

**Certified Service, Inc. and Ralph Hoe. Case 19-
CA-16111**

30 April 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 23 September 1982 Administrative Law Judge Thomas E. Bracken issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering 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 briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.²

The judge found that the Respondent violated Section 8(a)(1) of the Act by discharging employee Ralph Poe because he filed a complaint with the Occupational Health and Safety Administration of the United States (OSHA). We disagree.

The undisputed evidence reveals that Poe acted alone and in his own behalf in filing his complaint with OSHA.³ Relying on the Board's decision in *Alleluia Cushion Co.*, 221 NLRB 999 (1975), the judge found that Poe's actions were concerted activities protected by the Act. However, in our recent decision in *Meyers Industries*, 268 NLRB 493 (1984), we held that activities will not be found to be "concerted" within the meaning of the Act unless they are engaged in with or on the authority of other employees. In so doing, we overruled *Alleluia Cushion* and its progeny. Accordingly, for the reasons fully set forth in *Meyers*, we find that the Respondent's discharge of Poe was not unlawful under the Act, and we shall dismiss this allegation of the complaint.

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), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

³ The record reveals that Poe talked to employee Steve Hays about silver solder fumes before complaining to OSHA about this and other matters. Hays told Poe that the fumes were causing the headaches Poe was having, but there is no evidence that Hays was personally concerned about these fumes, or that Poe's complaint to OSHA was in behalf of Hays.

The judge found that the Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge for filing complaints with OSHA. We agree with the judge for the reasons which follow. The record reveals that Poe contacted the Cincinnati office of OSHA 8 August 1980 to complain of certain working conditions at the Respondent's premises. On 14 August 1980 OSHA conducted an inspection as a result of which the Respondent was found to have violated the Occupational Safety and Health Act and was fined. On 21 August 1980 Poe and other employees were assembled outside Supervisor Claude Couch's office waiting for their shift to begin. Couch emerged from his office and shouted that if he found out who called OSHA, "they was gone."

We find that Couch's remarks would reasonably tend to interfere with employees in the exercise of rights under the Act. Thus, we conclude that under the circumstances here, including the particular language used by Couch and the fact that the remark was addressed to a number of employees, the assembled employees would reasonably construe Couch's statement as a threat to retaliate against employees for jointly filing complaints with OSHA. We find, therefore, that the Respondent, through Couch's statement, violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Certified Service, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge, or other reprisals, for engaging in concerted activities for their mutual aid or protection.

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

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

(a) Post at its plant in Dayton, Ohio, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, 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

⁴ 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."

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.

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

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 threaten you with discharge, or other reprisals, for engaging in concerted activities for mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you in the National Labor Relations Act, as amended.

CERTIFIED SERVICE, INC.

DECISION

STATEMENT OF THE CASE

THOMAS E. BRACKEN, Administrative Law Judge. This case was tried at Dayton, Ohio, May 3, 1982. The charge was filed on November 21, 1980,¹ and the complaint was issued July 21, 1981.² The primary issues are whether the Company, the Respondent; (a) unlawfully threatened to discharge employees for contacting OSHA, and (b) unlawfully discharged Ralph Poe because he engaged in protected concerted activities, in violation of Section 8(a)(1) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, and the Company, I make the following

FINDINGS OF FACT

1. JURISDICTION

The Company, an Ohio corporation, services and repairs air conditioning compressors at its two facilities in Dayton, Ohio, where, during the past 12-month period, it purchased and received at these facilities products,

¹ All dates are in 1980 unless otherwise indicated.

² Poe had also filed a complaint with the Occupational Safety and Health Administration (OSHA), and the Board's Regional Office had deferred to a concurrent investigation by OSHA pursuant to Sec. 11(c)(1) of that Act. Prior to the completion of the OSHA investigation Poe withdrew his OSHA complaint against the Respondent, and the Regional Office proceeded with its procedures.

goods, and materials valued in excess of \$50,000 directly from points located outside the State. The Company admits, and I find, that it is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company's two plants, located at 1803 Webster Street and 2035 Webster Street, are about one-half mile apart. The president of the Company has his offices at the 1803 plant, and here the employees work on large semihermetic used compressors. The 2035 plant works on smaller, full-hermetic used compressors. There has been little interaction or transfer of employees between the two plants. The hours of work are from 8 a.m. to 4:30 p.m., with lunch being from 12 noon to 12:30 p.m.

Ralph Poe, who had started to work for the Company in February 1978, worked exclusively at the 2035 plant in 1980. Here he tore down the welded compressors, cleaned usable parts, and scrapped the unusable ones. Approximately nine other employees worked at this plant with Poe. Claude Couch was the longtime foreman of the 2035 plant, and admittedly a supervisor within the meaning of the Act. Under Claude Couch was Assistant Foreman Roy Couch.³

Roy Couch was a long service employee, having been hired in 1973. In 1974 he had been promoted to the job of assistant foreman. When Claude Couch was absent Roy Couch took over the duties of running the shop. In addition, he had the key to the 2035 plant, opening and closing it each day. The record is clear and I find that Roy Couch was a supervisor under the Act when he ran the 2035 plant in Claude Couch's absences.

B. The Events of August

In early August or late July, Poe protested to Claude Couch on three different occasions about certain working conditions in the plant, in which he was tearing down compressors. Poe complained about a sandblaster that was blowing sand through the air, a hoist that had a weak I-beam support, and silver solder fumes that gave him headaches. Foreman Couch did not respond to Poe's complaints, but walked away after becoming red in the face. Poe had previously talked about these complaints with Assistant Foreman Roy Couch, and then fellow plant worker Stephen Lee Hays. Hays, who had worked for the Company since 1973, had informed Poe that he was getting the headaches from silver solder fumes as he silver soldered parts.⁴

After waiting several weeks for some response from the Company about his complaints, and receiving none, Poe telephoned OSHA at its Cincinnati office on August 8. Poe repeated the complaints he had lodged with his foreman. By a letter dated August 12, Poe received from

³ Claude Couch and Roy Couch were not related.

⁴ Hays showed Poe a card that came off a compressor, which read that if a person gets headaches or chest pains while soldering, to see a physician.

OSHA a complaint form OSHA 7 that set forth the three working conditions he had complained of over the phone, as well as pertinent data about the Company. (G.C. Exh. 3.)

On August 14, two OSHA inspectors came to the 2035 plant and inspected the facility. Claude Couch was in the hospital, and Roy Couch was running the plant as the acting foreman. Roy Couch admitted that Poe had informed him a day or two before the inspectors arrived that he had called OSHA. Roy Couch called Vice President Donald Groves at the 1803 plant, and informed him that OSHA was there to inspect the plant. The vice president advised he would be right down. The inspectors spoke to various employees and took photographs as they examined the plant over the course of the day. As a result of the inspection, several violations were found, and the Company was required to pay a fine.

Claude Couch returned to work on or about August 21, a week after the inspection. Poe, Roy Couch, and several other employees were sitting on workbenches about 6 to 10 feet from the office waiting to start to work at 8 a.m. At this time the foreman came out of his office, and hollered at Roy Couch asking if he had called OSHA. When the assistant foreman replied that he had not, Claude Couch stated that, if he heard who called OSHA, "they was gone." Poe made no response, but he heard Roy Couch tell the foreman that "you talk like somebody with a paper a—hole. Roy Couch then told the foreman that there was nothing he could do about the call to OSHA, that it was over with. Claude Couch then left the 2035 plant, and went to the main office. When he returned about 10 a.m. Claude Couch forcefully told the assistant foreman that the employees were now going to have to wear glasses, they would have to stop smoking, and other changes would be made. When Roy Couch informed the foreman that he was not going to tell the employees of these changes, the foreman advised him that these were things OSHA had required. Roy Couch was not satisfied and he told the foreman that "[i]f that's the way you feel about it I'll give the key to you," and resign as assistant foreman.

When Claude Couch told him to take it up with Paul and Donald Groves, Roy Couch insisted that Claude Couch accompany him to the executive office. Here all four met in the president's office at 1803, and Roy Couch proceeded to tell the president that he was giving the plant key back, and they could get somebody else to be the assistant foreman. Roy Couch then described the conversation as follows:

And he said, "Well, Roy did you call OSHA?" and I said "No, I didn't." He said "Now—or I said "Paul, there ain't nothing you can do about it, it's over with." I said "Just forget about it." He said, "Well, I can close it down." I said, "That's up to you."

Both the president and vice president asked Roy Couch if he knew which employee had called OSHA, and he replied that he did not know. He then turned his key in, resigning his position of assistant foreman. There-

after, he had no more responsibility as a supervisor, but as a worker, rebuilding compressors.

Following Claude Couch's return from the hospital, Poe found himself assigned with a bigger workload than he formerly had. In addition to his duties of tearing down compressors, and silver soldering, he was assigned to sanding crankshafts and washing parts. Poe was able to perform all of his duties, as he "got it all completed the best I could." Foreman Couch complained to him at times that he was slow in tearing down, and was not getting enough compressors torn down. As Roy Couch testified without contradiction, following the OSHA inspection he noticed that every time Poe stopped working, even when he went to the bathroom, the foreman would holler at him.

On one occasion, a few days after the inspection, Poe did refuse to perform an additional assignment given to him by Claude Couch. The new work called for Poe to paint compressors in a paint booth. Poe explained to the foreman that OSHA did not want any employee to paint in the Company's booth because it did not have blow-proof lights in it, and if one of the nonblow-proof lights in the paint booth blew up while he was working in there, "you get burned up." Poe had learned of this dangerous condition in the paint booth from a form he had received from OSHA, which set forth defective conditions that had to be repaired. C. Couch became red in the face, but did not insist that Poe use the paint booth, telling him to go back to the work he had been doing previously.

Poe was not thereafter ordered to work in the paint booth again, but other employees were required to do so. Poe noticed this, and also that the sandblaster was being used, although it had not been altered so as to meet OSHA standards. So, several days after the August 14 inspection, he telephoned OSHA again, and reported these two conditions. OSHA's next inspection was made on December 1, and this time Poe was not present in the plant, as he had been discharged.

C. *The Forklift Truck*

In October, Poe was virtually the only employee working at the 2035 plant who had not received a certificate from the Company, authorizing him to operate forklift trucks. Forklifts were used in the plant to lift and move compressors around the building. Poe asked Claude Couch to give him the test so that he could be certified, but no test was given. Subsequently, Roy Couch asked the foreman if he was going to have Poe take the forklift truck test, "Because everybody else had already took one." Roy Couch testified as follows: "He said, no, Ralph wouldn't be there long enough to drive a fork truck." Poe never did receive the test, and the record does not disclose that he ever drove a forklift truck for the Respondent.⁵

⁵ While the record does not set forth any Company rule that required an employee to have a certificate in order to operate a forklift truck, it is undisputed that an employee could not operate a forklift truck until he had taken a test and received a certificate. It is obvious that an employee who could operate a forklift was a more valuable employee than one who could not.

D. Stephen Lee Hays as Assistant Foreman

On October 13, Hays became the assistant foreman, replacing Roy Couch in that position. In early November, Claude Couch was again in the hospital, and Hays took over his duties as the acting foreman of the plant. Poe was working at the tear-down bench, while Roy Couch was working nearby. The assistant foreman then came over to the bench and told Poe and Couch that, before Claude Couch came back to work, they would both be fired. Poe made no reply, but Roy Couch told Hays that he talked like somebody with "a paper a—hole."

The above testimony by Poe and Roy Couch is uncontradicted and credited. In relation to Poe's work performance, Hays testified that he had no problems other than Poe and Roy Couch standing around and talking for longer periods of time. However, he never reported this to either the president or vice president, as he assumed they were talking about the work they were doing.

E. The Events of November 17

1. According to the General Counsel's witnesses

Poe testified that as he drove to work on the morning of November 17 he heard on his car radio the prediction that there was going to be a blizzard that day. Sometime before 12 noon, snow commenced to fall. He was concerned about the snow because his son had gone to school in the morning with a bad cold, and was not properly dressed for snow. Poe went to lunch at the regular period of 12 to 12:30 p.m. At approximately 1 p.m. Poe was working at his workbench, while Roy Couch was helping to tear down compressors. Poe did not have a backlog of work as the employees were not rebuilding compressors, but were performing the annual task of cleaning up the shop by scrapping all junk parts and non-usable metal, and sending this material to a junkyard. Claude Couch was in the hospital again, and Hays was in charge of the plant as the acting foreman. Poe testified that at approximately 1 p.m. he called Hays over to his workbench and "told him that if it kept up snowing I was going to have to pick my son up because he had bad cold and it was too much for him to walk, about six blocks home." Poe further told him that he was going to leave about 2 p.m. because his son got out of school at 2:30 or 2:45.⁶ At this time, Hays did not answer verbally, but "He kind of shrugged his shoulders as if to say he didn't care," and walked away.

Close to 2 p.m., Poe went to the plant office, opened the door, and saw that Hays was using the telephone. Poe said to him, "I'm leaving now." At this point Hays waved to him, which Poe interpreted to mean the acting foreman was saying good bye. Poe then walked to the timeclock which was about 35 feet from the office, clocked out, and left. He did not see Hays come out of the office or hear him call to him. John Smith, an employee supplied to the Respondent under a contract with

Manpower, who regularly rode to work with Poe, left with Poe in the snow.

Roy Couch testified that it was snowing pretty hard before lunch when Poe told him that if it kept snowing like it was he would have to go get his kid. After lunch, Poe was tearing down compressors at his workbench for the junkyard, and Roy Couch was operating a forklift, bringing compressors to Poe.⁷ When about 6 to 8 feet from Poe's workbench he heard Poe tell Hays, who had just come out of the grinding room, that he was going to have to go and pick up his boy if it kept snowing. Roy Couch did not hear Hays say anything, but saw him move his shoulders and walk on.

Around 2 p.m. Roy Couch saw Poe go to the office door, which was about 30 feet from him and he heard Poe holler to Hays that he was leaving. Roy Couch then saw Poe punch out and leave with the employee from Manpower. Earlier he had seen Hays go to the machine which "John," the man from Manpower, was operating, and tell him to turn his machine off, as he would have to go home with Poe that day, because he could not take him home that night.

About a half hour later, Hays came out of his office and picked up Poe's timecard, then came over to Roy Couch, and told him that he was going to fire Poe for leaving. Roy Couch replied that if he were Poe he could call the Labor Board. The acting foreman then asked Roy Couch if he was threatening him, and Roy Couch replied that he was not. Roy Couch further testified that Hays never approached Poe in this period of time and said to him that he and Hays should go into the office and discuss the situation.

Roy Couch testified that the procedure in effect at the Company when a person wanted to leave early was to come tell the foreman, or acting foreman in the foreman's absence, that he was leaving, without giving a reason. The foreman had the discretion to disallow this action of the employee. Roy Couch testified that he never gave Claude Couch a reason when he wanted to leave early and, while he was in charge of the shop as acting foreman, no employee who informed him that he was leaving early ever gave him a reason.

2. According to the Respondent's witnesses

Hays testified that the snow started to fall about 11 a.m. on that day, and thereafter he talked to Poe two times. The first time was right after lunch, going on 1 p.m., when he was walking through the shop. He saw Poe looking out the window at the snow that was coming down when "Poe said he was going to leave at two o'clock." When asked if he made any statement to Poe, Hays answered, "At that time I told him I didn't believe so and I just went on as I was walking by. I didn't stop to talk to him." The assistant foreman did not believe that any other employee was in the vicinity.

According to Hays the second conversation took place as follows:

⁶ According to Poe, if an employee wanted to leave work early, the company procedure was "to notify the foreman and let him know."

⁷ On direct testimony R. Couch testified that he was standing beside Poe. On cross-examination, the former assistant manager stated that he was on his forklift. I regard this as a clarification, not a contradiction.

Well almost at one o'clock, right around there, as I was moving back and forth through the shop coming from the back to the front he was close to his work area and he hollered at me a good fifteen or so away that he was going to leave again at two o'clock. And at that time I told him I didn't think so that the snow wasn't that bad outside that I had just been out at noon time to get my own lunch and it didn't—it wasn't going to be that much of a snow.⁸

Hays went on that "right soon after that" Manpower employee John Smith came to his office and asked if he could leave. Smith told him that he would have a 2-mile walk in the snow to his house if he left by himself, "and that he was riding with Ralph and if Ralph was leaving, could he leave too." Hays further testified "and I told him Ralph was not going to leave, that there was plenty of work to be done and that if he wanted to leave he could go on. He had already put in the time. I couldn't reasonably make him stay."

Hays further testified that he had never had a situation arise like this one, as it had been standard policy for an employee who wanted to leave early to go to the foreman, tell him he had a problem and what the problem was, and ask permission to leave. "So I called for a little bit of help, because, like I said, I had never run across anything like this before, so I called Don, since Claude was in the hospital." Hays then explained to the vice president that Poe has said he was going to leave. When Donald Groves asked him if there was any work, Hays told him that there was plenty of work. Hays then stated the answer given by the vice president: "And he said if he intends on leaving and there's work to do, tell him that if he leaves that that's his job and if we want him to come back to work we'll call him." Hays also testified that Donald Groves told him to find out why he wanted to leave. Hays then testified:

I went out from the office just as I was getting ready to get off the phone, and Ralph stuck his head in the outer office and told me to hurry up, that he was getting ready to leave. It was just a few minutes until two o'clock.

Hays said he then hung up the phone from talking to Donald Groves, and went out to the buildup area, where Roy Couch was working, and asked Poe to come in the office, so that they could talk. Poe refused. Hays then asked him to go to the back, "away from the guys" so that they could talk.⁹ When Poe refused, Hays told Poe that "if he left that he'd be gone and we'd call him back if and when we wanted him to come back to work." Hays went into his office, but returned in a few minutes where he saw Poe and R. Couch talk for about 8 to 10 minutes. Poe then left and Hays went about his job. While Hays did not see the Manpower employee go out

⁸ On cross-examination Hays admitted that he told the NLRB investigator that he did not reply, as he had other things to do, so he left the area.

⁹ Hays furnished no names of any employees he was referring to as guys.

the door with Poe, he admitted that he did not see Smith after 2 p.m.

Hays admitted on cross-examination that he made the remark about the snow not being that bad, because he assumed that Hays wanted to leave "because the snow was too bad for him to get up the hill to his house." The acting foreman admitted that, if Poe had told him that was the reason he wanted to leave early, it would have been a sufficient reason for leaving work early.

Donald Groves was asked on direct examination if he received a telephone call from Hays on November 17. After he answered that yes, he had, he was asked:

Q. Do you recall what that conversation was about?

A. Basically, it started out as a general call to find out how things were going because I knew he had only been doing what he was doing for a short period of time. And he commented that he was having trouble with one of the employees that wanted to leave. During the discussion on the phone I heard Ralph Poe come to the door and scream that he was leaving. And Steve said, "Just a minute." And he said "If you want to talk to me, hurry up." And with that the door slammed. And I asked Steve what was going on and he told me. And at that time I told Steve, you know, did he have a reason or give you a reason for leaving and he said no. And so I suggested to him that he talk to him or call him aside and see what his reason was. If it was an emergency, there is nothing we can do about it. But if there's no reason at all and we had work for him, to ask him to stay and advise him that if he left he wouldn't be returning.

He was then asked if he met with Hays later that day, and he replied as follows:

Yes, he brought me the card after he was up—after Ralph and left and at that time he said he tried to talk to Ralph and asked him to come to the office and Ralph refused. He also asked him to go in the back of the shop and he wouldn't. And then he also said the only time he would talk to him was right there at that time. And Steve told him that if he left he would be laid off and only called back if he was needed.

F. *The Events of November 18*

On November 18, Poe reported to work at 8 a.m., and he noticed that his timecard was not in its slot.¹⁰ He then asked Hays where his timecard was, and was informed that Don Groves had it at the 1803 office. Poe then got into his car and drove to the main office. Here, he asked the vice president why he had his timecard. When asked if Donald Groves responded, Poe testified as follows:

¹⁰ On driving to work he observed that the streets were pretty clear of snow, and that there was 6 to 8 inches of snow in yards.

Yes, he said you just can't leave whenever you feel like and, uh, whenever you feel like it. And I asked him was I fired and he shook his head and said, yes.

Q. What did you do then?

A. Well, rather than be in an argument or something, I left.

On cross-examination, Poe admitted that he could not remember if Donald Groves asked him why he had left on the previous day, stating he was mad at the time and figured it would lead to an argument.

Donald Groves, when asked if he met with Poe on November 17 testified as follows:

A. Yes, he came in early in the morning shortly after stopping down the street and he come to me and asked if he had lost his job. And, I told him, ask him if he had got permission from Steve to leave and he said he did. And I said, Steve said he didn't. I said did you talk to Steve and he said Steve never asked to talk with me. And I then commented that I was on the phone and heard him scream to Steve that he was leaving and asked Steve to talk to him. And told him that Steve had asked him three times to talk to him and Steve said that he wouldn't. And with that Ralph had nothing to say, got up and left.

Donald Groves further testified that, if Poe had given him a reason on November 18 for his leaving on the previous day, he would not have fired him. The vice president also testified that, in the 20 years he had worked for the Company, only one employee other than Poe had ever been fired, and that was so long ago he could not remember that employee's name.

G. Credibility

The facts in this case as far as the events that occurred prior to November 17 are not in dispute, as the testimony of the General Counsel's witnesses is uncontradicted. This is largely due to the fact that Claude Couch, the foreman of the plant, did not testify, although he was still working for the Respondent at the time of the hearing. In fact, the president of the Company testified that he assumed Claude Couch was at work on the day of the hearing. I therefore draw the inference that Respondent's unexplained failure to produce this witness was for the reason that the witness' testimony would have been adverse to the Respondent. *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 (1977); *G. C. Murphy Co.*, 223 NLRB 604 (1976), *enfd.* 550 F.2d 1004 (4th Cir. 1977).

The General Counsel's witnesses Ralph Poe and particularly Roy Couch impressed me as sincere, straightforward minimally educated laborers telling the truth as best they could remember it, and I credit their testimony. Also, they withstood searching cross-examination, while the hearing was conducted under the rule of exclusion of witnesses.

The Respondent's witnesses Hays and D. Groves did not impress me as witnesses in whose testimony I could have confidence, as to its accuracy or reliability. Rather, I received the strong impression that they were advo-

cate trying to furnish answers that helped the Respondent's cause, rather than trying to state the facts as they actually remembered them. I also found much of their testimony to be implausible. I have therefore credited the testimony of Poe and Roy Couch where there is a conflict with the testimony of Hays and D. Groves.

H. Discussion and Conclusions

The record is uncontradicted that Poe complained to Supervisor Claude Couch about what he perceived to be three different dangerous working conditions in the plant. It is also clear that he contacted the Cincinnati OSHA office and filed a complaint against the Company for what he considered to be uncorrected safety violations at the 2035 plant. It is established that when an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees such activity is concerted and is protected by Section 7 of the Act. *Hotel & Restaurant Employees Local 28*, 252 NLRB 1124 (1980); *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

Thus on August 21, after C. Couch had returned from the hospital to the plant and learned of the recent OSHA inspection, he was an obviously angry man. After he questioned Roy Couch as to whether he had contacted OSHA and was told no, he let out an ominous threat to the assembled employees. His shop language words, that if he found out who called OSHA "they was gone," were plainly coercive and a threat of reprisal, and would reasonably tend to interfere with the employees' exercise of Section 7 rights in violation of Section 8(a)(1). *Providence Medical Center*, 243 NLRB 714 (1979); *Seneca Foods Corp.*, 244 NLRB 558 (1979).

The Respondent contends in its brief that the Company did not know that Poe had filed a complaint with OSHA until November 24, when it received from the Board the charge filed by Poe with the Board on November 21.¹¹ I find that the weight of the evidence contradicts this position. Several weeks before the August 14 OSHA inspection, Poe, on three separate occasions, had complained to Claude Couch right in the plant about what he regarded as unsafe working conditions. This is uncontradicted and certainly the veteran and very loyal company foreman would remember just which employee had angered him by pointing out what the employee regarded as dangerous working conditions. While C. Couch made no verbal response to Poe's complaints, he obviously showed his ire by becoming red in the face, and walking away without making any comment whatsoever. The foreman apparently was of the old school that an employee should be glad to have a job, any job, and not complain about working conditions. However, Congress, in enacting the National Labor Relations Act, and the Occupational Health and Safety Act, gave this right to employees, with safeguards provided when this right is exercised.

¹¹ This charge, G.C. Exh. 1(a), stated succinctly under basis of the charge, "On or about November 18, 1980, the above-named Employer discharged Ralph Poe because he filed complaints with OSHA concerning unsafe working conditions."

Then when C. Couch returned from his stay in the hospital about a week after the initial OSHA inspection, he made his first order of business an inquiry of Roy Couch as to whether he had called OSHA. When the assistant foreman denied that he had done so, Claude Couch showed his anger at the whole concept of anyone reporting unsafe working conditions in the plant to OSHA, by yelling that if he learned which employee had called OSHA "they was gone."

On the same day, the then president of the Company, Paul Groves, showed his intense anger at the employee who had reported the Company to OSHA, when Roy Couch advised him to forget about trying to learn who reported the Company to OSHA. The president's caustic reply that he could close the plant down is illustrative of the bitterness that the president felt over what he obviously regarded as disloyalty to the Company.

The finger of guilt overwhelmingly fixed on Poe when he refused C. Couch's order to paint compressors in the paint booth. Poe let the foreman know in clear terms that OSHA did not want any employee to use the Company's paint booth because it did not have blowproof bulbs in it, and that the use of nonblow-proof lights in it subjected an employee to the chance of being severely burned. The foreman again became red in the face at Poe's words, but did not comment on how Poe came to have such information. OSHA had sent a form to the Company listing the defects it had discovered at its October 14 inspection, and obviously Poe had a copy thereof, as did Claude Couch. The foreman backed down and did not order Poe to paint in the paint booth. I draw the reasonable inference that Claude Couch then reasoned that this same Poe was the employee who had filed the complaint with OSHA, as he had verbally complained on three occasions to him about safety matters prior to the OSHA visit, and now he was stating a plant violation that OSHA had found shortly before, when a plant inspection had been made. *Tapper Co.*, 228 NLRB 1389 (1977).

I also find that the Employer knew of Poe's activities with OSHA, as the small size of the plant sustains an inference of employer knowledge that he was the contact employee. There were only 10 employees at the 2035 plant, with all employees working in close contact with each other. In the summer Poe had openly complained to Roy Couch and Hays about the sandblaster, the I-beam hoist, and silver solder fumes. He had subsequently complained to the foreman about the same three working conditions, without seeing any change. Claude Couch, as well as the assistant foreman, was continuously in contact with the work force. Vice President Groves admitted that he was "quite frequently" in contact with his foreman, and talked to Assistant Foreman Hays about what was going on in the plant. Claude Couch vindictively wanted to uncover the employee who contacted OSHA, when he predicted that when he found out that person would be fired. President Groves sought the same information and was so angry at the unknown informer that he threatened to close the plant down because of the OSHA inspection in the Respondent's plant. The smallness of the plant, coupled with Poe's open complaints about what he regarded as unsafe working conditions,

and the close supervision, makes it likely the Employer knew of Poe's activity, and I so find. *Webco Bodies, Inc.*, 238 NLRB 1213 (1978), *enfd.* 595 F.2d 451 (8th Cir. 1979); *Eastern Steel Co.*, 253 NLRB 1230 (1981).

Applying the precepts of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981),¹² it is evident that the General Counsel has made a prima facie showing sufficient to support the inference that Poe's activity in filing a complaint with OSHA was a motivating factor in his termination.

The record is clear that the Respondent had strong hostility for the employee who had reported it to OSHA, as Foreman Claude Couch's threat of discharge showed, as well as President Groves' statement that he could shut the plant down if he did not find out who reported the Company to OSHA. At the latest, the Respondent had knowledge in late August that Poe was the employee who reported the Company to OSHA, when Poe refused to go into the Company's paint booth and paint a compressor because, as he told Claude Couch, OSHA had found it to be dangerous.

The record also discloses that Poe was a reasonably competent employee. Roy Couch, who was the assistant foreman over Poe for many years, described Poe as an employee whose quality of work was fair, as were also his work habits.¹³ He also stated that Poe's attendance was good, and that he did not leave early as a matter of practice. Hays admitted that he had no complaints about Poe's work during the month he was assistant foreman except for conversations he held with Roy Couch.

Also, in support of the General Counsel's case, is the ominous prediction that Claude Couch made in early October that Poe would not be with the Company long enough to drive a forklift truck. Then, in November, Hays, who had been an assistant foreman for approximately 1 month, but who was at the time the acting foreman as Claude Couch was again in the hospital, added his prediction that before Claude Couch came back to work both Poe and Roy Couch would be fired.

It is also clear that the Company had a very relaxed policy as to the discharge of an employee. In the 20 years prior to Poe's discharge only one other employee had ever been discharged, and that for a reason lost in antiquity.

I turn now to the reason offered by the Respondent for Poe's discharge, to rebut the General Counsel's case. It is the Respondent's position that Poe was discharged for the sole reason that he did not have permission to leave work when he left the plant on November 17. As set forth below, I find that this reason does not stand scrutiny.

There is no doubt that it was snowing during the lunch period of the Respondent's employees on November 17. It is also unchallenged that the employees were

¹² The General Counsel states in his brief that the Respondent's reason for discharging Poe was clearly pretextual, and therefore it is unnecessary to view this case in terms of *Wright Line*. The Respondent in its brief contends that the test to be applied is that of *Wright Line*. I have proceeded along the test set forth in *Wright Line*.

¹³ Roy Couch also classified his and Claude Couch's quality of work as fair.

not working on any jobs of immediate importance to any customer, but were in fact performing the annual chore of junking old metal and parts that had been lying around the plant for some time. Thus, after lunch, it was in a relaxed work atmosphere as Poe looked out at the falling snow, and told Hays that if it kept snowing he would have to leave about 2 p.m. and pick up his son. I credit both Poe's and Roy Couch's testimony that they did not hear any reply from Hays. I do not credit Hays' testimony that he replied that he did not believe so, and just kept walking. Such a reply would be totally out of character with Hays' subsequent testimony that he would have given Poe permission to leave early, if Poe had told him he had to leave so as to get his car up the hill to his house, before the snow got too bad.

However, accepting Hays' testimony that at some point that afternoon he replied to Poe that the snow was not so bad outside, even though he claimed Poe had not mentioned snow to him, certainly points out that Hays knew that Poe wanted to leave because of the snow. Yet, Hays' testimony would require that he thereafter subtly tried to extract from Poe why he wanted to leave early, by asking him to come in the office to discuss it, and asking him to go to the back of the plant where the other employees could not hear their conversation. I find this testimony incredible as it is totally at variance with Hays' own immediate recognition that Poe wanted to leave because of prospective problems with the snow.

Hays' granting permission to John Smith, the employee from Manpower, to leave at 2 p.m. points up the inconsistency of the Respondent's discharge of Poe. Roy Couch's testimony that prior to 2 p.m. he had seen Hays go to Smith's machine, told him to turn off his machine as he would have to go home with Poe, was uncontradicted and is credited. Hays admitted that he gave Smith permission to leave early that day, and that he knew Smith rode with Poe. Hays' testimony that he could not "reasonably" have made Smith stay until he had finished the regular 8-hour day is incredible. The Respondent failed to submit any written contract or other documentation that would show that a Manpower employee could leave the plant at will, any time after working 4 hours. Even if the Respondent only had an oral agreement with Manpower as to its respective contractual rights, the Respondent would have had time records showing that other Manpower employees had left after working more than 4 hours and less than 8, when they desired to do so, if that, in fact, had been company policy. As testified to by Vice President Groves, the Respondent had used Manpower employees since 1962. One would expect that to bolster such a contention the Respondent would have offered its business records in evidence. However, without explanation, the Respondent did not do this. Its failure to do so leads me to believe that its records would not have supported its position. *Northern States Beef*, 226 NLRB 365 (1976), *enfd.* in pertinent part 575 F.2d 658 (8th Cir. 1978); *Bechtel Corp.*, 141 NLRB 844 (1963).

Finally, we have the contradiction between Hays' version of his telephone conversation with Donald Groves and the vice president's version. Hays testified that he had never before experienced a situation with an employ-

ee where the employee had told him he was going to leave, and he had told the employee he did not think so. Faced with this new problem, Hays called the vice president for what he termed, "a little bit of help," as Foreman C. Couch was in the hospital. According to Hays, he started immediately to tell the vice president in detail about his problem with Poe.

The vice president contradicted Hays' version of this conversation, in not only his direct testimony, but also during cross-examination. On direct he was asked if he had a telephone call from Hays on November 17, and he replied that he had. He was then asked:

Q. Do you recall what that conversation was about?

A. Basically, it started out as a general call to find out how things were going because I knew he had only been doing what he was doing for a short period of time.

On cross-examination, he again testified that the conversation started about work in the plant and denied flatly that he and Hays talked about Poe at the beginning of the conversation. I regard this fundamental contradiction between the vice president and the acting foreman as evidence of the fabrication of the Respondent's account of Poe's and Hays' conversations on November 17.

The conference on the following morning between Poe and Donald Groves was very brief and with a minimum of words. It is true that the record does not show that Poe gave any reason to the vice president as to why he had left early. But I find Poe's abrupt leaving to be in accord with his calling on the United States Government to help him in his work problems. This he illustrated by calling OSHA on two prior occasions about what he regarded as dangerous working conditions at the plant. He again illustrated this by going to the Board's Regional Office 2 days after his discharge and filing a charge against the Company.¹⁴

The Respondent argues strenuously in its brief that "No employer could operate an efficient operation where employees could leave for no reason and without obtaining permission even when there was no work to be performed." However, this misses a point contained in Roy Couch's testimony, as the leave procedure he described contained a safety net for the Company's ability to operate its business efficiently. The veteran employee, who for many years had been the assistant foreman, pointed out that the foreman had the authority to turn down the employee's request to leave. In the instant case the credible record does not show that Hays turned Poe down, but that he silently acquiesced to his leaving, and Poe had reasonable grounds to believe he had permission to leave.

From the foregoing I conclude that the Respondent's stated reason for Poe's discharge was a pretext, and that Respondent sought to disguise the true motive. When the

¹⁴ It is also to be noted that Claude Couch on four occasions made no response to Poe when he complained to him about safety conditions, but silently turned away. Thus, it is not uncommon for any people to be at a loss for words, particularly in a time of stress.

asserted motive is not reasonable as I have so found herein, then that fact is evidence that the true motive for discharge is an unlawful one, which the Respondent seeks to conceal.¹⁵

Finding that the alleged reason for Poe's termination was false, I infer that the true motive was because he was viewed by the Respondent as the employee who reported it to and filed the complaint with OSHA, and the Company wanted to rid itself of this disloyal employee. Accordingly, I find that the Respondent's discharge of Poe for engaging in protected concerted activity violated Section 8(a)(1) of the Act. *Farmland Soy Processing Co.*, 263 NLRB 237 (1982).

CONCLUSIONS OF LAW

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

2. By discharging Ralph Poe on November 18, 1980, because of his engaging in protected concerted activities,

¹⁵ *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d (9th Cir., 1966); *First National Bank of Pueblo*, 240 NLRB 184 (1979).

the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By threatening employees with discharge for contacting the Occupational Safety and Health Administration of the United States Government, the Company violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully discharged Ralph Poe, I find it necessary to order it to offer him reinstatement and make him whole for lost earnings, and other benefits, computed on a quarterly basis from date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]