

**Edgar Mantha and Kathleen Mantha, a Partnership, d/b/a Hopkins Hardware; Mantha's Carpet & Draperies; Mantha's Handyman Plumbing; Mantha's Fence and United Food and Commercial Workers Union, Local 839. Cases 32-CA-4225 and 32-RC-1506**

12 July 1984

### DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER

On 12 April 1983 Administrative Law Judge Gordon J. Myatt issued the attached decision. The General Counsel filed limited 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, and conclusions<sup>1</sup> and to adopt the recommended Order as modified.

The judge noted in his decision that the Respondent sold its business prior to the hearing and that the General Counsel did not litigate the issue of whether the purchaser was a successor under the Act. Accordingly, in his recommended remedy the judge found, inter alia, that since the General Counsel had neither asserted nor litigated the successor status of the purchaser of the Respondent's business the sale of the business must be taken into account in designing a remedy for the Respondent's unfair labor practices. He presumed that the sale of the business was bona fide and found therefore that "any remedial order worded as if Respondent still owned the business enterprise would be meaningless and unrealistic." Accordingly, he recommended that the backpay period for the three discriminatees be tolled as of the date of the sale of the business. He also found that it was unnecessary to determine whether the Respondent had made valid offers of reinstatement to three discriminatees immediately prior to its sale of the business.

The General Counsel excepts to the judge's comments regarding the legal significance of the General Counsel's failure to litigate the successorship issue at the hearing and his tolling of the backpay periods as of the time the Respondent sold its business. We find merit in these exceptions.

It is well settled that a bona fide purchaser of a business who continues the employing enterprise and has knowledge of unremedied unfair labor

<sup>1</sup> No exceptions were filed to the judge's factual findings and Conclusions of Law.

practices committed by its predecessor may be ordered, as a successor employer, to reinstate unlawfully discharged employees and to pay, jointly or severally with its predecessor, backpay to such employees. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), and *Perma Vinyl Corp.*, 164 NLRB 968 (1967), enfd. sub nom. *U.S. Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968). It is equally well established that the liability of such a successor "may be imposed upon a party to a supplemental proceeding, even though [it] had not been a party to the proceeding in which the unfair labor practices were found" *Coast Delivery Service*, 198 NLRB 1026 (1972), *Southeastern Envelope Co.*, 246 NLRB 423 (1979), and *Perma Vinyl Corp.*, supra. In addition, although frequently the General Counsel litigates the successorship issue at the unfair labor practice hearing when he is aware that the business of the originally charged respondent has been sold prior to the hearing, he is not required to do so. See, for example, *Bell Co.*, 243 NLRB 977 (1979).<sup>2</sup>

Thus, even though the General Counsel was aware prior to the unfair labor practice hearing that the Respondent had sold its business and he could have litigated, at that time, the issue of whether the purchaser was a successor, he chose not to do so. This choice does not preclude him from litigating the successorship issue in the future. Thus, we see no reason to limit our make-whole remedy as recommended by the judge. We shall modify the Order accordingly.<sup>3</sup>

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and hereby orders that the Respondent, Edgar Mantha and Kathleen Mantha, a Partnership, d/b/a Hopkins Hardware; Mantha's Carpet & Draperies; Mantha's Handyman Plumbing; Mantha's Fence, Watsonville, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Offer Steven Bobeda, John Clarke, and Frederick Smith immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without

<sup>2</sup> We note that in *Bell Co.*, supra, unlike the present case, the General Counsel asserted at the unfair labor practice hearing that the succeeding employer was liable as an alter ego and, when this theory proved unsuccessful, alleged in the backpay proceeding that it was a successor. Thus, the present case is not complicated, as *Bell*, by the issue of whether the General Counsel should be permitted to litigate alternative theories of a party's liability at subsequent stages of a proceeding.

<sup>3</sup> We leave to the compliance stage of this proceeding the determination of the validity of the alleged offers of reinstatement made to discriminatees Clarke and Smith.

prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest thereon shall be computed in the manner provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962)."

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

#### 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 unlawfully interrogate you about your union activities or the union activities of other employees.

WE WILL NOT inform you that you can anticipate being discharged because you are suspected of engaging in union activities.

WE WILL NOT select you for layoff or discharge because you are suspected of engaging in activities on behalf of the Union.

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

WE WILL offer Steven Bobeda, John Clarke, and Frederick Smith immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

EDGAR MANTHA AND KATHLEEN  
MANTHA, A PARTNERSHIP, D/B/A  
HOPKINS HARDWARE; MANTHA'S  
CARPET & DRAPERIES; MANTHA'S  
HANDYMAN PLUMBING; MANTHA'S  
FENCE

#### DECISION

##### STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge. On a charge filed in Case 32-CA-4225 by United Food and Commercial Workers Union, Local 839 (the Union), a complaint and notice of hearing was issued by the Regional Director for Region 32 on March 5, 1982. The complaint alleged, inter alia, that Edgar Mantha and Kathleen Mantha, a Partnership, d/b/a Hopkins Hardware; Mantha's Carpet & Draperies; Mantha's Handyman Plumbing; Mantha's Fence (the Respondent) engaged in a series of unlawful acts in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act). The Respondent filed an answer and an amended answer in which it admitted certain allegations of the complaint, denied others, and specifically denied the commission of any unfair labor practices.

In Case 32-RC-1506 a Board-conducted election was held in an appropriate unit of the Respondent's employees on January 11, 1982. The tally of ballots disclosed that there were approximately 8 eligible voters and 10 ballots cast. Of this number, three were for the Union, three were against, and four ballots were challenged. Since the challenged ballots were sufficient in number to affect the outcome of the election, the Regional Director caused an investigation to be made and issued a Report and Recommendation on Challenged Ballots. In this report, the Regional Director sustained the challenge to one ballot and recommended that the other three challenged ballots be considered jointly with the unfair labor practice proceeding. In the absence of any exception to the Regional Director's report, the Board adopted his recommendations.

A hearing was held in this matter on November 2 and 3, 1982, in Santa Cruz, California. All parties were represented and provided full opportunity to examine and cross-examine witnesses and to present relevant and material evidence on the issues under consideration. Briefs were submitted by counsel for the General Counsel and the Respondent. In addition, counsel for the Respondent submitted a reply brief.

On the entire record in this matter and on my observation of the witnesses, I make the following

##### FINDINGS OF FACT

###### I. JURISDICTION

At all times during the operative events here, the Respondent was a partnership with an office and place of business located in Watsonville, California, engaged in the retail sale and installation of hardware products, carpets, draperies, and fences. During the 12 months preceding the issuance of the complaint in this case, the Respondent derived gross revenues in excess of \$500,000 in the course and conduct of its business operations and purchased goods and services valued in excess of \$50,000 from points located outside the State of California. On the basis of the above, I find that the Respondent was an employer within the meaning of Section 2(2) of the Act

engaged in commerce within the meaning of Section 2(6) and (7) of the Act.<sup>1</sup>

## II. THE LABOR ORGANIZATION INVOLVED

United Food and Commercial Workers Union, Local 839 is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

The testimony discloses that in mid-October 1981<sup>2</sup> two of the Respondent's employees, Steven Bobeda and Ron Yetter, met with a representative of the Union to explore the possibility of organizing the Respondent's employees. Following their efforts in this regard, the Union sent a letter to Edgar Mantha dated October 26, claiming to represent a majority of the employees and requesting negotiations for a collective-bargaining agreement. (See Jt. Exh. 1.) The events which followed provide the basis for the asserted unlawful conduct set forth in the complaint.

John Clarke testified he was called into Mantha's office on October 27 and shown the Union's letter. Clarke stated that Mantha wanted to know if he knew anything about the matter.<sup>3</sup> Clarke told Mantha that he did not feel the Respondent could question employees about the Union and he did not want to get involved in the matter. Mantha replied that he was questioning the employee because he heard that a list had been passed around in the store for employees who were interested in the Union to sign. He asked Clarke if this were true and Clarke disclaimed any knowledge of such a list. According to Clarke, Mantha then stated he felt the Union was "bluffing when they said that a majority of the employees had indicated an interest in this." Clarke then told Mantha that he had been through an acrimonious situation involving a union organizing effort with a former employer (San Lorenzo Lumber) and did not want to get involved in a similar situation again. He indicated to Mantha, however, that he did not believe the Union was bluffing. According to Clarke, Mantha said, "Thanks, I think you have told me what I wanted to know."

Mantha acknowledged that he had a conversation with Clarke about the letter from the Union on October 27. According to Mantha, he wanted to know if Clarke knew anything about the letter, and the employee said he did not want to get involved. Mantha admitted Clarke referred to his previous experience at San Lorenzo Lumber and stated that Mantha had no right to discuss the matter with him. At this point, Mantha stated, he told the employee, "Fine, thank you very much," and terminated the conversation.<sup>4</sup> Mantha admitted that he

later called the San Lorenzo Lumber Company to find out if Clarke had been a ringleader in the union activity which occurred there. He was informed that the employee was not considered by the management of that company to have been involved.

Contrary to the testimony of Mantha, two other employees testified they were called into his office and questioned about the letter from the Union. Frederick Smith stated he was called into the office by Mantha late in the morning or early in the afternoon and shown the letter. According to Smith, Mantha wanted to know if he knew anything about the letter or who was involved "in the Union." The employee replied that he did not know and that he had not been contacted by any union officials.

Bobeda testified that Mantha called him into the office in the afternoon on October 27 and showed him the letter from the Union. As in the case of the other employees, Bobeda testified that Mantha asked if he knew anything about the matter. According to Bobeda, he told Mantha that he "really couldn't say at this time." Mantha then asked the employee if he would swear to that on the Bible and the employee declined to do so.<sup>5</sup>

Raymond Schaefer, Respondent's former store manager and an admitted supervisor, testified as a witness for the General Counsel. Schaefer was the store manager of all the departments except the carpet department. This latter section was managed by Mantha's wife and copartner. Schaefer quit the Respondent's employ on January 15, 1982, because of dissatisfaction with the amount of the Christmas bonus paid to him the previous December.

Although he was an admitted supervisor and could not be represented by the Union, Schaefer signed a union authorization card and attended two union meetings held at Bobeda's home. He also acknowledged that he maintained a personal friendship with Bobeda, Clarke, and Smith while employed by the Respondent.

Schaefer stated that at approximately 9 a.m. on October 27, Mantha showed him the letter from the Union and said he wanted to know which of the employees were involved so he could get rid of them. According to Schaefer, Mantha said that "he would close the doors of his store before he would allow the Union to be involved." Schaefer then cautioned Mantha that the employees had certain rights and advised him to contact the Union or the National Labor Relations Board. Mantha then made a phone call while Schaefer was present. Schaefer testified he heard Mantha exclaim during the conversation, "You mean I can't fire everybody?"<sup>6</sup>

Schaefer further testified that Mantha spoke with him later that same afternoon. According to Schaefer, Mantha said that, after his conversations with Clarke and Smith, he suspected they were involved in the Union's effort to represent the employees. Mantha indicated he

stated he did not question any other employees about the letter from the Union after talking with Clarke.

<sup>5</sup> Mantha denied that he called either Bobeda or Smith into his office to question them about the Union's letter.

<sup>6</sup> Mantha admitted that he called the Regional Office of the Board seeking advice. He stated he asked if he could fire all of the employees and was told that he could not.

<sup>1</sup> The testimony reveals that the Respondent sold its business in Watsonville to a Donald Spence on March 16, 1982. The question of whether Spence is a successor employer, and, as such, is liable to remedy any unfair labor practices that the Respondent might be found to have committed, was not litigated nor was there any claim to this effect by the General Counsel. Accordingly, this matter is not before me for consideration.

<sup>2</sup> Unless otherwise indicated, all of the operative events here occurred in the year 1981.

<sup>3</sup> Clarke had received an authorization card from Yetter and signed it on October 16.

<sup>4</sup> Mantha also testified that he called in Rex Oliver and questioned him about the letter before calling Clarke into the office. However, Mantha

came to this conclusion based on their answers to his questions earlier that day. Mantha told Schaefer that Clarke stated he did not wish to discuss it (the matter of the Union's representational claim) at this time and Smith said he had not been contacted by any union officials.

Bobeda testified he was called into Mantha's office a second time and questioned about the identity of the employees involved with the Union.<sup>7</sup> Bobeda stated Mantha wanted to know if another employee who was recently terminated (Jack Frum) was the leader of the union activity at the store. Bobeda disclaimed any knowledge about Frum's involvement. It was at this point, according to Bobeda, that Mantha said if he were in Canada, he would have Frum taken care of.<sup>8</sup> Bobeda further testified that Mantha said if there were any possible way, he would stop Frum from working anywhere in Watsonville. When questioned about Bobeda's statements, Mantha denied that he had any such conversation with the employee regarding Frum's possible role in the union activity at the store. However, Mantha did acknowledge that, during some conversation he had with Bobeda, the employee said, "Frum was bull-shitting about being involved with the Union."

According to the testimony, two union meetings were held at Bobeda's home. Although the precise date is not clear in the record, the second meeting was held sometime during the first week in November. In addition to the employees, Schaefer also attended this meeting. During the course of the discussion, Schaefer told Clarke and Smith that Mantha suspected them of being involved in the union activity at the store. He stated that based on his conversations with Mantha these two employees could expect to be fired.

On November 2, a warning letter was issued to Bobeda by Schaefer. (R. Exh. 2.) The warning cited four incidents, occurring during the period of October 28 through 31, that management found unacceptable. It stated that any similar conduct in the future would result in the termination of Bobeda's employment.

The first incident cited related to an event on October 28. Bobeda was charged with giving a fence estimate which later proved to be \$800 in error (in favor of the customer). Bobeda testified that the error occurred because he was not informed as to the type of fence the customer was going to receive. The second incident occurred on October 29. Bobeda was charged with failing to replace a faulty toilet flapper while on a service call and thereby causing Schaefer to have to return to the customer's premises to complete the job. When questioned about this incident, Bobeda stated that Mantha himself had worked on the customer's toilet the previous evening and he assumed that Mantha had taken care of the toilet flapper when he went to complete the job. The third incident occurred on the same day as the plumbing

repair job. Bobeda was charged with unauthorized use of the company truck in that he drove it home for lunch and became stuck in the mud while there. This required Schaefer to come to his assistance and it took them three and a half hours to free the vehicle. Finally, on October 31 the Respondent rented a spray paint gun and Bobeda was to paint window guards which the Respondent had installed. The job was poorly done and the Respondent had to assign Smith to repaint the window guards by hand. According to the written warning, it took Smith 4 hours to redo the job. When questioned about this incident, Bobeda claimed that he had never used a spray gun before and that he had so notified Mantha when he was given the job.

In regard to the written warning, Schaefer testified that Mantha directed him to type up the complaints against Bobeda on the evening of November 1. Schaefer stated he did so the following morning. According to Schaefer, Mantha said he wanted something "concrete" against Bobeda for future use in the event a decision was made to terminate the employee. Mantha, on the other hand, testified that it was Schaefer's idea to document the complaints against Bobeda. According to Mantha, this was proposed by Schaefer because of the union activity occurring in the store. Mantha indicated he went along with the idea and both he and Schaefer signed the document.<sup>9</sup>

The testimony discloses that Mantha went on a vacation in October and returned sometime in the middle of that month. According to Mantha, when he returned he became concerned that the store was overstaffed for the volume of sales it was producing. He stated that he directed Schaefer to meet with him on the evening of November 10 to review the store records to determine if this were in fact true. Schaefer did not appear, and Mantha stated he conducted his own independent appraisal of the records. He determined that the store was overstaffed by 2-1/2 employees. As a consequence, he decided that he had to let two employees go.

Mantha stated he then decided to lay off Clarke and Smith, even though they were not the most junior in terms of employment with the Respondent.<sup>10</sup> Mantha testified that he selected Clarke because he spent too much time with customers on each sale, and therefore did not produce a high volume of sales. According to Mantha, he had mentioned this fact to Schaefer several times, although he acknowledged that no written warning had ever been given to Clarke for this deficiency in his work performance. Schaefer testified that in his opinion Clarke and Smith were "excellent" employees. He

<sup>9</sup> When the written warning was given to Bobeda, he refused to sign it.

<sup>10</sup> Mantha testified that Bobeda, Diana Wilson, and Craig Machado were junior in point of service to Clarke and Smith. He stated he kept Wilson because she was bilingual and this skill was necessary in dealing with a number of customers, especially in the carpeting department. He stated he decided to retain Bobeda because he was a handyman and worked on plumbing. Mantha further testified that he retained Machado because he was a welder and could be used in installing fences and welding gates. He also used Machado to perform work outside the building and to weld tubing to hold stocks of pipe which the Respondent stored on the premises.

<sup>7</sup> Although Bobeda fixed the date of this conversation as early November, he recalled that it occurred shortly before he received a written warning on November 2. Thus, it would appear that this conversation occurred, if in fact it did take place, sometime during the last few days in October.

<sup>8</sup> Mantha was either from Canada or maintained a residence there. After selling the store, he apparently went to Canada and returned to California solely for the purposes of this hearing.

admitted, however, that Mantha had talked to him about the length of time Clarke spent handling his customers and, while Schaefer agreed with Mantha, he did not want to lose Clarke because of the quality of his work as a salesman.

Schaefer testified that on November 11 Mantha directed him to tell Clarke that work was slow and the store was overstaffed. Therefore, the employee was being laid off but would be recalled when business increased. According to Schaefer, business was slow for approximately 7 days in November and then increased substantially. Schaefer stated the volume of business was such during November and December that Mrs. Mantha, who normally worked exclusively in the carpet department, had to come into the store and work on the floor selling hardware. Schaefer said this was highly unusual because Mrs. Mantha normally only worked on the sales floor in the hardware department occasionally on Sunday to relieve employees going to lunch. He also stated that the bookkeeper was required to leave the office and come out on the floor in order to sell. Finally, Schaefer also testified that Mantha told him December was his best month in 1981, and the entire year of 1981 was his best year at the store.

Clarke testified that, when Schaefer discussed the layoff with him, Schaefer prefaced his remarks by saying the "official reason" was the decline in the business at the store. Clarke further testified that before he left that day Mantha called him aside and stated the layoff was temporary. Mantha told him that business had dropped 55 to 60 percent and asked Clarke if he would be willing to work on the fencing crew. Clarke replied that he would because he needed the money. Mantha then promised to contact the employee within a week or 10 days because some fencing jobs were scheduled to start then.

Mantha, while admitting he spoke to Clarke about the layoff, stated Clarke asked if the layoff were permanent. According to Mantha, he replied that he did not know, but that it probably was permanent. He acknowledged asking Clarke if he were willing to work on the fencing crew and stated the employee said yes, but not if Mantha required him to work "90 miles an hour." During this conversation, Mantha never mentioned to Clarke that he was dissatisfied with the employee's slow manner in handling customers or that this was the reason the employee was selected for layoff.

On November 27, Smith was called at home in the evening by Mantha. Mantha told the employee the Respondent was losing money with its fence crew and, therefore, the Respondent had to lay Smith off. Smith testified that he asked Mantha why he was being selected when less senior employees were being retained. He stated he was told that Wilson was bilingual and needed in the store and Bobeda was needed to install window guards as well as work on the fence crew. Smith then asked if the layoff was permanent or temporary and stated that Mantha replied, "We have to see what happens down the road." Mantha said he would call the employee if conditions changed.

Mantha testified Smith was selected to be laid off on November 27 because he had received a number of complaints from customers that Smith was sarcastic and rude

in his dealings with them. When pressed for the names of these customers, Mantha could only recall one by the name of Welsh. He stated that Welsh complained about Smith's sarcastic attitude and ignorance of the products he was selling. According to Mantha, the customer said he would stop purchasing at the store if he had to deal with Smith.<sup>11</sup> Mantha stated he and Schaefer had spoken to Smith on a number of occasions about the rude manner in which the employee handled customers, but claimed Smith failed to make any improvement in this area. However, Mantha acknowledged that Smith was never given a written warning for this conduct.

Bobeda testified to two other conversations with Mantha regarding the Union. He stated the third occurred later during the month of November.<sup>12</sup> According to Bobeda, Mantha repeated that he suspected Clarke and Smith were involved in the union activity at the store and that Bobeda was also involved. He stated Mantha said he would get rid of Clarke and Smith and if he could prove that Bobeda was involved with the Union, he would fire him.

The final conversation Bobeda asserted he had with Mantha about his possible involvement with the Union also occurred in the office. Bobeda recalled that this conversation took place on December 12. He stated that Mantha said he definitely thought Bobeda was involved in the union activity and, if he could establish this, he would fire Bobeda. According to Bobeda, he did not make any reply to Mantha's statement but simply stomped out of the room.<sup>13</sup>

The record reveals that Bobeda's father had suffered a heart attack sometime during the Christmas week and was hospitalized in the Watsonville Community Hospital. It is apparent from the testimony that Bobeda's father had a chronic heart condition and had suffered a series of heart attacks over a period of time. Bobeda testified that on December 30 he and Yetter were unloading a truck in the back of the store and Mantha was standing approximately 6 feet away at the time. According to Bobeda, Wilson came out and informed him that his brother had called and said he had to take his father to the hospital. On direct examination, Bobeda stated he immediately grabbed his coat and left without saying anything to anyone or securing permission from Mantha to

<sup>11</sup> Clifford Bond, a self-employed repairman, also testified at the hearing that Smith had been rude and had embarrassed him in the store in front of customers. According to Bond, he came into the store to purchase some items and Smith loudly accused him of making a faulty repair on a water valve of a customer. When Bond protested that this was not true, Smith continued to persist in his accusation. Bond became angry because he stated this occurred in front of six or seven customers. He stated that whenever he came into the store thereafter he avoided having Smith to wait on him. On rebuttal, Smith acknowledged speaking to Bond but stated that he did so in the back portion of the store where no customers were present.

<sup>12</sup> Since Bobeda asserted that Mantha made reference to his intention to fire Clarke and Smith, this conversation would have had to take place before Clarke's layoff on November 11.

<sup>13</sup> As with all of the conversations that Bobeda asserted he had with Mantha about the Union, Mantha denied they ever took place. However, Mantha admitted that, during the course of some discussion he had with Bobeda, he asked the employee if he were involved with the Union and Bobeda stated he was not. Mantha testified he believed the employee and did not consider him to have any role in the union activity.

leave. This occurred at approximately 2:45 p.m. According to Bobeda, he did not sign out on his timecard when he left.<sup>14</sup> Bobeda stated that when he returned the following morning and started to work Mantha came up and "threw" his paycheck at him saying "get out" and "there would not be any union in his shop." After Bobeda had completed his testimony (on direct, cross, redirect and recross), counsel for the General Counsel was permitted to recall him. He then added that, when Mantha terminated him on December 31, Mantha further stated "[T]hat if it got down to going to court, he would lie if he had to."

On cross-examination, Bobeda admitted that his father was in the hospital at the time Wilson relayed the telephone message to him, and he was unable to recall whether the employee told him that his brother wanted him to go to the hospital to pick up his father. During further cross-examination, Bobeda admitted that, when he applied for unemployment benefits after his termination, he initially told the interviewer that the message relayed to him was that his father had suffered a heart attack. When confronted by the interviewer at a subsequent session, after she had an opportunity to investigate the matter with the Respondent, Bobeda changed his story and indicated that he may have misunderstood Wilson's message. However, at an unemployment insurance appeals hearing where Bobeda was contesting the denial of benefits, he testified that he went directly to the hospital and took his father home. He stated that this was not completed until approximately 4 p.m. and, therefore, he did not return to work.

Schaefer testified that on December 31 Mantha told him Bobeda was fired because he falsified his timecard and because Mantha had discovered that Bobeda was "knee deep in the Union thing." In an affidavit given the Board agent investigating the case, Schaefer indicated that Mantha did not tell him until January 3, 1982, that he had learned that Bobeda was "knee deep" in the union activity.

Mantha, on the other hand, gave a completely different version of the events resulting in Bobeda's discharge. According to Mantha, when Bobeda was hired it was with the idea that he would eventually become assistant store manager. For this reason, the Respondent paid Bobeda the second highest wage of any of the staff employees and he was to work in the various departments to learn the jobs. According to Mantha, the first problem he experienced with Bobeda was a breach of the confidence regarding his wages. Mantha stated that Bobeda told Yetter, who was in charge of the fence crew, that he was earning more money than Yetter. Mantha stated this caused a problem with Yetter.

<sup>14</sup> Under the system used by the Respondent, employees noted their own time on the timecards. Bobeda testified that he followed the practice of putting his time on his timecard several days in advance of actually working the hours indicated. He asserted that on December 29 he put down the hours he was supposed to work on December 30 and 31, and his timecard indicated that he signed out at 4:30 p.m. on each of these days. (R. Exh. 1.) Bobeda stated he did this because the Respondent frequently changed the assigned work schedules and he placed his hours on the timecard in advance so that he would know which days he was supposed to work.

In addition to the four items set forth in the written warning, Mantha stated that before he went on vacation in early October, Bobeda was instructed to replace a tire on the company truck. He said Bobeda failed to do so and had to be requested four or more times to replace the tire. In addition, Mantha asserted that sometime in October he discovered Bobeda in his office using the office telephone. He stated that there were eight other phones in the building and the employees were instructed not to use the office telephone.

Mantha further testified that Bobeda was involved in a cash discrepancy in the store.<sup>15</sup> The date of this incident was never established in the record. Nevertheless, Mantha stated that a customer brought to his attention that the receipt she received from Bobeda at the cash register only indicated zeros. Mantha stated he checked the tape and Bobeda's cash drawer and found there was no discrepancy but that the customer's purchase, which totaled \$16.05, was not recorded on the tape. When confronted with this, Bobeda finally admitted that he handled the transaction, and that he had totaled the price of the purchases on a calculator rather than on the cash register. Mantha testified that he was concerned because it was possible for the sales people to pocket the payment made for purchases when they were not recorded on the cash register tape. According to Mantha, Bobeda subsequently counted the drawer from Schaefer's cash register and determined that it was over by the precise amount of the sale.<sup>16</sup>

Mantha also testified that on December 16 Bobeda refused to do a fence job at a customer's establishment. Mantha stated that he was away on a business trip and when he returned he learned that Yetter had to do a job that had been assigned to Bobeda. According to Mantha, he was disturbed by Bobeda's action because Yetter had a bad back and that was why the job was assigned to Bobeda initially. In addition, Mantha stated that on December 24, Bobeda left without permission at 3:30 p.m. to go Christmas shopping with his brother. A notation placed on Bobeda's timecard for this period indicates that he was observed leaving at 4 p.m. and he was credited with 7-1/2 hours for that day.

Finally, Mantha stated that on December 30, when Bobeda received the message from Wilson concerning his father and left without permission, it was the "straw that broke the camel's back." Mantha testified that Wilson informed Bobeda that his brother called for him to pick up his father at the hospital and to contact his brother. Mantha stated he went up on the roof to do some work after Wilson relayed the message, and when

<sup>15</sup> Mantha admitted, however, that it was not unusual for the sales employees to have "overages" or "shortages" in their cash register drawers.

<sup>16</sup> Both Bobeda and Schaefer testified that Mantha had installed a number of new cash registers, but Bobeda was assigned an old cash register where he could not multiply several items. They stated that it was customary for any sales person using the older cash register to total the amount of the purchases on a calculator and then ring it up on the cash register. Both Bobeda and Schaefer testified that Bobeda must have inadvertently put the amount of this particular purchase, which they stated was \$16.05, in the cash drawer used by Schaefer. They also stated that Schaefer and not Bobeda counted the cash drawer and discovered the precise amount of the purchase there in excess of what the tape revealed for that cash register.

he returned, Bobeda was gone. Mantha questioned his wife to ascertain whether she had given the employee permission to leave early and was told she had not. Mantha then went to the office and looked at Bobeda's timecard. It indicated 4:30 p.m. even though the employee had left at 2:45 p.m. He also noticed that the employee had signed his hours for the following day. Mantha spoke with Cora Farnham, the bookkeeper, and was told that Bobeda came into the office and borrowed her pen to make a notation on his timecard.<sup>17</sup> As a result of this, Farnham marked the timecard to show that Bobeda left at 2:45 p.m. Because of the falsification of the timecard, Mantha decided to terminate Bobeda the next day. While Mantha admitted telling Schaefer he had discharged Bobeda because the employee had falsified his timecard, he denied stating to Schaefer that he had discovered Bobeda was "knee deep in the union thing."

A handwritten summary of the number of the Respondent's personnel was introduced into evidence as Respondent's Exhibit 7. The summary indicates that prior to the layoff of Clarke and Smith, the Respondent had 11 employees. After their layoff, the number of employees continually declined from 9 to 5-1/2, the one-half being an employee who was working part-time. This number did not increase until the last day that Mantha owned the store in March 1982.

As the record indicates, Mantha sold the store effective March 16, 1982. On March 12, 1982, Mantha sent a letter to Clarke advising him that an opening was available in the store on March 15. (R. Exh. 9.) When Clarke contacted Mantha, he was asked if he wanted the position and the employee accepted. Clarke reported to work on March 15.<sup>18</sup> Similarly, Mantha got in touch with Smith and subsequently offered him a position in the store. (See R. Exh. 8.) Smith had been ill and told Mantha he would report to work when he was released by his doctor. When the new owners took over the store on March 16, Clarke was let go and Smith was never rehired.<sup>19</sup>

#### Concluding Findings

It is clear that the resolution of the issues presented by these cases depends heavily on the veracity of the witnesses. In this regard, I find that critical portions of the testimony of the principal antagonists here (Bobeda and Mantha) leave much to be desired in terms of trustworthiness and reliability.

<sup>17</sup> Farnham testified that Bobeda came into the office that afternoon at 2:45 p.m. She stated that he took a pen from her desk and marked his timecard and put it back into the rack. According to Farnham, Bobeda stated he was going to the hospital to pick up his father. Farnham corroborated Mantha's testimony that Mantha came in and looked at the timecard. She stated that Mantha then instructed her to make out a termination check for Bobeda and told her that the employee had falsified his timecard.

<sup>18</sup> Clarke stated that when he reported to work Mantha indicated to him that he would rehire Clarke and Smith, but he would never rehire Bobeda because he considered him a thief.

<sup>19</sup> Mantha testified that he made the offer to Clarke and Smith because the Regional Office of the Board was pressing him to rehire the employees in order to settle the case. He stated that he had nothing to lose and it would be the new owner's problem rather than his.

For example, Bobeda testified on direct examination that when Wilson relayed the telephone message from his brother, he was told his father had a heart attack and his brother had to take him to the hospital. Since his father had suffered a heart attack several days before, Bobeda stated, he grabbed his coat and left without securing permission from anyone. On cross-examination, Bobeda admitted that his father was in the hospital at the time he received the message and had been there for a week because of the heart attack. Bobeda professed to be unable to recall whether the message relayed by Wilson was for him to go to the hospital to pick up his father. Contrary to this, however, the record shows that Bobeda gave the same version of this event that he gave on direct examination to the interviewer when he applied for unemployment benefits shortly after his discharge. But when she conducted an investigation of the discharge and learned that the telephone message was for Bobeda to pick up his father at the hospital, she confronted him with this discrepancy in his story. At this point, Bobeda changed his version to indicate that he misunderstood the message given by Wilson and assumed that his father was worse. At the appeal of the denial of his claim for unemployment benefits, Bobeda testified under oath that the telephone message was for him to go to the hospital and pick up his father. He stated he went directly there and took his father home. Thus, in this proceeding and in the unemployment compensation proceeding, Bobeda did not hesitate to give several different accounts of the same event. I find this casts serious doubts on the reliability of his testimony in general.

Similarly, after Bobeda completed his testimony on direct and cross-examination in this proceeding, he was recalled to the stand to give an addition to the statements purportedly uttered by Mantha at the time he discharged Bobeda. According to Bobeda, Mantha stated "that if it got down to going to court, he would lie in court if he had to." It seems highly improbable that Bobeda would have neglected to include this incriminating statement during his testimony in chief, both on direct and redirect, or that he would have forgotten that such a statement was made at the time he was terminated by Mantha.

In sum, I not only find that Bobeda was inclined to giving different accounts of the same event at different forums, but that he was also inclined to embellish his testimony with obvious afterthoughts. I can only conclude that this was done in order to bolster his cause and to establish culpability on the part of the Respondent.

Likewise, the testimony of Mantha gives rise to serious concern about the veracity of his statements. While admitting that he spoke with Oliver and Clarke the morning that he received the letter requesting recognition from the Union, Mantha denied interrogating Bobeda or Smith regarding the Union's organizing activity at the store. However, Schaefer testified to a conversation with Mantha in which Mantha indicated he had spoken to Clarke and Smith and had begun to suspect them as the leaders in the organizing effort. In so doing, Schaefer repeated Smith's response to Mantha's questions about the employee's involvement in the union activity, thereby

buttressing Smith's testimony that he had been questioned by Mantha.

In the case of Bobeda, Mantha denied ever speaking to the employee about the union activity or the role, if any, that he played in it. However, Mantha admitted at another point during his testimony that he asked Bobeda if he were involved with the Union and the employee said he was not. Mantha indicated that he then dropped the matter because he believed Bobeda. Thus, on the one hand, Mantha testified that he did not question Bobeda or interrogate him about the Union and, on the other, admitted that he spoke with the employee regarding his involvement with the Union.

In light of the obvious inconsistencies in Mantha's testimony and the blatant tendency of Bobeda to alter and embellish his testimony concerning crucial events, I find it extremely difficult to place any reliance on their statements. However, since it is necessary to sift through their distortions and contradictions to determine a reliable set of facts on which to resolve the issues here, I give credence to their testimony only where corroborated by the credited testimony of other witnesses or supported by independent objective facts.

Turning to the events in this case, it is more than evident, not only from the testimony of Clarke, Smith, and Schaefer, but also by the admissions of Mantha, that Mantha unlawfully interrogated the employees when he received the Union's request on October 27. Mantha called Clarke and Smith separately into his office and demanded to know what they knew about the Union's organizing effort in the store. In the case of Clarke, Mantha stated he heard a list had been circulated among the employees to sign if they supported the Union, and he questioned Clarke to ascertain if this were true. Mantha did not give any assurances to either Clarke or Smith prior to or during his questioning of them that reprisals would not be taken against them. Indeed, it was Clarke who had to caution Mantha that it was not lawful for him to discuss the union activity with the employees. It was also at this point that Clarke told Mantha he had been through a similar experience at San Lorenzo Lumber Company and the whole affair had become acrimonious. When Mantha told Clarke he thought the Union was bluffing, Clarke stated he did not think so, thereby giving Mantha an indication that the employee had some knowledge of the Union's activity in the store. I note at this point that, prior to calling Clarke and Smith into the office to question them about the union activity, Mantha, at Schaefer's suggestion, had contacted the Regional Office of the Board and was surprised to learn that he could not discharge the employees for engaging in union activity. I also note, that after Mantha spoke with Clarke, he contacted the San Lorenzo Lumber Company to ascertain if Clarke had been considered one of the ringleaders in the union activity at that firm.

In view of all of the above, I find Mantha's questioning of Clarke and Smith on October 27 about the union activities in the store constitutes unlawful interrogation. I do not credit Mantha's testimony that he did not question Smith since, as previously noted, Mantha subsequently informed Schaefer of the precise response Smith

made to his questioning.<sup>20</sup> Each employee was interrogated separately in Mantha's office, and it is apparent from the credited testimony that Mantha was seeking to identify those employees responsible for the union activity in his store. Although Mantha did not make overt threats of retaliation against the employees or promise them benefits, the circumstances under which these interrogations took place was patently coercive and served no legitimate purpose. See *Edgcomb Metals Co.*, 254 NLRB 1085 (1981); *PPG Industries*, 251 NLRB 1146 (1980); *NLRB v. Truss-Span Co.*, 606 F.2d 266 (9th Cir. 1979). Accordingly, I find that, by interrogating Smith and Clarke on October 27, the Respondent violated Section 8(a)(1) of the Act.

While I have indicated doubts about the trustworthiness of Bobeda's testimony, I find, nevertheless, that he was also called in by Mantha on October 27 and questioned about the union activity. First, it is highly improbable that Mantha would have overlooked Bobeda in his efforts to discover the employees responsible for the Union's effort to organize the store, especially in view of Mantha's pattern of conduct in questioning the employees. But more significant is the admission by Mantha that he spoke with Bobeda about his involvement with the Union (at some undisclosed date during this period) and the employee disclaimed any such involvement. Based on this admission by Mantha which buttresses Bobeda's statements, I find that Mantha also unlawfully interrogated Bobeda on October 27 in violation of Section 8(a)(1) of the Act.

Similarly, I find that a second conversation occurred in early November between Mantha and Bobeda in which the subject of discussion was the possible involvement in the union activity by a discharged employee named Frum.<sup>21</sup> Here again, while there is reluctance on my part to give credence to the testimony of Bobeda regarding this conversation, I find that Mantha, by his own admission, indicated there was a conversation between him and Bobeda in which Frum was discussed. It was in this conversation, according to Mantha, that Bobeda made the statement, "Frum was bull-shitting about his involvement in the union activity in the store." This statement by Bobeda occurred after Frum was no longer employed at the store. From this I deduce that some conversation took place between Bobeda and Mantha regarding Frum and the critical question is whether, during the course of this conversation, Mantha made the statements attributed to him by Bobeda. In view of the unreliability of the testimony of both Bobeda and of Mantha, I am unable to state on the basis of this record

<sup>20</sup> I credit the testimony of Clarke, Smith, and Schaefer. All of these witnesses testified in a straightforward and candid manner. I am not unmindful in making this credibility resolution that Schaefer had subsequently quit the Respondent's employ in a dispute over the amount of his Christmas bonus and that during the organizing campaign he participated in the union meetings and was a close friend of the employees. Schaefer's activities and his relationship with the employees does not, however, in my judgment impinge on his veracity nor do I consider it sufficient bias to cause his testimony to be unworthy of belief.

<sup>21</sup> Although from Mantha's testimony it is not certain whether Frum was discharged or quit, it is clear from the testimony that Mantha was unsatisfied with the employee and pleased to have the employment relationship ended.

that the threat to prevent Frum from securing other employment in Watsonville was in fact made by Mantha. There is no independent evidence other than the conflicting testimony of these individuals on this issue. Accordingly, I conclude that the General Counsel has failed to support by any credible evidence or testimony in the record that such a statement was made and for this reason I find that this portion of the allegations of the complaint should be dismissed.

Bobeda testified about two other conversations which he asserts he had with Mantha. The first took place in early November where he claims Mantha threatened to get rid of Clarke and Smith because he felt they were involved in the union activity at the store, and that Bobeda would also be fired if Mantha could establish his involvement in the activity. The second purportedly occurred on December 12 when Mantha threatened to fire Bobeda if he could prove that Bobeda was part of the union organizing effort.

Since there is little to choose from in terms of the lack of veracity of each of these witnesses, a factual determination of these issues is made all the more difficult. It is a fact that Clarke and Smith were subsequently laid off and, indeed, that Bobeda was subsequently fired. I also find as a fact that prior to the layoffs Mantha informed Schaefer that he suspected both Clarke and Smith were instrumental in getting the Union to organize the employees at the store. It was on the basis of Mantha's statements to Schaefer, that the store manager warned the employees that they could expect to be fired by Mantha. I note at this point that Mantha was unaware of Schaefer's involvement with the employees' union activity or that he was attending the union meetings. Thus, while it is perfectly logical for Mantha to have revealed his suspicions about the involvement in the union activity by Clarke and Smith to Schaefer, it is extremely illogical to believe that Mantha called in Bobeda and voiced threats that he would fire the two employees for being involved in union activity, and would fire Bobeda for the same reason. It is true that much of Mantha's conduct here was ill advised and characterized by precipitous action, but there is nothing which indicates that after his initial contact with the Board's Regional Office, that he was so blissfully ignorant of the requirements of the Act as to overtly threaten to get rid of employees for suspected union activity in a face-to-face confrontation. Furthermore, based on my observation of Bobeda, I am not unpersuaded that Bobeda's testimony regarding these conversations was specifically fabricated and tailored by him in order to establish grounds for unlawful conduct by the Respondent. Accordingly, I find that the allegations of the complaint which rest on these two purported conversations between Bobeda and Mantha have not been proven by a preponderance of the credible testimony in this record and should be dismissed.

Turning to the issue of the layoffs of Clarke and Smith, I find that each of these employees was unlawfully laid off by the Respondent in violation of Section 8(a)(3) of the Act. Schaefer credibly testified that he warned the employees to expect to be terminated because Mantha suspected them of being involved in the union activity. The Respondent's counsel sought to es-

tablish during the cross-examination of Schaefer that this was solely Schaefer's opinion. However, this opinion was not formed in a vacuum at the time Schaefer notified the employees to expect retaliation from Mantha. It was based on his conversations with Mantha in which Mantha pointed out that he suspected each of these employees of being involved in his problems with the Union. As noted, at the time Schaefer made this statement at the union meeting, Mantha was unaware that the store manager had aligned himself with the employees' organizing effort. Therefore, even though Mantha had not authorized the statements by Schaefer and was not aware that the store manager was attending the union meetings, Schaefer, as an admitted supervisor, was an agent of the Respondent. As such, the threat that Clarke and Smith could anticipate being terminated because Mantha suspected them of union activity is imputed to the Respondent and violated Section 8(a)(1) of the Act. The coercive effect is plain—not only could Clarke and Smith expect reprisals in the form of loss of employment because of their union activity, but others attending the meeting could reasonably anticipate similar retaliatory conduct. This statement clearly interfered with the rights guaranteed the employees by Section 7 of the Act.

The Respondent's claim that a layoff was required in November because of the fact that the store was overstaffed is, in my judgment, nothing more than a pretext. Schaefer gave unrefuted testimony that the volume of business in the store was only slack for a 7-day period and then picked up considerably. Indeed, Schaefer stated that Mantha informed him that the month of December was the best month of the year and that the entire year of 1981 was the best, in terms of volume of business, that the store had enjoyed. To refute this, Mantha asserted that he had gone over the records and determined that the store was overstaffed by 2-1/2 persons. However, at no time did Mantha offer into the record any of his business records to establish the volume of business or how he ascertained that the store was overstaffed. The only record offered by the Respondent was a summary to show that after the layoffs and the subsequent discharge and termination of other employees, they were not replaced until immediately prior to the time the Respondent sold the business in March. However, offset against this is the credited testimony of Schaefer that the store was so busy that Mrs. Mantha had to leave the carpet department to work in the hardware department and it was necessary for Mantha to not only bring the bookkeeper but also outside employees onto the sales floors to handle customers. I note at this point that the testimony by Schaefer in this regard is completely unrefuted in the record.

Nor do I find Mantha's explanation as to why he selected Clarke and Smith for layoff in November to be persuasive in terms of a legitimate business decision. Mantha claimed Clarke was slow in dealing with customers and Smith had a history of being rude to customers. Although Mantha stated he brought these facts to Schaefer's attention on several occasions and each had spoken to the employees about their performance deficiencies, I note that at no time did Mantha issue any type of written

warning to these employees. In contrast, however, he issued a written warning to Bobeda on November 2 involving four separate incidents. This alone gives rise to the inference that whatever their deficiencies both Clarke and Smith were considered valued employees to the Respondent prior to the time Mantha suspected them of involvement in the union activity. Moreover, when each of these employees was laid off, Mantha never expressed to them the fact that he was dissatisfied with their job performance and for that reason had selected them to be laid off. Rather, Mantha simply offered an explanation as to why he was keeping three less senior employees, and this group included Bobeda against whom the Respondent had a professed litany of complaints, including a written warning issued earlier that month.

In sum, I find that the timing of the layoffs and the selection of Clarke and Smith, who Mantha had suspected of being the leading activists in the organizing campaign, far outweigh the business explanation that Mantha offered to support his conduct. Indeed, on the basis of Schaefer's testimony and Mantha's avowed hostility toward the unionization of his employees, as well as his determined effort to identify those responsible for the organizing activity, I conclude that the reasons offered by the Respondent for laying off Clarke and Smith are purely pretextual. When the above is considered in connection with the unrefuted testimony of Schaefer that the business was enjoying its most profitable year, it becomes reasonable to draw the inference that Clarke and Smith were laid off in retaliation for their suspected union activity. Cf. *American Fence Co.*, 255 NLRB 692 (1981). Therefore, I find the layoffs of Clarke and Smith violate Section 8(a)(3) and (1) of the Act.

The final issue to be determined here is whether the discharge of Bobeda on December 31 was for unlawful reasons. As already noted, little credence is given to the testimony of either Bobeda or Mantha. Therefore, resolution of this question rests on independently established facts and the credited testimony of the witnesses.

It is evident that Bobeda left at approximately 2:45 p.m. on December 30 after receiving the phone message concerning his father. Contrary to the testimony of Bobeda, I find that, instead of grabbing his jacket and leaving immediately, the employee went into the office and took his timecard out of the rack. I credit the testimony of Farnham, who appeared as a straightforward witness giving an accurate account of the events, that Bobeda took a pen from her desk and made some notation on his timecard. I also credit her statement that Bobeda said he had to leave to pick up his father at the hospital. Thus, I reject the claim of counsel for the General Counsel that Bobeda was confronted with an "emergency situation" and believed his father had suffered another heart attack, thereby accounting for his failure to record the correct time on his timecard when he left the store that afternoon.

In these circumstances, I find it reasonable to conclude that Bobeda marked his timecard to show that he finished work at 4:30 p.m. that day and placed his hours on the card for the following day. I find Bobeda's explanation that he marked his card on December 29 to reflect the hours he was scheduled to work on December 30

and 31 to be dubious at best and not worthy of belief. But even if his testimony in this regard were to be believed, it is clear that Bobeda had falsified his timecard to show hours he worked when in fact he had not.<sup>22</sup> Thus, when Mantha checked Bobeda's timecard and discovered the falsification, he had a legitimate business reason for terminating the employee.

The credited testimony of Schaefer reveals that Mantha also assigned Bobeda's union activity as a reason for firing the employee. He told Schaefer that Bobeda was fired for falsifying his timecard and that he had discovered that the employee was "knee-deep in the union thing." While Schaefer testified Mantha made this statement to him the day that Bobeda was discharged, his affidavit indicated that Mantha made this remark to him on January 3. Since the affidavit was given shortly after the charges were filed in this case, it is presumed that the affidavit is more accurate than the testimony given at the hearing. I do not find, however, that Schaefer's testimony in this regard is to be discredited since I attribute his inaccuracy about the precise date to be the result of a faulty memory rather than a desire to distort the facts. Regardless of when this remark was made to Schaefer by Mantha, it nevertheless revealed one of the motives underlying the decision to discharge Bobeda.

Although Mantha denied making the remark to Schaefer, I do not place any credence in his denial. It is not only consistent with his efforts to discover the employees responsible for the Union's organizing effort, but also tracks the pattern he established in getting rid of employees he suspected of being involved with the Union, i.e., Clarke and Smith.

Therefore, the facts here place Mantha's discharge of Bobeda squarely within the principle established by the Board for "dual motivation discharges" in its *Wright Line* case.<sup>23</sup> Under this doctrine, the General Counsel has the burden of making a prima facie showing sufficient to support the inference that the protected conduct was a "motivating factor" in the decision. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.<sup>24</sup>

Applying the *Wright Line* test to the facts here, I find the record clearly establishes that the General Counsel has made a prima facie showing that Bobeda's union activity was a motivating factor in Mantha's decision to discharge him. It is equally clear that because of the patent falsification of the timecard Mantha had sufficient business justification to fire the employee. Thus, the critical question becomes whether Mantha would have discharged Bobeda even in the absence of his union activity. On the basis of the record here, I am constrained to

<sup>22</sup> There is no evidence in the record, other than Bobeda's testimony, to establish that other employees marked their timecards in a similar manner or that the Respondent condoned this practice.

<sup>23</sup> *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>24</sup> While I am aware that there is a division between the various circuit courts of appeals regarding the shifting of the burden of proof to the employer and that the matter is currently before the United States Supreme Court, I am nevertheless bound by the Board's application of the doctrine until there is a definitive ruling by the Supreme Court.

conclude that he would not. Mantha recited a litany of complaints management had against Bobeda. In addition, a written warning was issued to Bobeda on November 2 setting forth four separate incidents which management considered unacceptable. Nevertheless, when a decision was made by Mantha to lay off two employees in November, he overlooked the deficiencies which he now claimed were so determinative in Bobeda's case and selected Clarke and Smith to be laid off. Since I have found that Clarke and Smith were laid off for discriminatory reasons, I find it reasonable to infer that Mantha was more concerned about getting rid of employees who were suspected of being involved in union activity than he was about discharging employees for poor work performance. While I strongly condemn Bobeda's actions in falsifying his timecard, I am unable to overlook the fact that it was not until Mantha associated Bobeda with the union activity that he then decided he could no longer tolerate the employee's misconduct.

For these reasons, I find that the Respondent has not met the burden of demonstrating that Bobeda would have been discharged even in the absence of his union activity. Accordingly, I find that, by discharging the employee on December 31, the Respondent did so for discriminatory reasons and thereby violated Section 8(a)(3) and (1) of the Act.

#### The Challenges to the Ballots in the Representation Election

In view of the above findings, it follows that the challenges to the ballots of Frederick Smith, John M. Clarke, and Steven Bobeda in the representation election held in Case 32-RC-1506 must be overruled. Since each of these individuals has been found to have been unlawfully laid off or discharged by the Employer prior to the representation election, they continue in their status as employees eligible to vote and their challenged ballots should be opened and counted.

Accordingly, it is recommended that the challenges to the ballots of the three above-named employees be overruled. It is further recommended that their challenged ballots be opened and counted and a new tally of ballots be issued in this representation case.

#### CONCLUSIONS OF LAW

1. Edgar Mantha and Kathleen Mantha, a Partnership, d/b/a Hopkins Hardware; Mantha's Carpet & Draperies; Mantha's Handyman Plumbing; Mantha's Fence was, at all times material herein, an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers Union, Local 839 is a labor organization within the meaning of Section 2(5) of the Act.

3. By unlawfully interrogating employees about their union activity and the union activity of other employees, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 and thereby violated Section 8(a)(1) of the Act.

4. By informing employees that they could expect to be discharged because they were suspected of engaging in union activities, The Respondent has violated Section 8(a)(1) of the Act.

5. By selecting employees John Clarke and Frederick Smith for layoff on November 11 and 27, respectively, because they were suspected of engaging in union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

6. By unlawfully discharging employee Steven Bobeda on December 31, the Respondent has violated Section 8(a)(3) and (1) of the Act.

7. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be ordered to cease and desist therefrom and to take certain affirmative action which will effectuate the policies of the Act. Since it was neither asserted by counsel for the General Counsel nor litigated at the hearing that the purchaser of the Respondent's business was a successor responsible for remedying its predecessor's unfair labor practices,<sup>25</sup> the remedy here must take into account the sale of the business by the Respondent on March 16, 1982. In addition, on the basis of the state of this record, it must be presumed that the sale of the business was bona fide. Therefore, any remedial order worded as if the Respondent still owned the business enterprise would be meaningless and unrealistic.

For this reason, the Respondent shall be ordered to mail signed copies of the notice attached to this decision to each of the employees employed by it during the time the unfair labor practices found herein were committed. See, e.g., *Webb Tractor & Equipment Co.*, 167 NLRB 383, 384 fn. 10 (1967). In addition, the Respondent shall be required to make Steven Bobeda, John Clarke, and Frederick Smith whole for any loss of earnings and benefits they may have suffered by reason of the unlawful discrimination against them from the date of their layoffs and/or discharge until the date of the sale of the business by the Respondent.<sup>26</sup> Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest thereon shall be computed in the manner provided in *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>27</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>28</sup>

<sup>25</sup> See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), and *Perma Vinyl Corp.*, 164 NLRB 968 (1967), *enfd.* 398 F.2d 544 (5th Cir. 1968).

<sup>26</sup> In light of this, the contention by counsel for the General Counsel that the offers of reinstatement made to Clarke and Smith were invalid is of no significance.

<sup>27</sup> See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

<sup>28</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## ORDER

The Respondent, Edgar Mantha and Kathleen Mantha, a Partnership, d/b/a Hopkins Hardware; Mantha's Carpet & Draperies; Mantha's Handyman Plumbing; Mantha's Fence, Watsonville, California, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Unlawfully interrogating employees about their union activities and the union activities of other employees.

(b) Informing employees that they can anticipate being discharged because they are suspected of engaging in union activities.

(c) Selecting employees for layoff because they are suspected of engaging in union activities.

(d) Unlawfully discharging employees because they are suspected of being involved in union activities.

(e) 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 designed to effectuate the policies of the Act.

(a) Make Steven Bobeda, John Clarke, and Frederick Smith whole for any loss of earnings or benefits they

may have suffered as a result of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(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 the backpay due under the terms of this Order.

(c) Mail to each of the employees employed by the Respondent from October 27, 1981, to the date of the sale of the business copies of the attached notice marked "Appendix."<sup>29</sup> Copies of said notice, on forms provided by the Regional Director for Region 32, shall be mailed by the Respondent immediately upon receipt. The Respondent shall take steps to ensure that said 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.

---

<sup>29</sup> 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."