

Bill Fox Chevrolet, Inc. and Local 376, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 7-CA-20535

14 May 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS**

On 6 February 1984 Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bill Fox Chevrolet, Inc., Rochester, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Remove from its files any reference to the unlawful layoff and notify the employee in writing that this has been done and that the layoff will not be used against him in any way."

2. Substitute the attached notice for that of the administrative law judge.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In par. 3 of the section of his decision entitled "the General Counsel's Prima Facie Case," the judge erroneously reported the citation to *NLRB v. Central Power Co.*, 425 F.2d 1318, 1322 (5th Cir. 1970). We correct this error.

² The judge inadvertently failed to include in his recommended Order and notice a provision ordering the Respondent to remove from its files any reference to the unlawful layoff and notify the employee that this has been done. We shall therefore modify the recommended Order accordingly, and issue a new notice to employees.

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.

WE WILL NOT lay off or otherwise discriminate against you for supporting Local 376, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Duane R. Morris immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his layoff, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his layoff and that the layoff will not be used against him in any way.

BILL FOX CHEVROLET, INC.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This proceeding was heard in Detroit, Michigan, on October 27 and 28, 1983, on an unfair labor practice complaint¹ alleging that Respondent, Bill Fox Chevrolet, Inc., unlawfully laid off its employee Duane Morris on April 2, 1982, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act). Respondent filed a timely answer in which, inter alia, it both denied the substantive allegations of the complaint and affirmatively pleaded that Duane Morris "was laid off due to poor performance and not for any reason outlined in the within complaint."

At the hearing, all parties were represented by counsel who had full opportunity to call and examine witnesses, to present testimony, to argue on the record, and to file posttrial briefs. After the close of the hearing, the General Counsel elected to argue orally and Respondent filed a brief.

¹ The relevant docket entries show that the unfair labor practice charge was filed by Local 376, IBT, the Charging Party herein, on April 13, 1982 and served on Bill Fox Chevrolet, Inc., Respondent, on April 14, 1982. The Regional Director for Region 7 of the National Labor Relations Board issued the complaint on May 21, 1982.

On the basis of the entire record herein, including oral argument and Respondent's brief, and particularly on my observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW²

I. THE BUSINESS OF RESPONDENT

The complaint alleges, Respondent admits, and I find that Respondent, a Delaware corporation, at all material times has been engaged in the sale and repair of automobiles and trucks in the city of Rochester, State of Michigan. During the year ending December 31, 1981, a representative period of Respondent's operations generally, Respondent had gross revenues in excess of \$500,000, and during the same period purchased products valued in excess of \$50,000 which were transported and delivered to its aforesaid place of business directly from points located outside the State of Michigan. Respondent admits and I find that at all material times it has been, and is, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS A STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admitted at the hearing, and I find that Local 376, International Brotherhood of Teamsters, at all material times has been, and is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Animus*

At least as early as 1979, Respondent operated an automobile dealership in Rochester, Michigan, employing over 40 persons. At that time its 14 "garage and service department" employees were represented for collective bargaining purposes by Local 376, IBT, herein the Union. Although the record does not disclose the length of the bargaining relationship, it does show that Respondent and the Union had executed a 3-year collective-bargaining agreement in July 1978 which expired October 30, 1981. The parties entered into an extension of that agreement expiring January 31, 1982.

In the period subsequent to January 31, 1982, the parties have been in collective bargaining with regard to further extension but it is undenied that no notices of ending the agreement have been exchanged by the parties pursuant to Section 8(d) of the Act. The General Counsel contends that the collective-bargaining agreement is thus in effect pursuant to language (art. XXV) in the extending agreement which purportedly extends the collective-bargaining agreement from year to year. Respondent contends that there is no effective collective-bargaining agreement in existence. I conclude that the resolution of this dispute is not material to this case. I make no finding as to whether the agreement is in

² Respondent's answer admits that William Fox, Broadway, and Stanley Karras are its statutory supervisors within Sec. 2(11) of the Act and agents of Respondent.

effect.³ It should be noted, however, that the collective-bargaining agreement (G.C. Exh. 4) contains a lawful union-security clause requiring as a condition of employment, inter alia, membership in the Union following the 31st day on and after employment (art. I, sec. 2).

There is also no dispute that a hearing before Administrative Law Judge Bernard Ries was held on October 14 and 15, 1980, in Cases 7-CA-16876, 7-CA-16919, and 7-CA-17176 in Detroit, Michigan, involving the same Employer and the same labor organization. The complaint in that matter alleged violations of Section 8(a)(1), (3), (4), and (5) of the Act because of Respondent's alleged unlawful actions in and about July 1979. As a result of that hearing, Administrative Law Judge Ries found, inter alia, that Respondent:

In July, September, and October 1979, by initiating an effort to decertify the Charging Party as the collective-bargaining representative of Respondent's garage and service department employees, by offering such employees benefits for agreeing to decertification, by encouraging such employees to form their own labor organization, by initiating, assisting in, encouraging, and monitoring an effort to petition for withdrawal from the Charging Party of union-security authorization, by inquiring of an employee into the progress of such a petition, by informing employees of its intent to disavow the bargaining agreement in order to persuade them to abandon support of the Charging Party, by telling an employee that Respondent was going to enforce work rules more stringently against supporters of the Charging Party, and by threatening that an employee would be discharged for engaging in protected activities, Respondent violated section 8(a)(1) of the Act.

Furthermore, Administrative Law Judge Ries found that, by discriminating against an employee during pay periods ending December 11 and 18, 1979, because of his union and protected concerted activities, and because he gave testimony to the Labor Board, Respondent violated Section 8(a)(1), (3), and (4) of the Act. Moreover, in October 1979, by refusing to process contractual grievances filed by the Charging Party and by unilaterally altering a condition of employment without bargaining with the Charging Party, Respondent was found to have violated Section 8(a)(5) and (1) of the Act.

As a result of these findings and conclusions, Administrative Law Judge Rise recommended to the Board that Respondent cease and desist from such action and take the standard affirmative action to remedy these unfair

³ The contract extension executed by the parties on October 30, 1981 (G.C. Exh. 5, art. XXV), provides as follows:

Termination Clause—Section 1. This Section shall be amended to read as follows:

Cancellation or Termination; Automatic Renewal. This Agreement shall be in full force and effect from August 1, 1981 to January 31, 1982, and shall continue in full force and effect from year-to-year unless written notice of desire to cancel or terminate this Agreement is served by either party upon the other at least sixty (60) days prior to annual date of expiration.

labor practices. Administrative Law Judge Ries' decision is dated January 7, 1981.

Respondent failed to take exception to any of Administrative Law Judge Ries' findings and the Board, on February 26, 1981, issued a pro forma decision pursuant to Section 10(c) of the Act and Section 102.48 of the Board's Rules and Regulations, wherein the Board adopted the findings and conclusions of Administrative Law Judge Ries as contained in his decision and ordered that Respondent, in that case, take the actions set forth by Administrative Law Judge Ries in his recommended Order.

It is apparent from the above findings and conclusions of Administrative Law Judge Ries and the pro forma Board Decision and Order that the gravamen of the unfair labor practices in which Respondent's chief operating officer and president, William Fox, actively participated and, indeed, headed, was the initiation of the process, and the encouragement of employees, to deauthorize and decertify the Union as the collective-bargaining representative—in particular, to file a petition for deauthorization under the Act. While this activity forms a basis of Administrative Law Judge Ries' multiple findings of violation of Section 8(a)(1) of the Act, it also led to reprisals in violation of Section 8(a)(3) against the employee (Becker) who refused to proceed with the deauthorization petition because the unit employees apparently did not wish to deauthorize or decertify the Union.

In the instant proceeding, William Fox testified that there were approximately 24 employees in the service department and body shop bargaining unit. Fox also testified that at a certain meeting occurring on or about April 14 or 15, 1982, some 2 weeks after the termination of the alleged discriminatee, Duane Morris, he addressed members of the unit and other employees relating, inter alia, to the reason for the termination and the basis for reinstating him.

Lastly, the record shows that there is on file a decertification petition dated March 18, 1982, which was served on March 19, 1982. Ten days after the discharge of Duane Morris, the parties entered into a stipulation for holding a vote on that decertification petition on April 12, 1982. The actual vote is "blocked" by the current unfair labor practice proceeding.

On the basis of the above facts, and there being no intervening allegations of proof by Respondent, or by any other party, that there has been a substantial change of management or a lawful repudiation of these unfair labor practices, or other change of circumstances, I take administrative notice of the findings of fact and conclusions of law of Administrative Law Judge Ries which have now been, pro forma, adopted by the Board, *Moulton Mfg. Co.*, 152 NLRB 196, 198, 207-209 (1965). Although I do not give that proof of Respondent's prior animus dispositive weight in this proceeding, *NLRB v. Tama Meat Packing Corp.*, 575 F.2d 661 (8th Cir. 1978), cert. denied 439 U.S. 1069, I would consider it naive to ignore the pervasiveness of Respondent's recent past misconduct with regard to this union, *Shattuck Denn Mining Corp. v. NLRB.*, 362 F.2d 466 (9th Cir. 1966). Since evidence of hostility to the Union is not derived solely from the prior adjudication, the prior adjudication can be used

as evidence of present hostility. *Tama Meat Packing Corp. v. NLRB*, supra; *NLRB v. Clinton Packing Co.*, 468 F.2d 953 (8th Cir. 1972). Thus, I take official notice and conclude on the basis of the preponderant credible evidence that there exists evidence demonstrating that Respondent was possessed of substantial union animus with regard to Local 376, IBT; that Respondent in the past has unlawfully discriminated against an employee because he opposed decertification of the Union; unlawfully sought to deauthorize or decertify the Union; and that a petition to decertify the Union was filed on March 18, 1982, 2 weeks before the discharge of Duane Morris, the alleged discriminatee.⁴

In the instant case, the facts show that Duane R. Morris, the alleged discriminatee, was hired as a porter on February 8, 1982, and laid off on April 2, 1982.

In response to the Regional Director's unfair labor practice complaint of May 21, 1982, Respondent filed its timely answer on May 26, 1982 (thus, some 7 weeks after the alleged discrimination against Duane Morris herein). Respondent, in its answer, not only denied the allegation that Morris' layoff of April 2 was because of his membership in, sympathies for, and activities on behalf of the Union (par. 9 of the answer in response to par. 9 of the complaint), but affirmatively pleaded in paragraph 14 of the answer that:

14. By way of further answer, Respondent affirmatively states that Duane Morris was laid off *due to poor performance* and not for any reasons outlined in the within Complaint. [Emphasis added.]

Morris worked from February 8 until about 2-1/2 to 3 weeks before his termination as a porter in the body shop where he washed cars, cleaned floors, removed used and broken parts of automobiles, and cleaned the body shop generally. Aiding him at all material times was a part-time porter, Roger Melado, who worked a few hours per day in the afternoon. About 2-1/2 weeks before he was laid off, Morris was directed to also do janitorial work in Respondent's offices and showroom. This included vacuuming the showroom and emptying the trash in the offices. The emptying of the trash in the offices and the cleaning of the showroom occurred as part of Morris' duties only in the morning and were performed first thing in the morning. Thereafter, he returned to work in the body shop. In this period, commencing 2-1/2 weeks before layoff, he was no longer

⁴ A view of Administrative Law Judge Ries' decision, however, gives some moral balance both to Respondent's antipathy to the Union and the conduct of its president, William Fox. Administrative Law Judge Ries' decision recites the existence of a bribery incident involving an official of the Charging Party and Fox wherein Fox cooperated with the United States Department of Justice in the matter. As Administrative Law Judge Ries suggests, it is easy to understand and sympathize with Fox's resentment against the Union stemming from this bribery incident. That episode, however, does not privilege the course of conduct in which Fox and Respondent thereafter engaged to oust the Union as the incumbent collective-bargaining representative (Administrative Law Judge Ries' decision). It should also be noted that Administrative Law Judge Ries, in his recommended Order adopted by the Board, proscribed Respondent, inter alia, from again discriminating against employees for engaging in union activities. Like Administrative Law Judge Ries, I found William Fox a pleasant, if incredible, witness.

under the supervision of his erstwhile supervisor, Body Shop Manager Stan Karras, but under the direct supervision of General Manager Ron Broadway.

On the morning of Wednesday, March 31, 1982, union shop steward Ron Waldrup, in the body shop, told Morris that there was a union shop in Respondent's work force which required Morris to join the Union; that Morris had to fill out papers for the Union and that there would be a \$25 initiation fee. Morris said he wished to pay the \$25 initiation fee in a two pay-period period rather than in one and Waldrup agreed to speak to Office Manager Jan Keller to see if this were possible. Jan Keller is a corporate officer of Respondent, its secretary-treasurer; and Respondent concedes that she is a supervisor and agent within the meaning of the Act. Her immediate supervisor is General Manager Ron Broadway.

At that time, Duane Morris signed a union dues-check-off authorization form and gave it to Waldrup.⁵ Waldrup credibly testified that he gave Morris' signed checkoff authorization (G.C. Exh. 6) to Supervisor Jan Keller on that day and she agreed to deduct the initiation fees over a 2-week period rather than a 1-week period. Jan Keller did not testify at the hearing.

On Friday morning, April 2, Ron Broadway received a phone call from Office Manager Jan Keller regarding covering Morris under Respondent's collective-bargaining agreement insurance plan. Keller told Broadway that she was including Morris in coverage because he was in the Union. Broadway said that he was not in the Union but Keller contradicted him and assured Broadway that Morris was in the Union.

With respect to the following conversation, although its substance and the date, April 2, 1982 (Morris was terminated in the afternoon of April 2), are not in dispute, Morris and Broadway dispute when it occurred: Broadway testified that it occurred about 9:30 a.m.; Morris testified that it occurred about 2:30 p.m. Broadway testified that it could not have been at 2:30 p.m. because after 9:30 a.m. he left Respondent's premises and was away at a meeting until about 4:30 p.m. He did not give specifics or offer corroboration as to where he was all that afternoon. I find that the flow of evidence and ensuing events demonstrate that Broadway was incorrect (whether by design or otherwise), and Morris' recollection, that it occurred at 2:30 p.m., is accurate. Morris credibly testified that, contrary to his regular routine, he went up to Broadway's office in the afternoon only because Supervisor Stan Karras told him that he should go up to Broadway's office to clean the floors and empty the ashtrays. Stan Karras, Respondent's supervisor, was never called to testify at the hearing and, especially in his absence, and Broadway's failure to corroborate his alleged whereabouts, I credit Morris' testimony that it occurred at 2:30 p.m. Compare *Hitchiner Mfg. Co.*, 243 NLRB 927 (1979), with *Laredo Coca-Cola Bottling Co. v. NLRB*, 613 F.2d

⁵ Waldrup credibly testified that he dated the March 31 checkoff authorization signed by Morris as March 30, 1982. He did this in order to present the checkoff authorization to Office Manager Jan Keller in time to permit Respondent to divide the initiation fee over two pay periods rather than permitting it to fall into one period.

1338 (5th Cir. 1980), cert. denied 105 LRRM 2658 (1980).

In any event, I find, on the admissions of, and notwithstanding the partial denials of, Ron Broadway and the credited testimony of Duane Morris, that when Morris entered Broadway's office to clean the trash, Broadway greeted him with the statement: "You joined the Union, huh?" Morris said that he joined the Union because of the union-shop requirement; that he wanted a raise in pay; and that he would be discharged if he was not a union member. Morris testified (and Broadway denied) that Broadway then said: "You have not received your raise yet." At this point, Broadway smiled and Morris emptied the trash and cleaned the floors notwithstanding that the floors did not need cleaning. He also testified credibly that there was hardly any trash in the wastepaper baskets and the floor needed no vacuuming. Broadway did not deny Morris' testimony that the floors did not need cleaning and that there was little trash in the wastepaper baskets. I therefore credit Morris in these last particulars, that it occurred at 2:30 p.m., and in his version of this conversation with Broadway.⁶

Without contradiction, Morris credibly testified that, after he left Broadway's office, he returned to the body shop and swept up. About a half hour after his return, Body Shop Supervisor Karras approached him while he was at work and told him that he had both good news and bad news for him: The good news was that certain work on a car had been finished; and the bad news was that he was being laid off. When Morris asked why he was being laid off, Karras told him it was because "things were getting slow." About an hour later (4 p.m.) when, according to his normal quitting time, Morris was leaving the shop in the company of employees Ron Parmelee and Jimmy Powell, who were also laid off at that time, they asked Karras why they were being laid off and he told them they were being laid off because "things were slow." Morris asked him when the layoff was effective and he told them it was effective immediately. Parmelee, Powell, and Morris left Respondent's premises together, at the same time. As above noted, Supervisor Karras was not called to testify. I credit Morris' testimony on this point.

About 1 hour later, at 5 p.m., after Parmelee, Powell, and Morris had talked the matter over, they returned to Respondent's premises in order to pick up Parmelee's and Powell's tools and also to pick up layoff slips which, according to Supervisor Karras, were necessary in order for the employees to receive Michigan unemployment compensation. When they returned, Karras directed them to Ron Broadway to pick up their layoff slips. Respondent did not regularly give layoff slips when employees were laid off but only to employees on the employees' request. Morris asked Broadway whether the layoff had anything to do with his having joined the Union and Broadway said to him, "I didn't know you joined the Union." Broadway told them that they were all laid off for economic reasons and told them to go to

⁶ I do not credit Broadway's testimony that the conversation occurred at 9:30 a.m. and that he asked Morris if he had joined the Union only to inquire if Morris had been pressured into joining the Union.

the office to pick up their layoff slips which were then being typed up. The three employees then picked up their layoff slips and left.⁷

Broadway testified, when shown his prior affidavit given to the National Labor Relations Board, that in the final interview with Morris, Powell, and Parmelee he "must have" told them that they had been laid off for economic reasons. Nowhere in that prior statement, as Broadway admitted, was there any suggestion that Morris was being treated differently from Parmelee and Powell and nowhere was there any suggestion that Morris was being laid off for poor work performance which Respondent affirmatively pleaded as a defense. Nevertheless, Broadway, on the witness stand, testified that one of the reasons Morris was laid off was poor work performance even though such a reason did not appear in his April 30, 1982 sworn statement to the Labor Board, signed by Broadway only 4 weeks after the alleged unlawful layoff. I do not credit Broadway's testimony based on (a) his testimonial inconsistency; (b) Morris' credited and uncontradicted testimony that Supervisor Karras told the three laid-off employees that they were laid off for economic reasons; and (c) President Fox's postlayoff speech to assembled employees, *infra*, telling them that the employees had been laid off for economic reasons.

B. Discussion and Conclusions

1. Respondent's defenses

Broadway testified that when Roger Melado, like Morris, a porter in the body shop, returned from sick leave, Broadway expanded Morris' duties so that he no longer worked exclusively in the body shop. In particu-

⁷ Morris and Broadway agree that about 2 weeks after Morris was first hired, and ostensibly when he was under the sole supervision of Body Shop Manager Karras, Morris and Broadway had a conversation regarding the Union but they disagree as to the substance of the conversation. Morris testified that, in late February, he entered Broadway's office and asked for a W-2 income tax form. Broadway neither admitted nor denied the question of the W-2 form but stated only that Morris came into the office and asked to speak to him. Morris testified that the next statement was Broadway asking him (Morris) "... how do you feel about the Union?" Broadway testified that Morris opened the conversation by stating: "They want me to join the Union and I don't want to." Morris, in any event, testified that he answered Broadway by telling him that he had filled out the union papers but had not signed them. According to Morris, Broadway then said, "You don't have to join the Union." Broadway testified that in response to Morris' telling him that he did not want to join the Union, Broadway merely said: "Do what you have to do." Broadway specifically denied Morris' testimony insofar as Morris testified that Broadway told him, "You don't have to join the Union." I credit Morris and do not credit Broadway's version. There was no suggestion on this record that the Union, at any time, much less after only 2 weeks of employment, was using any pressure on Morris or any other employees to join the Union. Indeed, according to President Fox's uncontradicted testimony, union membership and support among Respondent's employees had been falling. The credited evidence is that Morris sought to join the Union in order to get a raise notwithstanding that shop steward Waldrup first raised the issue. I thus do not credit Broadway's testimony concerning this early conversation. I further do not credit Broadway's testimony that the only reason he spoke to Morris about joining the Union on April 2 was because of his prior understanding that the Union had been using pressure on Morris to join. Rather, Broadway learned from Supervisor Jan Keller, no later than the morning of April 2, that Morris had executed the dues-checkoff authorization. Morris was therefore a known union supporter.

lar, Broadway testified that, in the last 3 weeks of his employment, Morris worked directly and only under him and no longer in the body shop under Karras. This contradicts Morris' testimony that in the last 3 weeks of his employment he worked in two areas. As above noted, I credit Morris that he did work in both areas. Further, Broadway testified that Morris' work was of poor quality when he did it and that, in particular, Morris was always with his friends in the body shop. Broadway testified that although Morris' work in the morning was acceptable when he cleaned the offices and the showroom, yet after 10 a.m. he could not be found in any of these areas and he was always with his friends in the body shop. On many occasions when, according to Broadway, he remonstrated against Morris' alleged failure to work in the offices and the showroom, Morris would continually ask why he could not be assigned to work in the body shop. Broadway clearly testified that he told Morris that, since the return to work of Roger Melado, he was not needed in the body shop and that Broadway was trying to make a job for him. Broadway testified that, on 6 to 12 occasions, he spoke to Morris about Morris' failure to get work done in the service department; that trash and broken equipment remained in the service department; that oil spills had not been soaked up and swept away; and that Morris had been found continually in the body shop, talking to his friends even though he was not assigned to work there. Broadway also testified that, although he was not involved in the actual April 2, 1982 decision to lay off Morris, he said that on many occasions he had discussed the matter with President William Fox and told him of Morris' shortcomings at work. In particular, Broadway testified that over a 3-week period before the April 2 layoff, i.e., in the 3 weeks in which Morris was under Broadway's direct supervision, he told Fox repeatedly of Morris' failure to clean up the service department and his continued presence, unauthorized, in the body shop. Broadway particularized that the first time that he mentioned this to Fox was 3 weeks before the April 2 layoff; the second time, 2 or 3 days later; the third about 1 week after that; and the fourth time on the Monday or Tuesday before the April 2 layoff (i.e., on Monday and Tuesday, March 29 or 30). Again, Broadway testified that he had no participation in the actual layoff of Morris and, with William Fox's corroboration, denied that he ever told Fox that Morris had joined the Union.

Broadway further testified that at 5 p.m. when Morris, Powell, and Parmelee entered his office, telling him that they wanted layoff slips, he was "dumbfounded" and did not know anything of the layoff. He admits that Morris told him that the layoff was because he had joined the Union and corroborates Morris that he said nothing in return.

There is no dispute that Powell and Parmelee were laid off on April 2; that Friday, April 2, is payday; that Respondent's pay period runs from Wednesday to Tuesday of each week with the ensuing Friday being the payday; and that Powell and Parmelee, both body shop employees, were laid off for economic reasons. It is un-

disputed that they were the lowest employees in terms of seniority.

Fox testified that he made his decision to lay off Powell and Parmelee possibly earlier than Wednesday, March 31, possibly even on Monday or Tuesday preceding that time. He testified that he discussed their being laid off with the body shop foreman, Stanley Karras, but had no discussion with anyone regarding the Morris layoff until he directed Karras to lay him off on April 2.⁸ Fox testified that Morris' joining the Union had nothing to do with the layoff and that he had no knowledge that Morris had joined the Union prior to deciding to lay him off. The decision to lay him off, according to Fox, was made on April 2 when he directed Supervisor Karras to lay him off.

Fox did not contradict Waldrup's testimony that later, in a mid-April meeting, Fox told the 12 union members and other persons in attendance that the 3 employees (Parmelee, Powell, and Morris) had been laid off because of hard economic times, because work was slow *and that if things got better he would rehire them*. He also failed to deny Waldrup's testimony that he told them that he "had to be careful of what he said because of the existence of the decertification petition." Fox specifically testified that General Manager Broadway had the power to terminate employees without consulting him. The only possible limitation on that right was where a particularly important employee was going to be terminated. Fox said that he expected to be consulted by a supervisor who was going to lay off or terminate such an employee.

After Morris was laid off, a former employee, James Stein, was taken on as an independent contractor to do Morris' work on the assumption that Stein would acquire numerous professional cleaning equipment. He failed to do so, he did a poor job and was replaced by a professional maintenance organization: Thompson Janitorial Service. Thompson Janitorial Service has been Respondent's cleaning contractor for almost 2 years and has a contract with Respondent. Respondent points to the fact that, aside from high startup costs in the cleaning service, it costs Respondent about \$540 a month for the professional cleaning service whereas Morris, as an employee with full union benefits, would cost between \$700 and \$800 a month where social security, workmen's compensation, insurance, and other benefits were added to Morris' salary of approximately \$130 per week.

2. The General Counsel's prima facie case

There exists here a background of Respondent's animus against this Union and, in particular, President Fox's activities, sometimes direct, in unlawfully encouraging and fomenting decertification and deauthorization of the Union. Fox's participation in violations of Section 8(a)(1), (3), and (4) of the Act against this Union cannot be denied and have been previously established by the Board. There is no evidence of some intervening event

⁸ The transcript (Tr. 156-162) shows Fox's testimony, both in itself (Tr. 159) and compared to statements in a pretrial affidavit (Tr. 16) inconsistent on whether, prior to April 2, he discussed Morris' layoff with Supervisor Karras, or any one else. Again, Karras did not testify.

which has caused Respondent to look upon the Union through different, less jaundiced eyes.

Next, there is no question that Respondent knew of Morris' support for the Union prior to terminating him. Thus, the element of *knowledge* is clear in view of Morris' and Waldrup's testimony regarding Office Manager Jan Keller and Ron Broadway's own admission of his conversations both with Supervisor Jan Keller (March 31) and with Morris (April 2) himself, concerning Morris' union activities, all before the April 2 layoff. There is also no question of the abruptness of the termination of Morris: The first showing of Respondent's knowledge of Morris' executing the checkoff authorization (i.e., union support) was on March 31 and he was terminated 2 days later on Friday, April 2. This very abruptness of the layoff, following Respondent's acquisition of knowledge, in the face of union animus, is further support for the prima facie case. Furthermore, since Broadway, on Fox's testimony, had the absolute power to terminate any employee under his supervision, it would seem highly unlikely that, given Broadway's testimony of (a) Morris' continued poor performance; (b) Broadway's repeated (6 to 12) warnings to Morris that if he did not improve his work he would be terminated; and (c) Broadway's repeated conversations with President Fox concerning Morris' poor work performance, Broadway would have condoned and tolerated Morris' poor conduct for such a long period of time (3 weeks) without sooner terminating him. As President Fox testified, porters were replaced on a regular basis, sometimes two and three times per week. In view of such testimony, I cannot credit Broadway's testimony concerning his forbearance. When measured especially against the abruptness of the April 2 termination in the middle of the pay period, it is odd that Respondent tolerated Morris' alleged deficiencies for so long a period in the face of alleged repeated warnings from Broadway to Morris on the very same point. Moreover, if Broadway were endeavoring to "make a job" for Morris (in view of Melado's alleged return as a porter), there is no explanation why his endeavor ceased—except Morris' March 31 joining the Union.

With regard to perfection of the prima facie case, it should be noted that hostility to the Union and the termination of an employee shortly after the employer learns of his union activity alone may give rise to an inference that the termination was discriminatory. *NLRB v. Central Power Co.*, 424 F.2d 1318, 1322 (5th Cir. 1970); *NLRB v. Camco, Inc.*, 369 F.2d 125, 127 (5th Cir. 1966). In view of Respondent's established union hostility, the precipitous nature of Morris' discharge in the middle of the pay period within 2 days after it acquired knowledge of his union activity and support, and in view of Morris' alleged longstanding poor work; in view of both Broadway's failure to exercise his power to immediately discharge or terminate a poor employee and Fox's testimony that porters are replaced within the same week on many occasions, it cannot be said that the General Counsel failed to show, by timing, toleration of alleged deficiency, knowledge, animus, and precipitate action, that a prima facie case demonstrating that a motivating factor

in the termination of Duane Morris was his engaging in union activities, *Wright Line*, 251 NLRB 1083 (1980); cf. *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983).

In support of this prima facie case, there also exists the fact that Respondent's particularized pleaded defense, Morris' poor work performance, was not given as the reason for his layoff by the two supervisors who gave him "reasons" for layoff: Ron Broadway and Stanley Karras. Both of these supervisors *told him* he was laid off for lack of work.⁹ In addition, President Fox not only said that Morris, along with Powell and Parmelee, were laid off because of bad economic conditions, but that they would be rehired if economic conditions permitted. Morris' poor work evidently would not prevent his being rehired. Thus, not only was the reason, formally pleaded as a defense by Respondent, not given to Morris, but a different reason was given to Morris at all times. Moreover, if Morris' poor work performance were a reason for his termination, Fox would have no reason on which to tell assembled employees, 2 weeks after the termination, that Morris would be rehired if economic conditions permitted. Thus, where Respondent's pleaded defense is inconsistent with Respondent's proof at the hearing, the prima facie case is further supported. *Cera International Corp.*, 262 NLRB 612, 616 (1982). In short, in addition to the usual elements of a prima facie case, Respondent's pleaded defense (poor workmanship) is untrue, based on Waldrup's credited testimony, below, and does not match up to the only reasons (lack of work) given to Morris by Respondent's supervisors (even according to Respondent's supervisors' own testimony) at the time of his layoff.

There is even further support to the prima facie case in Respondent's further false defense: Ron Broadway and William Fox testified, in substance, that Respondent was attempting to keep Morris in employment and to give him new duties because of the return, 3 weeks before the layoff, of its porter, Roger Melado, who had been away on sick leave. Thus, according to Broadway's testimony, because Melado returned to and was working as a porter in the body shop, Duane Morris' presence in the body shop became largely superfluous 3 weeks before the layoff and that new duties had to be found for him in the service department and up in the offices and showroom. The problem with this defense was that Morris, in rebuttal, testified that Roger Melado had never left Respondent's employment; and that for the entire period of Morris' employment with Respondent, Melado worked for Respondent as a porter. Respondent never sought to clarify, much less deny, this testimony or to rebut Morris' rebuttal testimony by simply bringing in its pay records to show that Melado had been off on sick leave as Fox and Broadway testified and had returned to employment. This failure undermines Respondent's defense that it terminated Morris because Morris' body shop

duties had been returned to Melado, resulting in a lack of work for Morris. The credited testimony is therefore that Melado had apparently not returned because he had never been off on sick leave. Respondent's failure to produce its payroll records to show otherwise undermines Respondent's "economic reasons" defense—which was, of course, not its affirmatively pleaded defense—for the Morris layoff.

3. Respondent's other defenses

a. *The defense of Morris' poor work performance*

Broadway testified that Morris was not doing his work because he was always back in the body shop with his friends. Broadway testified that he repeatedly complained to Fox concerning Morris' poor work performance. Although Broadway had the power to fire him, he did not do so notwithstanding that he allegedly warned Morris on many occasions during the 3-week period that Morris was working under him. I have not credited Broadway's testimony that he had repeatedly or indeed ever warned Morris because I have credited Morris' denial that any such warnings were given to him. My observation of Broadway and especially his testimony contradicting his pretrial affidavit, above, preclude my believing that a man of his insight, experience, and responsibility would tolerate an employee who paid no attention to more than a half a dozen direct warnings in a 3-week period to cease going to the body shop and to improve his work performance. I have little doubt, on my observation of Broadway, who had the direct power to discharge employees, that he would have refrained from terminating Morris if Morris' performance had been repeatedly poor. Fox testified on the great turnover in porters. I have also credited Morris' denials that he loitered in the body shop or that he told Broadway that if he were returned to work in the body shop that his work would improve or that things would be all right.

Moreover, there is the rebuttal testimony of Waldrup. Notwithstanding that he is the union shop steward and therefore has a potential interest in support of Morris' testimony, there is his testimony that his observation of Morris' work, consistent with his 11 years of observation of porters in Respondent's employ during the period, led him to the conclusion that Morris' work was far beyond the quality of the other porters' work. Thus, I find that Respondent has in no way shown by credible testimony, which is its burden, that Morris was guilty of poor work performance. In this regard, the General Counsel having proved a prima facie case, the burden of proof shifts to Respondent to prove that the same action would have taken place even in the absence of Morris' protected conduct. *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983). In view of my finding that Respondent in general, and Broadway in particular, would not have tolerated an inadequate and insubordinate porter who rejected repeated (6 to 12 times) warnings regarding improvement of his work performance over such a long period, and Waldrup's testimony, I find, that the evidence in support of Respondent's defense (Morris' alleged poor work performance) was wholly unproven. In

⁹ Again, Karras did not testify. Broadway testified that it was Morris' poor performance that caused the layoff. When confronted with his pretrial affidavit, he admitted that the only reason he gave Parmelee, Powell, and Morris for the layoff was "economic reasons" (Tr. 109-112). My observations of Broadway concerning his testimony on this point lead me to be generally skeptical of his veracity.

view of this failure of proof, I conclude that Respondent would not have taken the action of laying off or terminating Duane Morris absent the matters proven in the prima facie case, i.e., his union activities. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Accord: *Brookfield Dairy*, 266 NLRB 698 (1983).

b. *Respondent's further economic defense*

Respondent introduced testimony that it terminated or laid off Morris because of poor economic conditions. In support of defense, Ron Broadway testified that, in the period of the beginning of 1982, the economic situation in the auto industry was "devastating." Broadway testified that he and Fox continuously discussed the questions of layoff and where to cut employees. In further support of the economic defense President Fox adduced testimony that it was cheaper to replace Morris with an independent contractor (James Stein) and that, when that relationship did not work out, it engaged a professional cleaning service. That may be so. However, there is no support for the fulcrum and dispositive support of this aspect of Respondent's economic defense: that because of the return from such leave of porter Roger Melado, the employment of Duane Morris became marginally necessary. The deficiency in this defense is that, as above noted, Melado never left Respondent's employ according to the credited testimony of Morris and Respondent's failure to produce its records to show that Melado *ever* was off on sick leave. Since Melado never left, and assuming, as I must and do, that Respondent wanted Morris to work in the service department and in the front offices and showroom, there is no showing, on this record, that Morris failed to do so, that his work was in any way poor, or that he was a supernumerary. On the contrary, the credited testimony of Waldrup shows that his work was superior. In addition, I reject the suggestion in the testimony of Fox or Broadway that there was not enough work for both of them (Melado's continued employment and the hiring of Stein and the professional cleaners show that there was) and I find that the economic defense, undermined by the falseness of the Melado cornerstone, is not supported on this record; rather, it is introduced as a pretext to justify Morris' layoff notwithstanding that the economic defense is not the reason offered in Respondent's formal, pleaded, particularized defense (Morris' poor performance) in the answer.

4. Other testimony in support of Morris' credibility

Moreover, I was particularly impressed by Morris' undenied testimony that Supervisor Karras directed him to report to Broadway's office on April 2, on the later-revealed pretext that Broadway wanted to have the ashtrays and the trash baskets in his office cleaned. The undenied and credited testimony was that neither the floor nor the ashtrays or waste baskets needed cleaning at 2:30 p.m. when the conversation occurred (Tr. 31) concerning Morris' having joined the Union ("so you joined the Union huh"). I was particularly impressed by this testimony as showing the discriminatory motive in the layoff. For, if there was no work reason, as undeniably appears

on this record, for Broadway to have Karras direct Morris to come to Broadway's office to clean the ashtrays, there was another reason for Broadway, at this irregular hour, to speak to Morris at 2:30 p.m. on April 2: It was to verify the fact that Morris had joined the Union. An hour and a half later, Karras notified him that he was terminated as a "layoff" because of the lack of work. Broadway thereafter repeated the economic reasons for the layoff. I reject this defense as false as I rejected the defense of Morris' poor work performance.

Lastly, there is the uncontradicted, postlayoff admission of President Fox which makes both of Respondent's defenses to the layoff (Morris' poor work performance; poor economic conditions) mutually exclusive: if Morris' poor work performance created an opportunity for Respondent to lay him off because of bad economic conditions, there would be no reason for President Fox to tell the assembled employees, 2 weeks after the layoff of April 2, that he would rehire the three employees if economic conditions improved. This is entirely inconsistent with the defense that Morris, in fact, was selected for layoff because of his poor work performance.¹⁰

I find that Respondent, under *Wright Line*, supra, *Limestone Apparel Corp.*, supra, and *NLRB v. Transportation Management Corp.*, supra, has interposed false, unpleaded, and inconsistent defenses which do not support its burden of proof to show Respondent would have taken the action of laying off Morris even in the absence of Morris' protected conduct. Here, the precipitate April 2 termination, immediately following Broadway's confirmation of Morris' joining the Union (verified on the pretext of cleaning Broadway's already cleaned office) in the middle of the pay period, 2 days after it first learned of Morris' union activities, with a background of animus directed against this Union, with defenses which are false, confused, and inconsistent, as to (1) what is pleaded, (2) what is told the alleged discriminatee, and (3) what is told other unit employees, all demonstrate that Morris was terminated because of his union activities in violation of Section 8(a)(3) and (1) of the Act.

5. Morris' credibility

During cross-examination of Morris, Respondent raised two criminal matters relating only to Morris' credibility. In the first instance, Respondent showed that Morris, in executing his job application form, denied that he had ever been convicted of a crime. Morris admitted that, prior to his applications for employment with Respondent, he had pleaded guilty to the offense, under the laws of the State of Michigan, of "impaired driving." This is apparently a lesser matter than "driving while intoxicated." The record does not demonstrate Morris' age but he testified, without contradiction, that although he had been intoxicated while driving, he was permitted to plead guilty to the lesser allegation ("driving while impaired") because he was 17 years of age. While the State of Michigan's penalty, if any, for this offense does not

¹⁰ Respondent's brief quite understandably suggests that, when Fox spoke of rehiring the employees if the economic picture improved, he did not mean to include Morris. There is no evidentiary support for this speculation.

appear on record, there is no question that Morris was placed on probation and had to pay \$300 in court costs. The question is whether this matter is admissible to impeach Morris' credibility.

As I remarked to counsel for Respondent at the hearing, I was willing, *arguendo*, to assume that Morris' plea was to a "crime" within the meaning of Rule 609 of the Federal Rules of Evidence (which I deemed to be applicable to the proceeding before me) for purposes of impeaching Morris' credibility.¹¹ Passing the further jury question of whether its admission involves a probative value superior to its prejudicial effect on the defendant, it does not appear that the impaired driving offense to which Morris pleaded was punishable by imprisonment in excess of 1 year or that it involves dishonesty or false statement. Thus, I conclude that, on the record before me, Morris' plea to "driving while impaired" failed to meet either wing of admissibility for impeachment purposes under Rule 609. I therefore excluded both from the record and my deliberation on the question of Morris' credibility, Morris' guilty plea to "driving while impaired." Even were it admissible, I would tend to not discredit Morris' testimony because of his "impaired" driving at age 17. On the basis of the entire record before me, I credit his testimony over that of Fox and Broadway.

In addition, Respondent elicited from Morris an admission that subsequent to his discharge on April 2, 1982, Morris went to California where he pleaded guilty to the crime of grand theft under Sections 487-489 of Title 13 of the California Criminal Code. I have agreed to take official notice of the California Criminal Code sections submitted by Respondent and include them as Administrative Law Judge's Exhibit 1 for the convenience of the Board.

The undisputed testimony from Morris is that he served 8 months of a 1-year term in the county jail in California. Punishment for grand theft, pursuant to California Criminal Code, Section 489 of Title 13, reads as follows:

Grand theft is punishable by imprisonment in the county jail for not more than one year or in the State prison for not more than 10 years.

It is not clear on this record, on submission by Respondent, whether the courts of the State of California have so interpreted Section 489 as to demonstrate whether sentencing after conviction or plea (as in the instant case) wherein the sentencing is to the county jail, creates a crime different from that which sentence would be in the state prison for more than 10 years. In other words, under California law, it was not made clear whether grand theft, punishable in the county jail, was considered

a matter legally different from grand theft punishable in the state prison for not more than 10 years. For purposes of this decision, however, I will assume, *arguendo*, that there is no difference and that the admission of Morris of a plea of guilty to grand theft meets the requirements of Section 609 of the Federal Rules of Evidence in that the crime of grand theft was punishable in excess of 1 year under the statute under which he was convicted and, in any event, involved dishonesty, regardless of punishment. I have therefore taken into account Morris' plea to the crime of grand theft committed in California in 1982 for which he served 8 months in the county jail.

It is I who have the responsibility of evaluating the credibility of the witnesses, both from their demeanor and from the record circumstances which may, as in this case, offer a further perspective as to who would be the more truthful witnesses. In the past, in Board proceedings, I have taken into account a prior conviction for grand theft and, because the record as a whole demonstrated the untrustworthiness of the witness so convicted, have discredited his testimony. *Bosk Paint Co.*, 266 NLRB 1033 (1981); cf. *National Sheet Corp.*, 242 NLRB 294, 302 (1979). Yet, each case stands on its own footing. The Act protects good employees as well as bad employees and the only pertinent restriction on Respondent's conduct towards its employees is not that it act reasonably or even rationally but that it not act unlawfully. *Paramount Metal Co.*, 225 NLRB 464, 465 (1976). In my observation of the witnesses as they testified, and particularly on viewing and reviewing the record evidence, I conclude, on the basis of the above record and my observation, that Morris was believable and that Fox and Broadway were not.

On the basis of the above finding of fact and the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is labor organization within the meaning of Section 2(5) of the Act.
3. By laying off Duane R. Morris on April 2, 1982, because of his activities in support of the Union, Respondent unlawfully discriminated against employees in terms and conditions of employment, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(3) and (1) of the Act, I shall recommend that it cease and desist from engaging in such conduct and take such affirmative action as will dissipate the effects of its unfair labor practice.

Because Duane Morris' April 2 layoff has been found unlawful, the order shall require Respondent to offer full and immediate reinstatement to his former or substantial-

¹¹ Rule 609. *Impeachment By Evidence of Conviction of Crime.* (a) General rule. For the purposes of attacking the credibility of the witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

ly equivalent job, without prejudice to his seniority or other rights and privileges,¹² and to make him whole for any loss of earnings he may have suffered as a result of the discrimination by payment to him of a sum equal to that which he would have earned, absent the discrimination, to the date of Respondent's lawful offer of reinstatement. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

In view of the prior pro forma Board Order encompassing Administrative Law Judge Ries' decision and recommended order in the above cases wherein violation of Section 8(a)(1), (3), (4), and (5) of the Act were found, I conclude that Respondent has now demonstrated a proclivity to violate the Act in order to gain unlawful objectives, *Hickmott Foods*, 242 NLRB 1357 (1979), notwithstanding any union illegality in terms of its conduct toward President Fox.

On the above findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended¹³

ORDER

The Respondent, Bill Fox Chevrolet, Inc., Rochester, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against employees for engaging in union or other activity protected by the Act.

¹² The recommendation for full reinstatement is made notwithstanding Morris' conviction for grand theft, *supra*. If Respondent desires to contest and avoid rehiring Morris for this reason, the issue may be litigated at the compliance stage of this proceeding. *L. D. Brinkman Southeast*, 261 NLRB 204 fn. 3 (1982).

¹³ 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.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights might be affected by a lawful union-security agreement within the meaning of Section 8(a)(3) of the Act.

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

(a) Offer to Duane R. Morris immediate and full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges, and make him whole in the manner described above in the section entitled "The Remedy" for any loss of pay or any other benefits suffered by reason of his discriminatory layoff on April 2, 1982.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and interest due under the terms of this Order.

(c) Post at its Rochester, Michigan location copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 7, 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.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹⁴ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."