

Flannery Motors, Inc. and Bruce Carland. Case 7–
CA–37280

August 19, 1996

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND FOX

On April 8, 1996, Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to substitute the following Order for that of the judge.²

In adopting the judge's finding that the Respondent unlawfully discharged Bruce Carland and Scott McClellan, we also rely on the Board's decision in *Limestone Apparel*, 255 NLRB 722 (1981); and see *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). The Respondent contends that the passage of time between Carland's and McClellan's protected activity and their discharges disproves the existence of an antiunion motive on the Respondent's behalf. Although the proximity between discharges and protected activities is a relevant analytic factor, it is not dispositive. We find, under the circumstances of this case, that the time lapse does not overcome the other evidence of an antiunion motive. Moreover, we find distinguishable *MECO Corp.*, 986 F.2d 1434 (D.C. Cir., 1993), relied on by the Respondent in its exceptions. There, the court held that the company had lawfully discharged two union activists for personal misconduct which occurred more than 8 months after their last protected activity, and more than a year after their supervisor had threatened to "get rid of" union activists. In that case, there was misconduct immediately preceding the discharges. In the instant case, there was no misconduct by the discriminatees, who were on disability leave prior to their discharge. Moreover, in *MECO* the supervisor who had uttered the

¹The job titles of Chris Pollack and John Shepp were listed incorrectly in the judge's decision. They are, respectively, Service Director and Service Manager.

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

²We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

threat no longer supervised the employees at the time of their termination and played no part in the termination decision.

Consistent with settled principles, the judge's finding that the discharges violated Section 8(a)(1) is derivative of his finding that the discharges violated Section 8(a)(3). 1938 NLRB Annual Report 52 (1939).

ORDER

The National Labor Relations Board orders that the Respondent, Flannery Motors, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily discharging employees because they support the Union and engage in protected concerted activities.

(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) Within 14 days from the date of this Order, offer Bruce Carland and Scott McClellan 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.

(b) Make Bruce Carland and Scott McClellan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Re-

³If 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."

spondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 5, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that 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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 283, International Brotherhood of Teamsters, AFL-CIO, or any other 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, within 14 days from the date of the Board's Order, offer Bruce Carland and Scott McClellan 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.

WE WILL make Bruce Carland and Scott McClellan whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharges of Bruce Carland and Scott McClellan, and WE WILL, within 3 days thereafter, notify each of

them, in writing that this has been done and that the discharges will not be used against them, in any way.

FLANNERY MOTORS, INC.

John Ciaramitaro, Esq., for the General Counsel
Lawrence F. Raniszkeski, Esq., for the Employer

DECISION

FRANK H. ITKIN, Administrative Law Judge. Unfair labor practice charges were filed in this case on June 1 and a complaint issued on July 10, 1995. General Counsel alleged that Respondent Employer violated Sections 8(a)(1) and (3) of the National Labor Relations Act by discharging employees Bruce Carland and Scott McClellan because of their Union and protected concerted activities. Respondent Employer denied violating the Act as alleged. A hearing was held on the issues raised in Detroit, Michigan on November 27 and 28, 1995, and on the entire record, including my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Respondent Employer, Flannery Motors, Inc., is admittedly engaged in commerce as alleged. Local 283, International Brotherhood of Teamsters, AFL-CIO, is admittedly a labor organization as alleged. Scott McClellan, one of the alleged discriminatees in this case, testified that he first started working for Respondent Employer about December 1989 and his last day of work there was December 5, 1994. His job was transmission technician. He was compensated on a flat-rate commission basis. (Tr. 26.) Chris Pollack was his service manager and John Schepp was his service director.

McClellan further testified that during January 1994 he and coworker Bruce Carland, the other alleged discriminatee in this case, went into Service Manager Chris Pollack's office. There, as McClellan recalled,

We explained to him [Pollack] that we had talked to other mechanics and people in the shop about some holiday pay, some benefits and our hourly flat rate. And we told him that we were unhappy with what our benefits were and our flat rate. . . . We told him that we wanted him to do something about it or we'd organize a union.

Pollack responded: "Do what you have to . . . we're not going to give you any different benefits or pay raise." McClellan and Carland thereupon contacted the Union, Local 283; they obtained union membership cards; distributed the cards among their coworkers; and urged their coworkers to join the Union.

Thereafter, on January 26, 1994, the Union wrote the Employer requesting recognition as the designated representative of a majority of the Company's unit employees, and on January 27 the Union filed a representation petition with the Board. Management made clear to the employees that it opposed union representation. And, a Board-conducted representation election was held as scheduled on March 18, 1994. Of approximately 46 eligible voters, 19 cast votes for

the Union, 22 cast votes against the Union, and there were three challenged ballots. (Jt. Exhs. 1-6.)

McClellan next testified that later, "after the representation election," about April 1994, Pollack admonished McClellan in the office that coworker Carland "was going to be fired because he [Carland] had lied to him [Pollack] about his involvement in the Union and that he had sat in on the vote as an observer."

Subsequently, during July 1994, McClellan broke his foot at work and went on disability leave until about December 1, when he was "released to go back to work" by his doctor. McClellan promptly notified Pollack that he had been "released to come back to work," and Pollack then stated: "Don't bother, you're fired." McClellan asked "why," and he was told that he had "missed too much time," "tardiness" and "attendance."

McClellan noted that the Employer had no "written attendance policy" or "written tardiness policy." He acknowledged, however, that he "might have been written up . . . for attendance or tardiness" "once or twice at the most" during his years of employment. Nevertheless, he had never been threatened with discharge "because of [his] absenteeism or tardiness record." He, in fact, has never "received anything in writing from the Company [with] respect to [his] termination."

After his discharge, McClellan sought employment with D&K Repair. There, he spoke with Kit McDonald. He related to McDonald where he had previously worked. He was never hired by D&K.

On cross-examination McClellan explained with respect to his attendance: "We were commissioned employees; if there was no work we were able to leave; . . . we'd talk to the service manager or director and we could leave at that point if it was okay with him."

He characterized his "attendance record" as "normal" "for the last three years of employment." He denied receiving Respondent's Exhibit 2, a written warning for unexcused absences, dated June 24, 1994. He denied that he had signed this document and insisted that "somebody forged" his "name." This document is also purportedly signed by Chris Pollack and John Schepp.

He was next shown some 50 or more "absence reports" covering 1991 through 1994. (R. Exh. 3.) Most of these documents refer to "excused" absences. He denied that he had "signed" various of these documents. (Tr. 58-60, 79-82.) He testified:

Q. How frequently Mr. McClellan would either Mr. Pollack or someone else from Management talk to you about your being absent or tardy?

A. Once to my recollection.

Q. Once in five years?

A. Yeah.

He further explained that during his disability leave from July to December 1994, he kept Pollack informed periodically on the condition of "his foot" and it was "only" in December, when he indicated that he was "released," that he was told he "was fired." (G.C. Exhs. 4-7; Tr. 170-174.)

Bruce Carland, the other alleged discriminatee in this case, testified that he started working for Respondent Company during 1988 and his last day of work was December 28, 1994. His last position there was as a used car technician.

Previously, he had served the Employer as a light technician. Pollack and Schepp were also his "immediate bosses." He related his union organizational activities with coworker McClellan. During late January 1994 he and McClellan went to Service Manager Pollack and "[W]e told him that we were unhappy about our pay, our health insurance and our holiday pay taken away from us, and we wanted to resolve this or we were going to get a union in." Pollack responded: "Fuck you. . . . Do what you have to do."

Thereafter, he and McClellan contacted the Union; distributed union membership cards among their coworkers; urged their coworkers to join the Union; and returned the signed cards to the Union. Subsequently, before the March 18 representation election, Pollack stated to Carland in Pollack's office:

He [Pollack] wanted to know who was all involved. . . . He asked me who was responsible and [said] if he found out he was going to fire them. He wanted to know if [employee] Tom Dizotell was involved. . . . I [Carland] said no, he is not.¹

Carland later served as an "observer" at the March 18 Board-conducted election.

Subsequently, about May 20, 1994, Carland broke his collar bone and went on sick leave. He returned to work as a light repair technician in used cars on September 9, 1994. There were, before his injury, only two light car technicians in used cars, Carland and Phil Warden. After his return to work on or about September 9, Carland and Warden were still the only two light technicians working there. Carland continued working in this capacity until December 28, 1994 when he was "terminated." On December 28, Carland had the following conversation with Pollack:

I [Carland] said, the word is around the shop that I'm being fired Friday. . . . He [Pollack] says, I am not going to lie to you, Dennis Foreman told me to let you go Friday. . . . I asked him, you cannot put me back on one of the teams or on the line? . . . And he said no, I have no place for you. . . . I'll give you a good reference, that's all I can do

Carland was given no "reason" for being "terminated." A few days later he was given a copy of General Council Exhibit 2, which states that Carland was "discharged" because

Expense controls have brought about a restructured used vehicle reconditioning department. Flat rate technician is to be replaced with lower priced clock hour technician. The used car technician with lowest seniority was replaced.

Carland next testified that since his discharge he has observed "help wanted ads for Flannery Motors seeking employees to work in the position from which [he was] terminated." (Tr. 102-104; G.C. Exh. 3. See also Tr. 269-271.)²

¹ On cross-examination, Carland explained that Pollack already "knew that I was talking for the mechanics" but he "did not know that I was behind it."

² In addition, Carland recalled that while on sick leave, he was temporarily replaced by a "fast lube technician" named Matt Cou-

Dennis McDonald owns D&K Repairs, a general automotive repair shop. He testified that McClellan had "applied for work" with him about April or May 1995. McClellan then gave McDonald his references. McDonald in turn telephoned Respondent Employer and his call was transferred to a person identified as Chris Pollack. McDonald testified:

I [McDonald] asked him [Pollack] about McClellan, his work habits, how he performed, what type of person he was. . . . He [Pollack] told me McClellan and a few others had tried to form a Union and he recommended that I not hire him because he was trouble. . . . I asked him if that was the reason he was terminated [and] he said that was the basis for it . . . we don't need the problems.

McDonald later told McClellan: "I can't use you . . . I don't need the problems around here . . . the man says you were fired because you tried to form a Union."

Philip Warden, a foreman working in used car maintenance for Respondent Employer, testified that Bruce Carland had worked with him during the pertinent time period, and Matt Couture also had worked for the Employer as an hourly rate "lube technician" "changing oil on the lube rack." When Bruce Carland went on disability leave, "Matt Couture came down to used cars to fill in." "And then when Bruce Carland came back to work," Couture went back to working as a "lube technician." Later, "when Bruce Carland was let go Matt Couture came back down to work" for Warden in "used cars." Warden noted that Couture could work for him without "certification" as "a trainee mechanic."

Warden next claimed that possibly as far back as 1992 or 1993, "prior to Bruce Carland even hiring in on used cars," Pollack had "expressed . . . concern about the costs in the used car reconditioning department" and "said he wanted to bring down an hourly guy to . . . reduce used car costs." Nevertheless, Carland, as noted, was still hired in "used cars" even though he was not "an hourly guy" working at a cheaper rate. Warden next claimed that on or about December 28, 1994,

I [Warden] saw an ad in the newspaper where they were looking for an oil lube technician So Bruce Carland right away went in and questioned Chris Pollack whether he was losing his job or not . . . and Chris Pollack informed him [Carland] yes he was.

Warden, as foreman, had not previously been notified of this termination of Carland. Warden recalled that about 1 week later Pollack explained at a meeting that Carland had been terminated "for financial reasons."

Edward Michaels is secretary-treasurer of Respondent Company. Michaels claimed, inter alia, that it is the "unwritten" "dealership's policy" that "we are not to give out any information about any employee other than the fact that they may have been hired, what period of time, and what time they left." Michaels, when asked on cross-examination if he had "responded to any inquiries from other employers about

ture. Couture was not a "certified" mechanic. Couture then worked with Warden. When Carland returned to work, Couture went back to "fast lube."

Scott McClellan," generally responded: "No, not that I know of."

Christopher Pollack is service director for Respondent Company. He claimed that about the "second quarter of 1993," long before the union organizational activities described above, company president and owner Dennis Foreman "approached" him about the "need" to "cut expenses or do something in the used car reconditioning department." Later, about January 1994, employees Carland and McClellan met with him. Pollack testified:

I [Pollack] vaguely recall them [Carland and McClellan] coming in with some requests and I almost felt like they were giving me an alternative to where I do something or they are going to do something on their own. . . . I don't believe there [was] any mention of a union. . . . I probably reacted and probably got a little hot

Later, the Union filed a representation petition. The Company subsequently "posted" a "notice" and distributed literature to the employees. (R. Exhs. 5 and 6.)

Pollack next recalled that he in fact had met with Carland shortly before the March 18 representation election. He denied asking Carland at that meeting to disclose "who was involved in the Union campaign so he could terminate them." The Union, however, was discussed. According to Pollack, there was also "another conversation" with Carland before the representation election where [H]e [Carland] told me [Pollack] he didn't want anything to do with the Union" Pollack was next asked whether he also had a meeting with McClellan shortly after the representation election. He responded: "It's possible, but I don't recall." He denied, inter alia, certain statements attributed to him by McClellan at this meeting.

Pollack next testified that Matt Couture from "fast lube" performed Carland's job while Carland was on sick leave. Couture, an hourly paid employee, worked cheaper than Carland who was at a flat rate, reducing "internal costs." Pollack was asked "why did you hire him [Carland] back" after his sick leave ended, and Pollack responded: "I didn't have anybody permanently in the fast lube area . . . where Matt Couture came from" Pollack assertedly then decided, during September 1994, that "[W]e were going to look for another fast lube technician and move Matt down, but that wasn't to happen until after the first of the year."

Finally, on December 28, some 3 months after Carland's return from sick leave, Carland was "terminated." See General Council Exhibit 2, given to the employee about 2 days later. Carland asked for other work and Pollack told Carland: "I don't have a spot for you right now . . . all the teams are full." Pollack was asked with respect to this termination of Carland for assertedly economy reasons, "was anything like that being done for anybody else other than [Carland]," and Pollack responded: "I [Pollack] really don't know if something like that would have gone on in another department. It's very possible it could have, but I don't know that it did happen."

In addition, Pollack, in explaining his failure to transfer Carland to "another team," claimed that in the past Carland's transfers among teams were "for the most part" because of "unsatisfactory performance." Cf. General Coun-

cil Exhibit 2, which makes no reference to this reason for Carland's termination.

Further, Pollack was asked whether he "ever got a phone call from Dennis McDonald." Pollack testified:

I [Pollack] got a phone call and I don't recall whether it was on Scott or Bruce, I think it was Scott, calling for a reference. And, I transferred the individual either to Ed Michaels or to the operator and told him that's who he had to talk to.

He denied statements attributed to him by McDonald.

Pollack was also questioned about employee McClellan's attendance and "absentee slips." (R. Exh. 3.) Pollack acknowledged that some of the signatures on those documents which purport to be the signatures of McClellan were not in fact the signature of McClellan. (Tr. 247-255.) Pollack acknowledged that the "bulk" of the "absentee slips" are for "excused absences." (R. Exh. 5.) Pollack elsewhere claimed that McClellan's "attendance record" was "less than adequate" during his years of employment going back to about 1990. Pollack claimed that he kept McClellan despite this attendance record "because he's the only transmission man I had." Pollack insisted that McClellan had signed Respondent's Exhibit 2, a June 1994 warning assertedly issued to McClellan. The only other written "warning" for "tardiness" was assertedly issued to McClellan in early 1991. (R. Exh. 7.) There are "no other " similar "documents."

Pollack next recalled hiring another transmission specialist named Pat Boomer about "three months or so" to work with McClellan before McClellan went on disability leave. Pollack claimed that he hired Boomer "because McClellan wasn't keeping up with his work load." McClellan's work, during his disability leave, was given to Boomer. Pollack assertedly determined during December 1994 that he did not want McClellan to come back to work. Elsewhere, Pollack vaguely claimed that he told McClellan about Thanksgiving: "You probably should look for a job." Elsewhere, Pollack claimed: "I [Pollack] may have [then] given him [McClellan] the reason [that] the work's getting done and because of his attendance record, but I don't recall if I did or not."

Finally, Pollack denied that the firings of Carland and McClellan were because of their union activities.

Dennis Foreman is president and owner of Respondent Company. Foreman claimed, with respect to the termination of employee Carland, that he had been "talking to Chris Pollack about the unsatisfactory performance of internal gross [profits] within the dealership"; "[W]e were substantially below comparable dealers and doing a lower percent than we had done in the past"; and "[O]ur performance was bad in 1993." When asked if his "concern" was "ever documented in any way," he responded: "[W]e don't use memos." Later, after Couture replaced Carland who was on sick leave, "[C]osts went down" and "[T]he used car department was fine." Later, after Carland returned, about October 1994, it was decided that "[W]e were going to make a change and go back to an hourly person like we originally had a few years prior." Carland would not be "informed" until "after the holidays." In fact, Carland was terminated before the "holidays." Foreman denied that union activity played any role in this determination.

As for McClellan's discharge, Foreman claimed that Pollack had stated to him during November 1994 that "he didn't think he needed to take [McClellan] back" with "his [McClellan's] attendance record and with the lack of work." Foreman assertedly relied on Pollack's judgment. Foreman also claimed that "department managers are authorized to give a start date and the termination date and that's all" for former employees when inquiries are made. Foreman acknowledged that his Company does not have an "attendance policy" or "written discipline policy."

I credit the testimony of Scott McClellan, Bruce Carland, and Dennis McDonald as recited above. Their testimony is in significant part mutually corroborative. Their testimony is substantiated in significant part by acknowledgments of Respondent Employer's witnesses. And, relying on demeanor, they impressed me as more credible, trustworthy, and reliable witnesses than Philip Warden, Edward Michaels, Christopher Pollack, and Dennis Foreman. I was not impressed with the testimony of Warden, Michaels, Pollack, and Foreman. Their testimony was at times vague, shifting, unclear, contradictory, and unsubstantiated. In particular, as discussed below, I reject as pretextual and incredible Management's belated and essentially unsubstantiated nondiscriminatory reasons for the firing of union protagonists Carland and McClellan.

Discussion

Section 7 of the National Labor Relations Act guarantees employees the "right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of" their Section 7 rights. And, Section 8(a)(3) of the Act, in turn, forbids employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"

I find and conclude on the credited evidence of record recited above that Respondent Employer discharged employees Carland and McClellan during December 1994 because of their union and protected concerted activities. Thus, during January 1994, Carland and McClellan went to Service Manager Pollack asking for better wages or benefits or they "would organize a Union." Pollack became angered and told the employees: "Fuck you Do what you have to do." Carland and McClellan then contacted the Union and an organizational campaign started in which they participated. A representation petition was filed and a Board-conducted representation election was scheduled for March 18, 1994. Management opposed union representation of its employees. Shortly before the election, Pollack stated to Carland in Pollack's office:

He [Pollack] wanted to know who was all involved He asked me who was responsible and [said] if he found out he was going to fire them. He wanted to

know if [employee] Tom Dizotell was involved
I [Carland] said no, he is not.³

Carland later served as an “observer” at the March 18 Board-conducted election. The Union lost the election by a vote of 19 to 22. And, Pollack then admonished McClellan that Carland “was going to be fired because he [Carland] had lied to him [Pollack] about his involvement in the Union and that he had sat in on the vote as an observer.”

McClellan subsequently broke his foot at work and went on disability leave. During December 1994, when his doctor “released” him to return to work, he telephoned Pollack. Pollack then summarily apprised McClellan that he was fired for “tardiness” and “attendance.” Management admittedly had no absenteeism policy or attendance policy or discipline policy. The cited attendance records of McClellan go back a number of years and demonstrate at most that apparently absenteeism and tardiness had been tolerated over the many years. The Employer produced an early 1991 “warning” to McClellan for “tardiness” and a disputed June 1994 “warning” for “tardiness” issued after the representation election which McClellan credibly denied receiving or signing. I note in this respect that Management acknowledged that other attendance records purportedly showing McClellan’s signature were in fact not signed by the employee. Later, when another employer telephoned Pollack checking on McClellan’s references, Pollack made clear that Management considered McClellan “trouble” because of his union organizing activities and had let him go for that reason.

On this record, I reject as incredible and pretextual Management’s belated and essentially unsubstantiated nondiscriminatory reasons asserted for the firing of McClellan. I find and conclude instead that the real and only reason was the employee’s union and protected concerted activities. Further, the credible evidence of record also makes clear that McClellan would not have been discharged at this time for lawful nondiscriminatory reasons.

As for Carland, following the representation election, about May 20, 1994, he broke his collar bone and went on sick leave. He returned to work on September 9, 1994. Then,

³On cross-examination, Carland explained that Pollack already “knew that I was talking for the mechanics” but he “did not know that I was behind it.” And, as noted, Pollack testified that Carland had told him before the election that “he didn’t want anything to with the Union.”

suddenly during December, shortly after McClellan’s firing, he too was fired. He was assertedly fired as a part an economy move that was under way for some time and apparently only affected him. I similarly reject as incredible and pretextual this belated and essentially unsubstantiated nondiscriminatory reason for his sudden firing. Indeed, Management later ran a “want ad” although it would not consider this employee. He too was fired because of his union and protected concerted activities and would not have been fired for lawful nondiscriminatory reasons as asserted.

CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce as alleged, and the Union is a labor organization as alleged.
2. Respondent Employer violated Section 8(a)(1) and (3) of the Act by discharging employees Carland and McClellan because of their union and protected concerted activities, as alleged.
3. The unfair labor practices affect commerce as alleged.

REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in such conduct or like and related conduct and to post the attached notice. Affirmatively, Respondent Employer will be directed to offer the discriminatorily discharged employees reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent Employer will also be directed to preserve and make available to the Board or its agents upon request all payroll records and reports and all other records necessary to determine backpay and compliance under the terms of this decision and order. And, Respondent Employer will be directed to expunge from its files any references to the above discriminatory discharges and notify the discriminatees in writing that this has been done and that evidence of these discriminatory actions will not be used as a basis for future personnel action against them, in accordance with *Sterling Sugars*, 261 NLRB 472 (1982).

[Recommended Order omitted from publication.]