Webb's Industrial Plant Service, Inc. *and* **Paul Huesman** *and* **Victor Van Hoose.** Cases 9-CA-15105-1 and 9-CA-15105-2

March 15, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On September 30, 1981, Administrative Law Judge Thomas E. Bracken issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Webb's Industrial Plant Service, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to the Administrative Law Judge's failure to strike Supervisor Jerry Smart's testimony. We find no merit in Respondent's exceptions for the reasons given by the Administrative Law Judge at the hearing.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In adopting the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(1) of the Act by threatening to discharge Van Hoose for engaging in union activity, we do not rely on the Administrative Law Judge's citation to *Conagra, Inc.*, 248 NLRB 609 (1980), and *Ethyl Corporation*, 231 NLRB 431 (1977). Instead, we rely on those cases where we have found a violation of Sec. 8(a)(1) of the Act when threats are made to an employee by a "friendly" supervisor. See, e.g., *Jax Mold & Machine, Inc.*, 255 NLRB 942 (1981); *Mayfield's Dairy Farms, Inc.*, 225 NLRB 1017, 1019 (1976).

We also correct the following inadvertent error in the Administrative Law Judge's Decision: at sec. III,F,3, par. 5, Webb learned about Van Hoose's dissatisfaction concerning an upcoming sale on March 11, not May 11.

DECISION

STATEMENT OF THE CASE

THOMAS E. BRACKEN, Administrative Law Judge: These cases were heard at Cincinnati, Ohio, on November 26 and December 9 and 10, 1980.[1] The charges were filed by the Charging Parties on March 24 and 28, respectively. A complaint was issued on May 8 for Case 9-CA-15105-1, and an order consolidating complaint was issued on June 10, 1980. The primary issues are whether the Company, the Respondent herein, (a) unlawfully threatened an employee in violation of Section 8(a)(1) of the Act; (b) unlawfully informed an employee that he was being discharged because of his union activities; and (c) discriminatorily discharged two union supporters, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended.

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

FINDINGS OF FACT

I. JURISDICTION

The Company, an Ohio corporation, is engaged in the retail sale of industrial safety shoes to various manufacturing concerns in the greater Cincinnati area and, during the past 12 months, has derived gross revenues in excess of $500,000, and in the same period has received at its facility goods valued in excess of $50,000 which were shipped from points outside the State of Ohio. The Company admits, and I find, that it is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

In July 1977 Kyle Webb, Jr., took over the business set forth in this case as its president, sole owner, and chief operating officer. The Company sold industrial safety shoes at both a store in Cincinnati, and through the deployment of three tractor-trailers, referred to as shoemobiles. Each shoemobile was operated by a driver-salesman who would be dispatched each day to various industrial plants. At the industrial plant the driver would park his unit and then, as a salesman, conduct shoe fitting in the trailer. Most, if not all, of the visits were prearranged by representatives of Respondent with representatives of the companies, whose employees were to be offered the opportunity to buy the safety shoes at their

[1] All dates are in 1980 unless otherwise indicated.

jobsite. The trailers were loaded at the store chiefly by store employees, most of whom were part-time workers.

At the times material to the case, the three driver-salesmen were Paul Huesman, who had been hired in October 1977, Victor Van Hoose in September 1978, and Rudy Crandall in early 1979. Jerry B. Smart, who had been hired in September 1978 as the dispatcher and scheduler, was the supervisor of the drivers.[2] The store manager was Bill Ogdin, who had been hired prior to Smart, but who was subordinate to him. According to Webb, Ogdin was a supervisor with the power to fire.

B. *Commencement of Union Activity*

As testified to credibly by Huesman,[3] in early 1979 he and the other two driver-salesmen, Van Hoose and Crandall, began to discuss with each other, and with Store Manager Ogdin, job problems they were encountering. The drivers' chief complaint was about the stock they carried on their trailers, as they regarded it as insufficient to make the sales they believed they could make, if they had a sufficient supply in their trailers.[4] In addition, these employees discussed rumored changes that were to occur in their fringe benefits as set forth in the employees' booklet. These conversations occurred in the trailers of the drivers, as well as in the store.

As credibly testified to by Van Hoose, during one of their complaint sessions in early 1979 Huesman stated that things had gotten so bad that they needed union representation. Prior to coming to work for Respondent Huesman had been a member of Sheet Metal Workers Local 141 for 25 years.[5] Huesman then specifically mentioned the Teamsters Union as a prospective representative, but further advised that "he was going to check a few unions out to see which one would really have us because of our size." The record does not disclose that Huesman contacted any unions at this time.

C. *The Events of June 30, 1979*

The record does show that on June 30, 1979, the matter of union representation surfaced at a regularly scheduled Saturday meeting at the Company's office.

Since approximately March 1978 Respondent had been holding regularly scheduled meetings every Saturday morning for its employees. At these meetings written schedules for the coming week were given to the driver-salesmen, instructions were issued on special type shoes, questions were answered, and the weekly paychecks were distributed to the drivers. The employees were paid for the time spent at the meetings.

On the morning of Saturday, June 30, 1979, Huesman came to the store prior to the normal meeting time, and met with Store Manager Bill Ogdin. Ogdin informed Huesman that he had discussed the matter of securing a union with Van Hoose and Crandall prior to Huesman's arrival. Huesman then advised Ogdin that these two drivers would have to tell him that they wanted a union and, if they did, then he would be their "spokesman to ask Kyle for a union." When Van Hoose and Crandall arrived, Huesman asked each employee if he wanted a union, and both replied that they did.

These employees then went upstairs, and Smart commenced their regular meeting, passing out the weekly schedules and discussing shoes and their problems with the stock on their trucks. Huesman then left the meeting room and walked into Webb's adjacent office.

Webb testified that Huesman walked into his office "complaining about the inventory" and that Huesman became "more loud, more vocal," finally stating that "we need a union here." According to Smart, Webb came out of his office, and as he spoke his voice was "heated and angry." As Webb admitted, he went into the meeting room and took a "straw vote" directly asking each of the employees present, except Smart, if he wanted a union. Webb admitted that Ogdin and Huesman stated that they wanted a union, and that Crandall said he did not. As to Van Hoose, Webb testified that he answered, "I don't want a Union, I want a representative."[6] After the poll was over Webb testified that he told the employees in a heated voice "to go ahead and pursue it," and the meeting then broke up. Smart credibly testified that, just before the meeting broke up, Webb told the drivers, "You will not have it as good, you will not make as much money with the Union as what you're making now."

Shortly after this meeting Webb conducted two other meetings. He first met with Smart, Mrs. Webb, and Van Hoose, for the purpose of learning, as he testified, what Van Hoose meant by a paid representative. He then told Van Hoose that he could see no difference between a union and a paid representative, and that Smart was his representative and could present his grievances. He then concluded by telling Van Hoose that he was giving him a raise.[7] Webb then met with Smart and Crandall, telling Crandall that he was doing a good job, and he was giving him a raise.[8]

Webb admitted that he gave raises to Van Hoose and Crandall, "to make things better and to make them more willing not to vote in a union." He further admitted that he did not give a raise to Huesman for several reasons, but the main reason was that "he was the one that instigated—or, in my opinion instigated the union talks," and he did not want a union in his company.

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[2] Respondent, in its answer to Case 9-CA-15105-1, denies that Smart was a supervisor under the Act, but in an amended answer, and in its answer to the consolidated complaint, admits that Smart was a statutory supervisor. The record also clearly discloses that he was a supervisor under the Act.

[3] Much of the testimony by all witnesses was uncontradicted and is for the most part credited. In sec. D below I have set forth credibility resolutions in detail.

[4] The drivers were paid a weekly base pay, and also received a commission on each pair of shoes sold.

[5] Huesman's membership in the union was known by Webb since "right after" he had been hired. Webb also knew that Huesman was a trustee of that union during his employment with Respondent, and had given him time off to attend annual union conventions.

[6] Van Hoose testified that when Webb first pointed his finger at him he stuttered and stammered, and did tell him that he wanted representation, but when Webb again pointed his finger at him and said, "Yes or No," he replied, "Yes." Smart corroborated Van Hoose's testimony that he told Webb he wanted a union.

[7] Van Hoose did receive an increase of $10 per week effective the following payroll of July 6, 1979.

[8] Crandall also received a $10-a-week raise at the same pay period as Van Hoose.

That afternoon Webb told Smart that the Saturday meetings were canceled, and that the drivers were no longer required to come in on Saturday. The president admitted that one of his reasons was to keep employees apart so that they would not be discussing a union.

Smart testified that, at this same conference, Webb told him that he wanted Huesman out of the Company so that there would be no more talk about unions. Smart further testified that Webb directed him to give Huesman "small jobs from that time forward, more or less force him into quitting so that he would have practically no income as far as commissions." Webb denied that he told Smart to schedule Huesman with small jobs.

D. *Credibility*

Smart was the most impressive witness at the hearing, and I credit his testimony including the fact that Webb told him to give Huesman small jobs so that he would quit.[9] He answered all questions directly and in rapid-fire order without any hesitation or equivocation, even when subjected to searching and grueling cross-examination. Also, further supporting his credibility is the fact that he testified against his employer's interest while still in his employ.

I have also found Van Hoose to be a credible witness, as he impressed me as a sincere, minimally educated, honest truckdriver-salesman, who conscientiously was seeking to answer the questions put to him straightforwardly and without equivocation. Huesman was a garrulous, rambling witness, but his testimony was essentially uncontradicted, and as such is credited.

Webb was an articulate, smooth witness, but he did not impress me as a witness in whose testimony I could have confidence. Rather, I received the strong impression that he was artfully trying to furnish answers that helped his cause, rather than trying to state the facts as he remembered them. I also find that the weight of the evidence on the record as a whole is clearly against the denials of the president.

E. *The November 1979 Threat*

Subsequent to the June 30, 1979, meeting, Huesman did contact the Teamsters and Retail Clerks Unions as to their possible representation of Respondent's employees. Little interest was expressed by these unions in such a small unit, and Huesman let the matter drop.

The record discloses that the next time Van Hoose talked about union representation was in November 1979, shortly before Thanksgiving. Van Hoose was in his trailer outside the Cincinnati Milacron plant when Smart approached him. Van Hoose told his supervisor that the stock situation was going downhill, that he was losing sales and customers, and that maybe the employees should get a union in so as to relieve the pressure. Smart recalled that Van Hoose stated that he wondered why the union was dropped, that things were getting so bad, he wanted a union brought into the Company. At this point Smart admitted telling him, "I said that because of Mr. Webb's change in temperament and his attitude, that anybody that even talked about a union would probably be fired." Van Hoose made no reply.

Respondent argues in its brief that this conversation was not coercive due to the close friendship which existed between Van Hoose and Smart.[10] As stated in *Conagra, Inc.*, 248 NLRB 609 (1980), "It is no defense that a violation is committed in a friendly or joking manner." It is well-established Board and court law that, in determining whether an employer's conduct amounts to interference, restraint, or coercion within the meaning of Section 8(a)(1), the test is not the employer's intent or motive but whether the conduct is reasonably calculated or tends to interfere with the full exercise of the rights guaranteed by the Act. I find that the supervisor's remark was coercive and violated Section 8(a)(1). *Ethyl Corporation*, 231 NLRB 431 (1977).

F. *The Discharges of Van Hoose and Huesman*

1. Van Hoose

On or about Wednesday, March 12, Van Hoose had his shoemobile parked at the plant of Cincinnati Milacron Company. Smart came to the trailer and discussed with him how a forthcoming job would be handled at the plant of a large-volume, once-a-year customer, Formica. This sales program was to commence at 10 or 11 p.m. on Monday, March 17, for the convenience of that company's night-shift employees. Smart informed Van Hoose that this year he would sell current style shoes to men and women out of his trailer, and that a second driver, Crandall, would sell out of his trailer discontinued men's and women's shoes, and that all commissions would be divided equally between the two drivers. Van Hoose protested strongly at this arrangement, claiming that again he would do the larger share of the work, and that it was a violation of an agreement made by the parties in the previous year. Van Hoose described the agreement as set forth below.

In the previous March, for a 2-week period, Respondent did have a large volume sale at Formica, using two shoemobiles. At this time, Crandall was a new driver-salesman, and Van Hoose agreed with him and Smart to split the commissions evenly with Crandall, while at the same time Van Hoose would service Formica's 900 male employees, while Crandall serviced 300 female employees. However, in the following year, Van Hoose was to wait on the women, with Crandall handling the men, with the commissions again divided equally.[11] Smart tes-

[9] In crediting Smart I have considered that he testified on direct that he had been convicted of a crime. However, he further testified that he had told Webb of this matter when he was hired, and this testimony was not challenged in any manner by Respondent.

[10] The record shows that Van Hoose and Smart did not know each other until Van Hoose's employment in September 1978. Smart testified that he knew Van Hoose as an employee and as a friend, and had gone out socially with him two or three times in a year. Van Hoose testified that they were close personal friends outside of work; they drank coffee together, but had no regular social activity.

[11] Webb agreed that this was the agreement made in 1979, but testified that he changed the procedure because the price of shoes went up so significantly in the succeeding year, while his basic contract price with Formica remained the same. He therefore had to use discontinued shoes along with the current stock.

tified that Webb had told him that morning how the Formica account was to be handled, and he had conveyed the procedure to Van Hoose at Cincinnati Milacron. He also testified that Van Hoose brought up unions after he had been informed of the new procedure at Formica, telling him that the drivers would not be having these problems if they had a union, and he was going to contact a union. Smart then told Van Hoose that he was sorry he felt that way, and he hoped to meet with Webb and get Van Hoose's grievance straightened out.[12]

On the following day, Thursday, March 13, Smart told Van Hoose over the telephone that Webb had refused to discuss the Formica job with the driver-salesman, and that the job would be worked as previously set up. Van Hoose then told his supervisor that, if the employees had a union, this would not have happened to him and he would not be faced with this problem. Upon Van Hoose telling Smart that he would like to talk to an attorney but did not know any, Smart informed him that he knew a young attorney, and set up an appointment for that evening.[13]

That evening Van Hoose met with Smart and the attorney at Smart's apartment, where Van Hoose explained the 1979 agreement for Formica, and the changes that had been made for the 1980 selling. The attorney advised Van Hoose that he had a binding oral contract but no action could be taken until the commencement of the sale at Formica.

On Friday Smart brought some stock to Van Hoose on the Cincinnati Milacron site. The driver-salesman then told Smart to tell Webb he had consulted an attorney who thought Van Hoose had a binding contract, and also that he was going to a union. Webb had gone to Chicago on that day, so Smart was unable to deliver this message.

On Saturday, March 15, Van Hoose and Smart talked over the telephone from their residences. The driver-salesman called to learn if anything had changed, and Smart informed him that it had not, and that he thought Webb was considering dismissing him.

Webb testified that on Monday morning, March 17, he was in the store when Smart arrived about 8:30 a.m. Van Hoose was not there and Webb admitted that he was not scheduled to work until late that evening when the sale at Formica started for the night-shift employees. Webb was bothered by Van Hoose's absence as he testified that, when there is a big fitting, although not required, the driver would come in to get ready for the big fitting. Webb then asked Smart, "What the hell is going on with Mr. Van Hoose?" Smart then told him that Van Hoose had consulted a lawyer and was going to sue him after the first shoe was sold at Formica that evening.

Webb then called Van Hoose's residence to learn from Mrs. Van Hoose that her husband was not home. Van Hoose did return the call and, at Webb's request, arrived at the office between 11 a.m. and noon, with his wife. Van Hoose testified that Webb said, "Sharon, go downstairs and let Vic and I talk." Van Hoose then told Webb that he wanted his wife present. At this point Webb replied, "Okay. In that case you are fired." Van Hoose was not told why he was fired and, when he picked up his pay about an hour later, and asked why he was fired, Webb told him, "I can't give you a reason." Webb did agree with Van Hoose's statement that he had been a good employee.

Webb denied that he discharged Van Hoose because of his union activities and sympathies, and, when asked on direct examination why he did discharge him, replied as follows:

> Mr. Van Hoose was discharged for insubordination. I called him into my office to have a meeting with him. He brought his wife in, I asked his wife to leave, he told me that she—he wanted her there, that she was staying, that he wanted her there for—as a witness, and I said, "I have no other choice than to discharge you."

Webb further testified that, when Van Hoose came to pick up his paycheck, he told him that if he had told his wife to leave and had discussed with him what he had to discuss, he probably would not have fired the driver-salesman.

On cross-examination Webb testified that he had decided to fire Van Hoose as of the end of his conversation with Smart that morning, as a result of learning that Van Hoose was going to sue him.

2. Huesman

Following the June 30, 1979, meeting, Huesman found that he was having more trouble with his stock and he kept telling Webb and Smart that he needed more stock. He also found that he was being assigned to smaller accounts, while several larger ones like the Dap Company and Durkee Food Company were taken away from him.[14] He also had trouble in securing his schedule. He would sometimes receive his schedule in the middle of the week and, even so, find that it was changed several times thereafter.[15] The Ford Company remained his principal account although his visits to this customer went from 3 days to 2 days a period. He particularly believed

[12] Webb testified that, during the 2-week period before the Formica job, Smart was helping Van Hoose at Cincinnati Milacron. At some point Smart had come to the president and informed him that Van Hoose was dissatisfied with the arrangement of the forthcoming Formica sale, since he had done 70 percent of the work the year before.

[13] Smart testified that he told Webb, on that same day, that Van Hoose was going to see an attorney, and probably also go to the Union. Webb's reply was, "You're either for me or against me. And if you're against me I'll eliminate the problem." Webb then refused to meet with Van Hoose. Webb denied that it was ever mentioned to him that Van Hoose was going to consult an attorney. I credit Smart's testimony.

[14] Smart admitted that in accordance with Webb's instructions he cut Huesman's schedule, and gave him small jobs, and on occasion gave him a job that could be handled in short hours, but which involved a much longer than usual drive to the jobsite. Webb testified that he did not reduce Huesman's earning potential after the meeting. I credit Smart. Huesman's earnings are reviewed in sec. F,3, below, and the Company's payroll records disclose that his commissions declined substantially after the June 30, 1979, meeting.

[15] In the payroll period of July 27, 1979, Huesman was hospitalized with appendicitis, and was off work for 7 weeks. During this period he was voluntarily paid his base pay of $180 per week by the Company for the first 3 weeks, and for the next 4 weeks he received $100 each week from the Company's insurance plan, to which the Company added $80 a week.

that he did not have the right shoes to sell to Ford employees. Webb attributed the decline in the Ford sales to layoff of its employees. Huesman would report these layoffs to him.

On March 20 at 6 a.m. Huesman drove the Company's converted pickup truck to a jobsite, where the trailer had been previously spotted by some other employee.[16] He had trouble with a shortage of shoes, particularly a popular shoe that many employees asked for. After several hours of selling, he returned to the store to pick up stock. "Tim," the new manager,[17] told Huesman that he was going to stock Huesman's trailer with certain type shoes. Huesman objected to these shoes being put on the trailer, saying that they were too many of the same sizes. When the store manager insisted he had to do it, Huesman told him to go ahead, but he would talk to Webb about it. Huesman then returned to that day's jobsite, and sold shoes until about 5 p.m.

That evening Huesman, from his home, called Webb, who was in his office. Huesman described the conversation as follows:

> I told him that Tim had a bunch of shoes there that I didn't feel should go on the truck and that they wouldn't have helped the situation that I was involved in on the jobs to sell shoes, and that I didn't want them on the truck, and if he put them on the truck I was going to go into the Ford Motor Company and tell them what kind of stock he was putting on the truck and then I was going to go to the union.[18]
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> Q. What did Mr. Webb say?
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> A. He said, "You do that, you're fired."
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> Q. Did he say anything else?
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> A. I think he said, "If you do that, you're fired. Bring the truck in tonight, and you're fired." I said, "If you're going to fire me you're going to fire me on the job in the morning. If I came in now I'd probably punch you in the nose."

According to Webb, the following events took place that evening:

> A. What happened is, is my wife gave me the background on what had happened, I took the phone, and Paul said that he was not going to put on the 436's on his truck, that there wasn't enough sizes, that there wasn't a complete run, and he would not take those out there. And if they were on his truck, he would go to Ford's management and the union and tell them about the inventory.
>
> Q. And did you respond to that?
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> A. I did. I said—
>
> Q. What—
>
> A. I said, "If you do that, I'd have to fire you."
>
> Q. What was Mr. Huesman's response, if any?
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> A. Mr. Huesman said, "If you fire me, I'll come out there and beat the s— out of you, then go to Ford's management, and then to the union."
>
> Q. Did you respond?
>
> A. I did. I said that, "If you would do that, then I would have you arrested and prosecute you to the full extent of the law."

Huesman then hung up and Webb discussed the just-completed conversation with his wife, who was working in the office that evening. His wife reminded Webb of Huesman's past physical violence, consisting of episodes with Smart and with Huesman's son, and recommended that he fire Huesman. Webb then called Huesman back and told him he was fired. Huesman's reply was, "You can't fire me now. This is my time. You have to fire me on Company time."

The following morning Webb and Smart drove out to the jobsite where Huesman was scheduled to work. Not finding him there, they drove to the Novamont jobsite.[19] At the Novamont site Webb asked Huesman to get in the car, and all three drove back to the office. Webb admits that Huesman was courteous, and they talked about nonbusiness affairs as they drove in. When they arrived at the office Webb discharged Huesman.

Huesman testified that, when they arrived at the Company's office and he was told that he was fired, he asked for a letter saying why he was fired, to tell him what he did wrong. Webb advised Huesman that he would give him a letter. On the following Monday Huesman went in for his pay, but he was not told why he was fired, nor does the record show that he was ever given a letter setting forth the reason for his discharge.

Respondent asserts in its brief that Huesman's income, as demonstrated by the payroll records, did not suffer after the June 30, 1979, meeting. An examination of Huesman's payroll record does not bear this out. For the 21 weeks prior to the tumultuous meeting of June 30, 1979, Huesman had average commissions of $52.52 a week. For the 30 weeks he worked after July 6, 1979, until his discharge, he averaged $41.65 commissions per week, an average loss of $10.87 per week, which constitutes a 20.7-percent reduction in his commissions. It is to be noted that Van Hoose's average commissions in the same periods, that is, before June 30 and after, averaged $87.15 and $83.37 per week, a percentage difference of only 3.8 percent.[20] Thus, it is evident that Huesman's

[16] Huesman thought that this customer was either Ralston-Purina Company or Novamont, whereas Webb testified that it was Novamont. No records were produced, and it is unnecessary to resolve this conflict. The record is clear that on Monday, March 24, Huesman was scheduled to go to the Ford plant to sell shoes.

[17] The date of Ogdin's leaving Respondent's employ and the reason therefor, are not disclosed in the record.

[18] On cross-examination Huesman was asked what union he meant when he told Webb that he was going to Ford and the union. He replied the "Teamsters," who were located right across from the Ford plant. On being shown his pretrial affidavit, he stated that he meant the UAW and the Teamsters. This portion of his affidavit was read into the record as follows: "I meant I would go to the UAW and tell them their members were not being serviced well at Ford. I also meant I would try to join the Union to get the aggravation off of my job."

[19] Huesman testified that he drove the pickup truck to the Ralston-Purina jobsite the next morning, knowing that his job assignment for the day was at Signode. However, he had to couple up the trailer to his converted pickup truck in order to pull the trailer to the new jobsite. The dolly wheels were in mud, and he had trouble winding them up, which delayed him in going to his new assignment.

[20] No comparison can be made with Crandall's payroll records, as he sold discontinued shoes on Sundays at flea markets, and had a special arrangement with Webb about receiving a percentage of the sales.

commissions did suffer substantially after June 30, 1979, and that Webb's instructions to Smart to give him small jobs were being carried out.

3. Analysis and conclusions

The central issue presented by this proceeding is whether Respondent discharged its employees Victor Van Hoose and Paul Huesman because of their participation in union activities, and thereby violated Section 8(a)(1) and (3) of the Act. In applying the teachings of *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), I find that the General Counsel has sustained his burden of establishing a *prima facie* case that Van Hoose's and Huesman's union activities motivated Respondent's decision to discharge them.

The evidence clearly established that Van Hoose and Huesman were the two union activists at Respondent's place of business. Webb became acutely aware of this on June 30, 1979, when Huesman unceremoniously entered the president's office loudly complaining about the stock, and finally telling the president that the employees needed a union, obviously to handle their grievances and straighten out their problems. Webb's reaction was swift and angry, as he immediately and face to face questioned the employees if they wanted a union to represent them. When two of the three driver-salesmen told him that they wanted a union, he heatedly warned them that with a union their working conditions would not be as good as they were without a union.

Then, after the formal meeting was over he proceeded at once to use the carrot and the stick to counterattack the union movement and nip it in the bud. He quickly gave Van Hoose and Crandall wage increases, and then instructed Smart to give Huesman, who "instigated the union talks," small jobs so as to eventually force him to quit. Webb also scuttled the Saturday morning meeting, thereby shortening their hours of work and making their working conditions more favorable, as they no longer had to come in on Saturdays. It also met Webb's admitted objective of keeping the employees apart so that they would have less of an opportunity to discuss union representation.

While it is true, as Respondent states in its brief, that these events occurred almost 9 months before the two driver-salesmen were discharged, this time lap is not so remote so as to extinguish Webb's antiunionism, and these events may be considered as background to shed light on Respondent's motivation in the instant case. *Tupco, Division of Dart Industries*, 216 NLRB 1046 (1975).

Thus, the evidence establishes that Van Hoose and Huesman were the leading union adherents; they were vocal critics of Respondent's shoe supply and the stocking of their trailers, which facts were well known by Webb. Then, in the week of May 11, Webb learned that Van Hoose was very dissatisfied about the way the shoes were to be handled at the Formica sale. He also knew from Smart that Van Hoose was going to see an attorney and that he was again talking about unions. On Monday, March 17, Webb found out that Van Hoose had actually gone to an attorney over what he considered a grievance against the Company. Then, on the evening of March 20, Webb admitted that Huesman told him that if certain shoes were put on his truck he would go to the union. While the record does not set forth what union Huesman was referring to, the word itself was a red flag to Webb, as seen by his precipitate conduct on June 30, 1979, when he canceled Saturday morning meetings, gave two drivers a raise, deliberately did not give a raise to Huesman because he was the one who instigated the talk about a union, and told Smart to make it rough for him so as to make him quit.

The record is uncontested that Van Hoose was a good driver-salesman. Respondent's Exhibit 6, the payroll records of Van Hoose for the period of February 6, 1979, through March 17, 1980, show that he received a raise of $15 a week to his base pay on March 4, 1979, and then received the $10 raise on June 30, 1979.

Webb's shifting reasons for discharging Van Hoose do not stand scrutiny. On the morning of March 21, Van Hoose's request that his wife be allowed to remain in the office was naive, but not so egregious as to warrant an immediate discharge, without any warning as to his position, and its possible consequences. The lack of warning and the abruptness of discharge have long been recognized as persuasive evidence as to the motivation of an employer. *N.L.R.B.* v. *Midtown Service Co., Inc.*, 425 F.2d 665 (2d Cir. 1970); *N.L.R.B.* v. *Montgomery Ward & Co., Inc.*, 242 F.2d 497, 502 (2d Cir. 1957), cert. denied 355 U.S. 829.

Accordingly, I find that Respondent's knowledge of these facts and Webb's fear that Van Hoose and Huesman would go to a union for representation were factors in Webb's decisions to discharge them. I conclude therefore that the General Counsel has met his burden of proof under *Wright Line*.

I turn now to the reasons offered by Respondent to rebut the General Counsel's case. On direct examination Webb testified flatly that he discharged Van Hoose for insubordination, the insubordination being Van Hoose's refusal to tell his wife to leave the room.[21] Then, on cross-examination, the president contradicted himself by stating that he was going to discharge Van Hoose because he had learned the driver-salesman was going to sue him. These inconsistent and shifting reasons, as well as the record as a whole, lead me to the conclusion that the alleged cause for Van Hoose's termination was pretextual. See *PRS Limited, d/b/a F. & M. Importing Co.*, 237 NLRB 628, 632 (1978). *Grede Foundries, Inc.*, 211 NLRB 710, 711 (1974).

As to Huesman's discharge, Respondent contends that it was because he threatened Webb with physical harm. Assuming *arguendo* that Webb's version of the telephone conversation is the more accurate, I note that Webb did not discharge Huesman at the end of the first conversation when some mention of physical force was voiced by Huesman. However, Huesman's final word to Webb, in both versions of the conversation, was union. Although the record does not show what union Webb thought Huesman meant, the president knew he did not want any union in his Company. This threat then was a signal to

[21] Webb admitted that neither Van Hoose or Smart indicated that Van Hoose was going to refuse to do the Formica job

Webb to eliminate the problem of having the last of the union activists in his employ, by discharging him. Webb's attempt to make the senior driver-salesman quit by cutting his commissions had not worked, but here was his opportunity to get rid of the union instigator, and the president grasped it by calling Huesman back and telling him he was discharged.

The incidents described by Mrs. Webb as establishing that Huesman was a violent man were few and of a minor nature. Huesman had been angry with his son when he brought the father's damaged car to the office. He had pushed his son, and had yelled at him that he would kill him, but both drove away from the office without any blows being struck. This incident occurred a year before Huesman's discharge and there was no testimony to show that anything violent occurred between the father and son after they left the plant.

Two other incidents were described by Mrs. Webb, both of which occurred prior to the June 30, 1979, meeting. Huesman had grabbed the Company's outside salesman by the front of his shirt, and he also had grabbed Smart by his lapels. That Webb regarded these two incidents as minor is shown by the fact that no disciplinary action was taken by Webb as to either incident.

Webb's conduct on the morning of March 21 also belies the contention that he was worried about physical harm from Huesman. The president drove out to Huesman's shoemobile with Smart, told Huesman to get in the car, and then all three drove back to the office, while they engaged in small talk, chiefly about their children. Certainly if Webb considered Huesman to be a real and present danger to his health, he would not have ridden in the same automobile with Huesman the next morning.

Unquestionably Respondent had the right to discharge Van Hoose and Huesman for any reason or no reason, except it may not discharge them for engaging in union activity. But, if the asserted reason is not reasonable, then that fact is evidence that the true motive for discharge is an unlawful one which Respondent seeks to disguise. See *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966); *First National Bank of Pueblo*, 240 NLRB 184 (1979).

Finding that the alleged reasons for Van Hoose's and Huesman's discharges were false, I infer that the true motive for terminating these two employees was because they were seeking union representation, which Respondent sought for a second time to nip in the bud, and rid the Company of these two union adherents. Again, I find the allegations by Respondent that there was cause to discharge these employees as just too unpersuasive in this factual context to believe. Accordingly, I conclude that Respondent by terminating Van Hoose on March 17, and Huesman on March 21, violated Section 8(a)(3) of the Act. *Heartland Food Warehouse, Division of Purity Supreme Supermarkets*, 256 NLRB 940 (1981); *Daniel Construction Company*, 229 NLRB 93 (1977).

G. *The March 20 Incident*

As set forth above, Webb testified that, in his telephone conversation with Huesman on the evening of March 20, Huesman told him that, if certain shoes were put on his truck, "he would go to Ford's management and the Union and tell them about the inventory." Webb's admitted response was, "If you do that, I'd have to fire you." What Webb meant by "that" is not clear. He could have been referring to Huesman going to the Ford Company alone, or going to Ford's union, or going to a union which would represent Respondent's employees, or any combination of these acts. However, an employer's words may be ambiguous, and still constitute a violation of the Act. Huesman knew that Webb had reacted angrily in June 1979 when he had complained to him about the stock, and had in tandem brought up union representation. Thus, he could readily believe that Webb's statement threatened him with discharge, that was at least in part, because of his stated intention to go to a union that would provide Respondent's employees with representation. Accordingly, I find that Webb's remark was a threat and coercive and violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By discharging Victor Van Hoose on March 17 and Paul Huesman on March 21 because of their seeking union representation, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By threatening employees with discharge for seeking union representation, the Company violated Section 8(a)(1) of the Act.

THE REMEDY

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

Respondent having discriminatorily discharged two employees, I find it necessary to order it to offer them reinstatement and make them whole for lost 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, in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[22]

The Respondent, Webb's Industrial Plant Service, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall:

[22] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for seeking union representation.

(b) Threatening its employees with discharge if they sought union representation.

(c) 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) Offer Victor Van Hoose and Paul Huesman inmediate 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 make them whole for any loss of earnings and other 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, upon 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.

(c) Post at its plant at Cincinnati, Ohio, copies of the attached notice marked "Appendix."[23] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[23] In the event that 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."

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

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 the right:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for the purpose of collective bargaining or other mutual aid or protection

To choose not to engage in these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting any union.

WE WILL NOT threaten you for seeking union representation.

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

WE WILL offer Victor Van Hoose and Paul Huesman 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 discharge, less any net interim earnings, plus interest.

WEBB'S INDUSTRIAL PLANT SERVICE, INC.