

**Birmingham Chrysler Plymouth Jeep Eagle, Inc.<sup>1</sup> and  
Thomas William Oberly.** Case 7-CA-39582

September 30, 1998

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On May 19, 1998, Administrative Law Judge Robert T. Wallace issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record<sup>2</sup> in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>3</sup> and conclusions<sup>4</sup> and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

*John S. Ferrer, Esq.*, for the General Counsel.

*John A. Entenman and William Thacker, Esqs. (Dykema Gossett)*, of Detroit, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Detroit, Michigan, on March 11 and 12, 1998. The charge was filed on March 11, 1997,<sup>1</sup> and the complaint issued on October 29.

At issue is whether Respondent discharged an employee for engaging in protected concerted activity in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties,<sup>2</sup> I make the following.

<sup>1</sup> The Respondent's name appears as amended at the hearing.

<sup>2</sup> We do not rely on any nonrecord material contained in the exceptions or briefs.

<sup>3</sup> The Charging Party 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.

<sup>4</sup> Member Liebman would find that, even assuming *arguendo* that employee William Thomas Oberly engaged in protected concerted and union activity, and that the General Counsel proved such activity was a motivating factor in his discharge, nevertheless, the Respondent established that it would have discharged Oberly even in the absence of his protected concerted and union activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>1</sup> All dates are in 1997 unless otherwise indicated by context.

<sup>2</sup> By stipulation dated April 10, 1998, the parties agree to and submit a tendered substitute for R. Exh. 8. The stipulation is accepted and the substitute is received in evidence. Respondent also offers an unopposed motion, dated April 15, 1998, to correct the transcript, to add tendered missing pages to G.C. Exh. 7 and R. Exh. 2 and to remove from the

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, has its office and place of business in Troy, Michigan, where it sells and services new and used cars and derives over a million dollars annual revenues therefrom. It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

William Oberly has been a used car salesman for Respondent since December 1994.

Between April and September 1, 1996, Respondent made several changes in its pay plan, the effect of which was to increase the number of cars that had to be sold before sales personnel began to be paid at bonus levels. Those changes provoked discontent, and Oberly on a number of occasions presented complaints to management on their behalf.<sup>3</sup> Receiving no satisfaction, Oberly set up and invited sales personnel to attend two after-hours meetings at which he urged them to support representation by Local 283, International Brotherhood of Teamsters, AFL-CIO. For many years that Union has represented Respondent's mechanics and service employees.

Following those meetings the Union, on September 5, 1996, requested recognition from Respondent; and on the next day it filed a petition with the Board for a representation election.

Beginning about the second week of September, Respondent held antiunion meetings during weekly sales meetings. Generally, these were attended by Owner Richard Mealey and all supervisors, including General Sales Manager Gary Eisele and used car Manager Steve Miller.

At a preelection hearing in late September, Oberly testified on behalf of the Union and sat at the union table with a Teamster official. No other employee was present. A Board supervised election was held on Friday, November 15, and Oberly served as an union observer. The Union lost six votes to seven. No unfair labor practice charges were filed in connection with the election and the result became final. The evidence amply demonstrates, and I find, that Respondent was well aware of Oberly's leadership role both in presenting employee concerns about wages and in supporting unionization.

On the following Monday morning Oberly handed Miller a handwritten note and left the premises. The note stated:

I Tom Oberly am taking a medical leave of absence  
Today . . . . I will have my doctor notify you of the  
medical reasons.

On Monday, December 9 (after a 20-day absence), he returned to the facility, handed General Manager Glen Hojnacki a "return to work approval" signed by the Brighton Hospital's medical director, and resumed his job. The form did not contain, and he did not supply, any reason for his hospitalization.

record two withdrawn exhibits (G.C. Exhs. 14 & 15). The motion is granted and received in evidence as R. Exh. 9. In addition, the General Counsel's brief (see fn. 5) contains a motion to correct the transcript. The motion is unopposed and is granted.

<sup>3</sup> On August 11 Oberly filed a wage complaint with the Wage and Hour Division of Michigan's Department of Consumer and Industry Services because, in his view, the dealership was "stealing money" from him. He admittedly filed the complaint on his own behalf.

Sales personnel at Respondent's dealership are given a "target" of 12 car sales per month, new or used. From January through September 1996 Oberly sold an average of 11 cars per month. In October he sold seven and in November, prior to his leave of absence, he sold one and received oral counseling from Miller. In December he again sold only one car. In mid-month he was again orally admonished by Miller, and on January 3 Miller gave him a written warning containing a note that "12 CARS MUST BE SOLD IN JANUARY!"<sup>4</sup>

At the end of January Oberly had sold three cars.<sup>5</sup> On February 5 when he received his sales tally (washout) sheet<sup>6</sup> reflecting that fact and showing him as owing the company \$555 for weekly advances, he wrote in large letters on the bottom:

I DISAGREE WITH HOW MUCH WE PAY FOR SERVICE WORK  
AND THIS \$850.00 PAC<sup>7</sup> WHICH IS RIDICULOUS AS FAR IS  
[SIC] THAT GOES THE WHOLE PAY PLAS [SIC] IS  
RIDICULOUS

He then gave the sheet to Miller without oral comment.

Having previously conferred with Eisele and obtained his approval, Miller called Oberly to his office on Monday, February 10, and, with Eisele present, gave him a separation notice. Therein Miller, after citing the prior written warning, gave as reasons for the discharge lack of production and insubordination arising from Oberly's written comment on the washout sheet. Miller explains that the comment was insubordinate because the washout sheet was an inappropriate vehicle for registering disagreement about "service work or anything else."

On reading the document Oberly commented "This is bullshit," and Eisele replied, "Tom, you know its not us." Oberly left the premises after writing on in the space reserved for employee comments:

Richard Mealey is harassing me because of my union activity, labor dispute<sup>8</sup> and my disability of alcoholism.

<sup>4</sup> On receiving the warning Oberly commented "This is bullshit." Miller replied that he had to issue it because Owner Richard Mealey "was on his back."

<sup>5</sup> Oberly testified that he sold a fourth car in January but "gave the sale" to another salesperson so that the latter could make the bonus level. Assuming that occurred, the transaction was performed sub rosa, was intended to deceive the dealership, and in fact did so.

<sup>6</sup> Pursuant to company practice sales personnel are required to review monthly washout sheets, note any errors, and sign and return it to supervisors.

<sup>7</sup> "PAC" is a fixed amount the dealership routinely subtracts from the sale price of a car prior to determination of an employees commission.

<sup>8</sup> Oberly testified that the "labor dispute" was his filing the wage and hour complaint with the State of Michigan.

He had sold four cars during the first 10 days of February.

I find no violation cognizable under the Act.

While Oberly's complaint on the washout sheet evinces concern about pay, it patently was not made in a representational capacity and hence is not protected. In this respect, viewing the comment as made in the context of his prior concerted/union activities is strained. Those activities appear on this record to have completely ceased 3 months earlier when the Union lost the election.

Even assuming arguendo that it was concerted, I find that the primary and determinative reason for the discharge was the dramatic decline in his car sales. He went from selling an average of 11 cars a month between January 1 and September 30 to selling 7 in October, 1 each in November and December, 3 in January, and another 4 by February 10 when he was discharged.

There is no evidence of antiunion animus that might have tainted the discharge decision. In this regard, opposition to unionization is insufficient in itself to establish animus. Indeed, Respondent's mechanics and service employees have been represented by a union for many years, apparently without problems. The circumstance that Supervisors Miller and Eisele disclaimed personal responsibility and intimated the decision was that of Owner Richard Mealey lacks significance. They appear simply to have using the age-old ploy of passing the buck to avoid jeopardizing past friendships. And even if Mealey was the moving force, as Owner he had more than a passing interest in weeding out low producers.

Further, the decision appears not to have been discriminatory. Respondent has a high turnover in sales personnel and a history of discharging low producers, including another used car salesperson in September 1996 and a new car vendor on January 3. For the period November 1 to February 10, Oberly was by far the low producer of the three used car salesmen employed by Respondent, having sold only 9 cars as compared with 29 and 30, respectively, for the other two.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

#### ORDER

The complaint is dismissed.

<sup>9</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.