group*. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) (single employee's appeal for help from other employees regarding working conditions is for the purpose of "mutual aid or protection" even though only that employee may have an "immediate stake in the outcome"); *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 7 (Aug. 11, 2014) (finding that an employee who solicited assistance from (b) (6), (b) (7)(C) colleagues regarding issues of individualized discipline was acting for the purpose of "mutual aid or protection"); *IBM Corp.*, 341 NLRB 1288, 1294 (2004) (employees have a right to seek assistance from a fellow employee regarding discipline and cannot be disciplined for asking for such assistance). Further, while the Property Manager was not employed by the Employer, it is well established that an employee's activity can be concerted when it involves statutory employees of different employers. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978) (the Act protects employees "when they engage in otherwise proper concerted activities in support of employees of employers other than their own"); *Washington State Service Employees*, 188 NLRB 957, 958 (1971) (finding that single employee engaged in a protest with employees of another employer about that employer's labor practices was engaging in protected concerted activity).

**The Allegations that the Employer Maintained an Unlawful Rule and Discharged the Charging Party Pursuant to that Rule Are Not Barred by Section 10(b).**

Under Section 10(b), “[n]o 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.” However, the Board will permit litigation of otherwise untimely allegations if they are “closely related” to a timely filed charge. In determining if untimely allegations are sufficiently “closely related,” the Board, under the *Redd-I* test, considers: (1) whether they involve the same legal theory as the timely allegations, and; (2) whether they arise from the same factual situation or sequence of events as those in the timely charge.<sup>25</sup> Additionally, the Board “may look” at whether the respondent would raise the same or similar defenses to both the untimely and timely allegations.<sup>26</sup>

In the instant case, the charge alleges that the Employer, by “assigning more onerous working conditions to [the Charging Party] and causing the termination of [the Charging Party,] has discriminated against [the Charging Party] because of [redacted] prior success in grievances” in violation of Section 8(a)(3) and (1). The allegations that we find meritorious, however, are that the Employer maintained an unlawful rule and unlawfully terminated the Charging Party pursuant to that rule in violation of Section 8(a)(1). We conclude that these allegations are not time-barred under Section 10(b). Regarding the allegation that the Employer maintained an unlawful rule, the Board has held that the maintenance of an unlawful rule is a continuing violation, regardless of when the rule was promulgated.<sup>27</sup> As for the allegation that the Employer terminated the Charging Party pursuant to that rule, we conclude that it is closely related to the timely-filed charge under *Redd-I*, as described below.

We conclude that the first prong of the *Redd-I* test—whether the allegations involve the same legal theory—is satisfied. The allegation that the Employer terminated the Charging Party pursuant to an unlawful rule is encompassed in the

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<sup>25</sup> *Carney Hospital*, 350 NLRB 627, 628 (2007) (citing *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988)).

<sup>26</sup> *Id.* at 628 & n.8 (observing that the third prong of the *Redd-I* test is “not a mandatory” requirement for permissible amendment of an otherwise untimely allegation).

<sup>27</sup> *Chesapeake Energy Corp.*, 362 NLRB No. 80, slip op. at 1-2 n.3 (Apr. 30, 2015).

theory alleged in the charge: that the Employer unlawfully “caus[ed] the termination of” the Charging Party. Although the legal theories of violation are not identical, this is not a requirement for satisfying *Redd-I*'s same-legal-theory prong.<sup>28</sup> Indeed, when the Board has found that the same-legal-theory requirement was not satisfied, the untimely alleged violations were entirely distinct from the legal theories that were timely alleged.<sup>29</sup>

We conclude that the second prong of the *Redd-I* test, which concerns whether the allegations arise from the same factual situation or sequence of events, is clearly satisfied. Both allegations relate to the same adverse employment action (termination) committed by the same entity (the Employer) against the same individual (the Charging Party).<sup>30</sup>

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<sup>28</sup> See *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 1 (Dec. 16, 2014) (instruction not to talk about wages “concern[ed] the same general legal issues” as a timely allegation of discharge based on talking about wages); *SKC Electric, Inc.*, 350 NLRB 857, 858-59 (2007) (untimely allegation that employer unlawfully interrogated employees arose under same legal theory as timely allegation that employer unlawfully denied employee training where the information obtained during interrogation led to employer’s decision); *Trim Corp. of America*, 349 NLRB 608, 608-09 (2007) (8(a)(1) allegation that the employer coerced employees was part of the same legal theory as an 8(a)(5) allegation, timely alleged, because at base, both allegations turned on the issue of whether the employer made alleged coercive statements).

<sup>29</sup> See, e.g., *Peerless Pump Co.*, 345 NLRB 371, 374 (2005) (complaint allegation that employer unilaterally implemented striker recall procedures in violation of 8(a)(5) was not same legal theory as charge allegation that employer recalled strikers in violation of 8(a)(3) because employer’s bargaining obligation to union is legally distinct from requirement that it not discriminate against strikers); *KFMB Stations*, 343 NLRB 748, 748-49 (2004) (8(a)(1) allegation that the employer solicited employees to resign from the union was not the same legal theory as 8(a)(3) allegations that the employer reduced charging party’s compensation, constructively discharged him, and retaliated against him during bargaining); *WGE Federal Credit Union*, 346 NLRB 982, 983 (2006) (8(a)(3) charge allegation that employer discriminatorily discharged one employee not same legal theory as untimely allegation that employer made 8(a)(1) threat against two other employees).

<sup>30</sup> See *Fry’s Food Stores*, 361 NLRB No. 140, slip op. at 2 (Dec. 16, 2014) (allegations arose from the same factual situation or sequence of events where they involved the same individuals and arose from the same brief sequence of events during a disciplinary interview).

Finally, although the third prong of the *Redd-I* test is not required, we conclude that the Employer would raise the same defense to the timely and untimely allegations. In defending against the timely filed discriminatory discharge theory, the Employer would have to argue under the Board's *Wright Line*<sup>31</sup> test that it actually discharged the Charging Party for complaining to the Property Manager, and that this was a lawful, legitimate reason for terminating [REDACTED]<sup>32</sup>. To show that this reason was lawful, the Employer would necessarily have to demonstrate that the Charging Party's complaint was not Section 7-protected activity and, if the conduct was unprotected solely because it was unconcerted, that the discharge was not pursuant to an unlawful rule. Thus, the defense to the untimely allegation that the Employer terminated the Charging Party pursuant to an unlawful rule is common to both allegations. This prong of the *Redd-I* test is satisfied here, even though the Employer also might be able to raise different defenses to the two allegations.<sup>33</sup> Therefore, the Employer is on sufficient notice to have preserved evidence on this issue and prepare its case.<sup>34</sup> For the above reasons, the third *Redd-I* prong is satisfied.

Finally, our conclusion that the timely and untimely allegations are closely related is consistent with the purpose of Section 10(b): to "bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' and of course to stabilize existing bargaining relationships."<sup>35</sup> Here, the original charge gave

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<sup>31</sup> 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

<sup>32</sup> See *Bowling Transportation, Inc.*, 336 NLRB 393, 395 (2001) ("An affirmative defense under *Wright Line* must be based on a lawful, legitimate reason for the challenged employment decision."), *enforced*, 352 F.3d 274 (6th Cir. 2003).

<sup>33</sup> See, e.g., *Trim Corp. of America*, 349 NLRB at 609 (rejecting argument that *Redd-I*'s third prong was not satisfied because potential defenses to an untimely 8(a)(1) violation had little in common with defenses to a timely 8(a)(5) allegation; the employer's principal defense to both allegations involved attacking the credibility of the same witness).

<sup>34</sup> See *Fry's Food Stores*, 361 NLRB No. 140, slip op. at 2 n.5 (noting that the "same or similar defenses" prong of the *Redd-I* test is concerned, at least in part, with "whether a reasonable respondent would have preserved similar evidence and prepared a similar case" in defending against the untimely allegations as it would in defending against the timely allegations).

<sup>35</sup> *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 419 (1960) (internal citations omitted).

sufficient notice to the Employer that the subject of the allegation was the discharge, which was explicitly carried out because of the Charging Party's complaint to the Property Manager. Thus, as noted above, the charge served the purposes of ensuring that the Employer preserved evidence relating to the untimely allegation. Further, the Employer was advised by the Region of the untimely allegation soon after the charge was served, was given the chance to fully respond, and has not claimed that it failed to preserve relevant evidence.<sup>36</sup> Moreover, while under Board Rule 102.12(d), a charge must contain a "clear and concise statement of the facts constituting the alleged unfair labor practice," it is important to note that it is the complaint, not the charge, that gives a respondent notice of the specific claims made against it.<sup>37</sup>

Accordingly, the Region should seek an amended charge and issue complaint, absent settlement, consistent with the foregoing.

/s/  
B.J.K.

ADV.05-CA-152507.Response.PritchardIndustries

(b) (6), (b)

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<sup>36</sup> See *Fry's Food Stores*, 361 NLRB No. 140, slip op. at 2 n.5 (noting that the employer did not claim that it failed to preserve relevant evidence or was unable to prepare an effective case against the new allegations).

<sup>37</sup> *Redd-I, Inc.*, 290 NLRB 1115, 1116-17 & n.12.