

**Woodline, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Chauffeurs, Teamsters and Helpers Local Union No. 878. Case 26-CA-6477**

October 21, 1977

**DECISION AND ORDER**

BY CHAIRMAN FANNING AND MEMBERS  
PENELLO AND MURPHY

On July 25, 1977, Administrative Law Judge Robert C. Batson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions with supporting brief and a brief in answer to the Respondent's exceptions.

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 briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge, to modify his remedy so that the interest is to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977),<sup>3</sup> and to adopt his recommended Order,<sup>4</sup> as modified herein.

**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, as modified below, and hereby orders that the Respondent, Woodline, Inc., Little Rock, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(d):

"(d) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

<sup>1</sup> The 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 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> Under the circumstances of the present case, we find that the Administrative Law Judge's recommended Order requiring, *inter alia*, that Respondent post the customary notice to employees for 60 consecutive days is fully adequate to remedy the unfair labor practices herein. Accordingly,

we shall not order Respondent to mail copies of the notice to all employees individually.

<sup>3</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>4</sup> Because the unfair labor practices here strike at the very heart of the Act, we shall modify the recommended order by requiring Respondent to cease and desist from "in any other manner" interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Sec. 7 of the Act. *Springfield Dodge, Inc.*, 218 NLRB 1429, fn. 2 (1975), and *N.L.R.B. v. Entwistle Manufacturing Company*, 120 F.2d 532 (C.A. 4, 1941).

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

The National Labor Relations Act gives all employees these rights:

- To engage in self-organization
- To form, join, or assist unions of their choosing
- To bargain collectively through representatives of their own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any and all these things.

WE WILL NOT threaten our employees that we will close or change the name of our Company and operate as a Cartage Company with new employees if they select the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees that it is useless for them to select the Union as their collective-bargaining representative by telling them that we do not have to sign a contract until told to do so by our attorney and the attorney can hold it up in court for as long as he wants.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL offer John Mark Yielding immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without loss of his seniority or other rights and privileges, and WE WILL make him whole for any losses he may have suffered by reason of our discrimination against him.

WOODLINE, INC.

## DECISION

## STATEMENT OF THE CASE

## Proceedings

ROBERT C. BATSON, Administrative Law Judge: This proceeding under the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (herein called the Act) was heard by me at Little Rock, Arkansas, on April 5 and 6, 1977, based on a complaint and notice of hearing issued by the Regional Director for Region 26, growing out of charges filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Chauffeurs, Teamsters and Helpers Local Union No. 878, herein called the Union, against Woodline, Inc., herein called the Respondent. All parties participated throughout by counsel or other representatives and were afforded full opportunity to present evidence and arguments and to file briefs. Briefs have been received from counsel for the General Counsel and counsel for Respondent. Record and briefs have been carefully considered.

## Issues

The primary issues presented are whether Respondent discharged John Mark Yielding on or about January 3, 1977, to discourage his, and other employees' union activities in violation of Section 8(a)(3) of the Act, or whether his discharge was motivated solely by his alleged absenteeism and tardiness, and his failure to timely call in on such occasions; whether Respondent violated Section 8(a)(1) by its agent, attorney Charles J. Lincoln, making various threats of reprisals to its employees in a speech and discussion the day before the December 19, 1976, election; and whether Wilton White, alleged as assistant to the president and sales manager, violated Section 8(a)(1) by interrogating an employee concerning his and others' union activities, and soliciting the employees to inform on the union activities of other employees. A preliminary issue with respect to White's supervisory or agency status is raised by Respondent's denial thereof.

Upon the entire record, including consideration of able briefs from General Counsel and Respondent,<sup>1</sup> and my observation of the testimonial demeanor of the witnesses,<sup>2</sup> I make the following:

## FINDINGS AND CONCLUSIONS

## I. JURISDICTION

At all times material herein, Respondent, Woodline, Inc., has been, and is, a corporation doing business in the State of Arkansas, with an office and place of business (terminal) located at Little Rock, Arkansas, the only location involved here, where it is engaged in the transportation of freight by motor vehicle. During the past 12-month period,

<sup>1</sup> In accordance with the Board's Rules and Regulations, Series 8, as amended, I requested proposed findings of fact and conclusions of law. Counsel ignored this request and filed only briefs.

<sup>2</sup> The facts found herein are based on the record as a whole and on my observations of the witnesses testifying under oath. Credibility resolutions have been derived from such record and observations with due regard for

Respondent derived revenues in excess of \$50,000 for the transportation of freight which originated at points outside the State of Arkansas, or which were designated for delivery at points outside the State of Arkansas.

I find that at all times material herein Respondent Woodline, Inc., has been, and is, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further find that at all times material herein the Union has been, and is, a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts as Found*

The union activities giving rise to the instant charges began at Respondent's Little Rock, Arkansas, Terminal in late November 1976,<sup>3</sup> when John Mark Yielding, the alleged discriminatee herein, went to the office of Local Union No. 878 and obtained some authorization cards which he passed out to 7 or 8 of the 12-14 employees at the terminal. He gave two cards to some employees for the purpose of having them signed by others. The cards were later returned to Yielding who retained them "until we got everything straight where we could turn them in." Senior driver John Hughes got some of the cards signed and subsequently returned the signed authorization cards to a representative at the union hall, which provided the basis for the filing of a Petition for Certification in Case 26-RC-5420 on December 6. An election was conducted pursuant to that petition on December 29, which was won by the Union 12 to 0.<sup>4</sup> Respondent's terminal manager, Al H. Rutherford, and vice president, Scotty Douthit, deny any knowledge of union activities at the Little Rock terminal until receipt of the petition on December 7.

In late November or early December, billing clerk Paul Toombs was approached by driver John Hughes and asked to sign an authorization card. Toombs signed a card at which time Mark Yielding joined the two and asked Toombs to keep their union efforts a secret. Toombs agreed. Later that day, Toombs asked rate clerk and salesman Wilton White, with whom he shared an office, his opinion of the Union should it ever try to come in at Little Rock. White advised Toombs to sign a card.

On December 7, the day of receipt of the petition by Respondent, Toombs told White there was going to be a meeting at the union hall that evening. White asked Toombs if he were going and if Terminal Manager Rutherford knew about it. Toombs told White he was going and that he didn't know or care whether Rutherford knew about it. White asked Toombs to listen and try to find out what was going on. The following day White asked Toombs if he attended the meeting; who was there and what went on. Toombs replied that he attended the meeting and all employees except two were there and that

the logic of probability under the teachings of *N.L.R.B. v. Walton Manufacturing Co., et al.*, 369 U.S. 404 (1962). Testimony not discussed has been in conflict with credited testimony or incredible or unworthy of belief.

<sup>3</sup> All dates hereafter are 1976, unless otherwise indicated.

<sup>4</sup> The credited and undisputed testimony of Yielding and Hughes establishes the foregoing.

the stewards had explained the types of contracts and also that he, Toombs, could not be covered under the drivers' contract since he was a clerical.

Toombs related another conversation with White, occurring about December 20, wherein White told him that he had told Vice President Douthit that Toombs had been asked to sign a union card and that Toombs was on a congenial basis with the drivers and could keep his eyes and ears open and report back to him on the union activities. He asked Toombs to report anything he heard involving the drivers' union activities, and, apparently, in the same conversation, asked him who the "ringleaders" were. Toombs told him Hughes, Yielding, Herman Fultz, and Hank Thorpe. White replied that he had Hughes and Thorpe "pegged," and asked if he were sure about Yielding. Toombs told him he was pretty sure about Yielding because he had had some cards.

The General Counsel contends the above exchanges between Toombs and White constitute acts of interrogation and solicitation to inform on employees' union activities. White was not called as a witness, thus Toombs' version of these conversations is undenied, and whether or not they constitute interference, restraint, and coercion in violation of Section 8(a)(1) turns upon whether White was a supervisor or agent of Respondent.

White has worked for Respondent 11 years; the first 9, until October 1974, as the Little Rock terminal manager. At that time, according to Douthit, White asked to be relieved as terminal manager and was assigned duties as rate clerk. White was succeeded by Jack Salee as terminal manager, who was in turn succeeded by Clyde McFadden, who remained terminal manager until about July 12 at which time he was succeeded by Al H. Rutherford, who was terminal manager at all times material herein. McFadden remained in the employ of Respondent in some unspecified, but apparently supervisory capacity,<sup>5</sup> until some time in October. From McFadden's departure until Dickie Willis was hired as dock foreman in January 1977, Rutherford was the only admitted supervisor at the terminal. In September White took on the duties of part-time salesman at which time he received, in addition to his salary, a \$100-a-week car allowance.

The General Counsel bases his contention that White is assistant to the president of Respondent on the existence of business cards reflecting that title. The existence of the cards is not in dispute. Paul Toombs testified that, when he came to work as billing clerk in March 1976, he was assigned the desk formerly used by White who had been assigned another desk located about 2 feet away and adjacent to that of Toombs. While cleaning out the desk, Toombs found a box of business cards and upon ascertaining what they were gave them to White, who thanked him and put them in his new desk. There is no evidence as to when the cards were printed, or that they were authorized or paid for by Respondent, or that such title had even been bestowed upon White. Moreover, there is no evidence that White distributed the cards, with or without knowledge of Respondent, or otherwise held himself out as assistant to the president. Neither General Counsel nor Respondent

called White as a witness. Rutherford testified that he first heard of the cards from a source he couldn't remember about a month before the hearing and that he reported it to Douthit who stated that he would check into it. Although Rutherford worked daily with White, at the time of the hearing neither Rutherford nor Douthit had made any effort to investigate the matter; Rutherford stating he did not think it important.

While the action, or reaction, to the rumor of the existence of the cards by Rutherford and Douthit in March 1977, particularly in view of an outstanding complaint alleging White as "assistant to the president" is suspect, in my opinion it is not sufficient to sustain the allegation that White was a supervisor or agent of Respondent by virtue of being assistant to the president, in the absence of a showing that such title was ever conferred on him or Respondent condoned his holding himself out as such. Moreover, it has not been shown that any employee except Toombs was aware of the cards, and, indeed, all the General Counsel's employee witnesses identified White as rate clerk and salesman.

The General Counsel's second contention is that at material times herein, between the departure of McFadden and the hiring of Dock Foreman Willis in January 1977, White relieved Rutherford as terminal manager whenever Rutherford was away and at those times exercised all the authority of the terminal manager, including the exercise of independent judgment in making assignments to employees and the discharge of employees. During this period of time, according to Toombs, White performed his sales chores in the morning and came to the terminal around or before noon. Rutherford testified that White came in about 9 a.m. and remained until about 10 a.m., at which time he would go out to contact prospective customers and make sales rate proposals, he not having the authority to finalize any proposal with a customer, and would return about 12:30 p.m. and perform his rate clerk duties in the afternoon. At any rate he was usually there when Rutherford went to lunch for 30 to 45 minutes each day, at which time he would answer the telephone and receive pickup orders and dispatch drivers to pick up freight when they telephoned in. Respondent's trucks are not radio equipped. If there were no freight for a driver to pick up and he had completed his deliveries, he was told to come in and clock out.

I do not credit Rutherford's testimony that he prepared a rather elaborate list of the drivers and their locations with instruction as to where to send them when they called in. Such would seem superfluous for a former terminal manager who was well acquainted with dispatching procedures. However, I find that at the times White relieved Rutherford he did so only for the dispatch duties normally performed by Rutherford, which did not include supervisory functions. In performing these dispatching duties for a brief time each day White was exerting direction and control over the movement of the freight and direction of personnel was only an incidental result. *Pilot Freight Carriers, Inc. and BBR of Florida, Inc.*, 223 NLRB 286 (1976).

and had talked with him about his tardiness and gotten a promise it would not happen again.

<sup>5</sup> On September 29, 1976, he placed a memo in the personnel file of Mark Yielding stating he had received a call from Yielding that he would be late

Finally the General Counsel argues that White had, and exercised, the authority to discharge. This contention is based on an event occurring, apparently in November, when, according to Paul Toombs, White discharged driver Hosea Williams for refusing to move some freight from a trailer to the dock or another trailer as directed by White. Toombs' testimony is extremely general and vague as to exactly what happened, although he testified he was present and heard the exchange between White and Williams. Rutherford's testimony concerning what happened, and why, as reported to him, was likewise vague and evasive. Rutherford stated that White and Williams had some "words" or that Williams did not like White's tone of voice and Williams went home. In any event Williams called Rutherford later the same day and asked if he could come back to work. Rutherford told him to come on in the next day. Williams lost no time from work as a result of the incident. I am unable to conclude from Toombs' general testimony that White discharged or attempted to discharge Williams and find that as a result of a disagreement over the movement of freight Williams did clock out and leave the terminal.

Assuming that White instructed Williams to clock out, I find that such was in connection with his dispatch duties and is not evidence of the existence or exercise of discharge authority or of the authority to effectively recommend such.

The General Counsel urges that memos placed in the personnel files of Jerry Richardson and Hosea Williams on January 4, 1977, by Rutherford, to the effect that they were to punch off the clock when told to do so by himself or White, conclusively establishes White's supervisory status. I cannot draw that inference from the memos. Admittedly, during this period of time White was in charge of dispatching drivers and directing the movement of freight on the dock for brief periods of time daily when Rutherford was at lunch or otherwise away from the terminal. I find that White's duties during this period of time were not those of terminal manager, but merely those of a dispatcher concerned with the movement of freight. While the issue is not free from some doubt, particularly in view of Rutherford's evasiveness concerning the Williams incident and his "bootstrapping" testimony concerning the preparation of elaborate instructions to White as to daily assignments to make while he was at lunch, which I do credit, and his general unreliability as a witness, the General Counsel has failed to sustain his burden of proof with respect to White's supervisory or agency status. Therefore, the allegations of interrogation and solicitation to inform on the union activities of fellow employees by White, directed to Toombs, do not violate Section 8(a)(1).

On December 28, the day before the Board-conducted election, Respondent's attorney, C. J. Lincoln, conducted a meeting with all unit employees from about 8 a.m. to 10 or 11 a.m. at the terminal. Employees Yielding, Richardson,

and Hughes testified about the meeting. Hughes, whose recollection of the meeting appeared to be better than that of Yielding and Richardson, gave the most cogent account of what was said. A composite of the testimony reveals that Lincoln opened the meeting by introducing himself as attorney for the Company and with the rhetorical question as to why the employees wanted a union.<sup>6</sup> The answers indicated dissatisfaction with wages, condition of the equipment, long hours of work, and other working conditions. Lincoln told the employees that they were going to get a raise in pay and then proceeded to tell each of them how much they were making and how much of a raise they would get. According to Hughes, the raises as indicated by Lincoln were received after the first of 1977. The employees told Lincoln they had been "promised and promised," but nothing had been done about the equipment and the 10- to 12-hour workdays. Lincoln told the employees they were going to do something about that. Either Hank Thorpe or John Hughes asked Lincoln if the employees at Respondent's Fort Smith (Arkansas) terminal had gone union. Lincoln replied that they had and "don't none of those boys at Fort Smith have a job anymore." He continued that he could do the same thing at Little Rock as he had at Fort Smith, "get us out and get a new crew." He stated that Woodline could shut the doors and not operate or could operate as a cartage line with all new men. Lincoln told them, according to Yielding, that they may have heard that the men at Fort Smith had gotten their jobs back but that it was not true, the matter was still tied up in court. He continued that he could keep it tied up in court as long as Marshall Wood (president of Respondent) wanted him to. He continued that Wood would not have to sign a contract until he (Lincoln) told him it was "o.k."; that Wood didn't want a contract and wouldn't have one, or "that he could hold it up in Court about a year."<sup>7</sup>

Mr. Lincoln did not testify, and in its brief Respondent contends that General Counsel has not carried his burden of proof that Lincoln threatened the employees with loss of jobs since only one witness made a categorical statement to that effect, and that Lincoln was merely relating the status of the law in alluding to the fact that Wood could not be compelled to sign a contract.

From the above it is clear that Lincoln interfered with, restrained, and coerced employees, by telling them that Respondent could close its doors and/or operate under a new name with new employees, much as it had done at Fort Smith. Lincoln also suggested the futility of selecting the Union as their collective-bargaining representative by telling the employees that he could hold the Union up in court for as long as he wanted. Lincoln's promise of a wage increase and the later granting of it, and his promise to do something about the long work hours, is not alleged as a promise of benefits to reject the Union, and the General Counsel did not move to amend his complaint, nor did he argue such in his brief, notwithstanding that the testimony

<sup>6</sup> Terminal Manager Rutherford was present at the beginning and from time to time throughout the meeting, thus no issue is presented with respect to Lincoln's speaking to the employees as an agent of Respondent.

<sup>7</sup> On April 4, 1977, Administrative Law Judge Robert A. Giannasi issued his Decision in *Woodline, Inc.; Marshall Wood, an Individual; and Marshall Wood d/b/a Fort Smith Cartage Company*, Cases 26-CA-6226; 26-CA-6264, and 26-CA-6314, finding that Respondent, at its Fort Smith

operation, had violated Sec. 8(a)(1), (3), and (5) of the Act; the 8(a)(3) violations being, *inter alia*, the wholesale termination of all Fort Smith Cartage employees, urging as a defense its cessation of operations and its purchase of Carter Truck Lines authority and ICC requirement that it take such action. I relate these findings to shed light on Lincoln's references to the Fort Smith employees and their misfortune with the selection of the union.

had been received without objection and Respondent had the opportunity to litigate the issue. Therefore, I make no finding that such violated Section 8(a)(1).

*B. The Discharge of Mark Yielding*

Yielding worked for Respondent on two occasions, the first from October 1975 to March 1976, at which time he quit to work for another truckline for more money. He discussed his leaving with Terminal Manager McFadden and Vice President Douthit, who urged him to stay, but stated they could not give him more money since they were trying to bring all employees up at the same time. About July 12, McFadden telephoned Yielding and asked him if he was looking for a job. Yielding said he was, having quit his other employer. McFadden told Yielding they had a new terminal manager, Al Rutherford, and he would talk with Rutherford and get back to him. About an hour later McFadden called Yielding and told him to come on in. Yielding reported to work that day. A couple of days later Rutherford talked with Yielding, telling him "Clyde recommended you highly, and I just wanted to tell you that I'm glad, you know, you are on the team."<sup>8</sup>

As noted above, Yielding testified that he talked with employees about getting a union almost from the time he came to work and in late November obtained cards from a union representative and took them to the terminal where he distributed them and obtained signatures from a number of employees. Having found that White was not a supervisor or agent of Respondent, it cannot be shown that Respondent was aware of Yielding's leading role in the union activities. However, at the Christmas party on December 23, Yielding, along with Thorpe and Hughes, complained to Rutherford about the alleged unsafe condition of the equipment and the attitude of management personnel. This occurred after Rutherford pointed to the notice of election poster and told the employees "that we didn't need that to get what we wanted from Marshall Wood." After hearing these complaints, Rutherford told them that Wood was trying to "fix" the trucks and give them more money, and if they wanted to talk to Wood he would pick up the phone and call him right then. Yielding told him no, but that he would like to come in the next working day "when we was sober" and talk to him. Yielding obtained permission for Hughes to accompany him. Rutherford did not deny this incident. The following Monday, after Christmas, Yielding and Hughes went to Rutherford's office and complained about the condition of the equipment and Rutherford told them Wood was having problems replacing his shop foreman and getting the trucks in shape. Thus, while there is no direct evidence of Respondent's knowledge of Yielding's leading role in the Union, he was vocal in his complaints about the condition of the equipment.

Yielding was given notice of his termination on January 3, 1977, after being absent from work on December 30 and 31, the 2 days immediately following the December 29 election which the Union won 12 to 0. At the hearing, Respondent settled upon the defense that it discharged

<sup>8</sup> I do not credit Douthit's testimony that Yielding was an unsatisfactory employee the first time and he would not have permitted his rehire had he known about it at the time.

Yielding for his excessive absenteeisms and tardinesses, and his failure to timely call in to report them. However, in a pretrial affidavit obtained by an agent of the Regional Office, Scotty Douthit had stated that the decision to discharge Yielding was made on December 30, on the recommendation of Rutherford, and had been building up for some time, citing incidents of alleged mishandling of freight going back to November 1975. Rutherford testified that he and Douthit also discussed Yielding's OS & D problems, along with those of absences and tardiness, in the December 31 telephone conversation at which the decision was made to terminate Yielding.

Yielding's attendance record received into evidence shows that he was absent August 26, sickness; August 31, wife in auto accident; September 7, personal problems; and December 17, 29, 30, and 31, due to sickness. Rutherford admitted that the December 29 entry was an error since Yielding had been at work that day, the day of the election. Although not reflected on his attendance record, a notation on the back indicates he was absent at least a part of the day on September 13 for a court appearance at noon. As to Yielding's tardiness, the first event of which there is any evidence that anyone had spoken to him about it is September 29, in a file memo signed "Clyde," identified by Rutherford as Clyde McFadden, wherein he states Yielding was 30 minutes late and he talked with him and "advised him what he had done to us." Yielding does not recall McFadden's talking with him on this occasion. Yielding was again late on October 14, 15, and 16, by 12, 42, and 30 minutes, respectively, and on October 18, Rutherford placed a memo in his file stating he had talked to him. Yielding remembers Rutherford's telling him if he were supposed to be there at 6:30, he expected him there at 6:30, and Yielding responded that he would try not to be late again. The record does not reflect that Yielding called at all on those occasions or that Rutherford indicated he should.<sup>9</sup> Yielding was not thereafter absent from, or late reporting to, work until December 17, on which date he telephoned Rutherford at 7:40 a.m., according to Rutherford's memo, and reported that he had a stomach virus and could not come to work. Rutherford asked why he had not reported earlier and Yielding stated he had just awakened. According to the memo placed in Yielding's file, Rutherford told him "in the future when he was unable to report to work he must call before time for him to report not after." This is the first memo reflecting an admonition to call in before worktime when going to be absent and it does not support Respondent's contention that its "flexible" rule was to report 1 hour before worktime. On December 21, Yielding was due to report to work at 6:30 a.m. and reported at 7 a.m., testifying that he had car trouble. Rutherford's memo to the file states Yielding called at 7 a.m. and said he had lost his car keys, but would be in. On this date, Yielding requested that Rutherford change his starting time to 8 a.m. Rutherford agreed. Yielding was not thereafter late.

On December 30, the day following the election, Yielding was sick and had his sister call in for him.

<sup>9</sup> Yielding placed this event in late November. However, he states that it followed his being late 3 consecutive days and the October incident is the only time this occurred.

According to Rutherford's file memo, Yielding's wife called at 7:45 a.m. and reported him sick. Douthit was at the terminal at that time, according to his testimony, and told Rutherford to ask to speak with Mark, and Rutherford was told that the caller was at a pay phone and Mark was not there. Rutherford could not recall whether Douthit was present at that time. Douthit stated that he thereafter went through Yielding's personnel file and called three telephone numbers found there; Yielding's home number, his brother's number and his mother-in-law's number. He received an answer only at the latter number and was told by the party they did not know where Yielding was. Douthit offered no explanation as to why he wanted to talk with Yielding. Later that day, noon, according to Yielding, and 4:30 p.m., according to Rutherford, Yielding telephoned and told Rutherford he would try to be at work the next day.<sup>10</sup>

The following day, Yielding was still sick and had his sister call Rutherford, according to Rutherford's memo, at 8 a.m. At noon Yielding called Rutherford and told him he was feeling better and could come in if he were needed. Rutherford told him things were slow and he had let a couple of drivers go home, and he did not need him. Later that day, Yielding went to the terminal and got his paycheck from Rutherford, who told him to come in at 8 a.m. on Monday.

At or about 8 a.m. on Monday, January 3, 1977, Yielding discovered his timecard was not on the board and went to Rutherford's office and asked about it. Rutherford told him he had the card and to come in he wanted to talk with him. Rutherford had a piece of adding machine tape on which he had written "Mark Yielding called in December 21, 30 minutes late," and reminded Yielding that he had missed Thursday and Friday, and told him he was going to have to let him go because of his absenteeism. Yielding refused to sign the resignation letter Rutherford had prepared, at which time Rutherford discharged him.

### C. Analysis and Resolutions

Respondent contends that it had for at least the last year a "flexible" rule requiring employees to call in 1 hour before reporting time if they were going to be absent or late, and it was the repeated violation of this rule, in addition to the number of absences and tardinesses, that precipitated Yielding's discharge. Admittedly, the rule was never written or posted until some time after Yielding's termination. Moreover, the numerous written notations placed in the personnel files of Yielding, Richardson, and Williams do not indicate the existence of such a "one hour rule," but merely a rule to call in prior to worktime. I find the "one hour rule" came into existence after the discharge of Yielding and even then employees were not discharged for a single or several violations. The record discloses that

<sup>10</sup> I do not credit Rutherford that Yielding told him he was feeling fine and promised faithfully to be at work the next day.

<sup>11</sup> This is illustrative of the unworthiness of Douthit's testimony. In addition to the forenoted discrepancies between his pretrial affidavit and his testimony, I note that in his affidavit he stated that he decided to discharge Yielding on December 30, while in Little Rock, but at the hearing testified the decision was not made until December 31, when he was back in Russellville. Also in his affidavit he stated that he played no role in the discharge of Richardson, but at the hearing testified that after the filing of the petition he was consulted on all discharges, including Richardson.

Jerry Richardson failed to call in eight times prior to his scheduled worktime before being given a written warning to the effect that continued failure to do so would result in his discharge.

Douthit testified that in reviewing the personnel files of all employees at Little Rock on December 30, he discovered that Yielding's absentee record was "a lot worse" than that of any other employee. The record shows that at that time Richardson had 19 absences compared with 6 for Yielding.<sup>11</sup> Further, the record shows that employee John Stage was absent on eight occasions between August and December.

Respondent argues that the failure of the General Counsel to show that it had knowledge that Yielding was the "ringleader" of the union activities eliminates any motive it may have had for discharging him for that reason. Be that as it may, on December 29, when the Union won the election 12 to 0, Respondent knew that all of its employees, including Yielding, had supported the Union, and Yielding's absence the following day made him vulnerable and provided Respondent an ostensibly legitimate reason to discharge him.

In determining employer motivation for an alleged unlawful discharge, all the circumstances of each case must be weighed, and where an employer has "good ground for the discharge of an employee. . ." the Board must "find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one." *The Firestone Tire and Rubber Company v. N.L.R.B.*, 539 F.2d 1335 (C.A. 4, 1976). Where, as here, the assigned reason for discharge is riddled with inconsistencies, exaggerations, and falsehoods concerning the extent of the employee misconduct,<sup>12</sup> a finding is warranted that the assigned reason is not the real one. Respondent's animosity toward the Union was clearly demonstrated by C. J. Lincoln on December 28, by his blatant threats of mass discharges and cessation or change in the operation of the business which would bring about the termination of employees if the Union were selected. Since Respondent's assigned reason is rejected, I find the more rational explanation for Yielding's discharge was retaliation for the employees having selected the Union as their collective-bargaining agent, and to discourage membership in, and support of, the Union. As the Fourth Circuit of Appeals recently observed in *Neptune Water Meter Company, a Division of Neptune International Corporation v. N.L.R.B.*, 564 F.2d 92 (C.A. 4, 1977). "Such motivation can be found from the absence of any good cause for discharge. This must be so unless we are willing to assume something we know to be false: that businessmen hire and fire without any reason at all." My finding of invidious motivation here is not impaired by the fact that Yielding was perhaps not an exemplary employee and did have absences and tardinesses and, on occasions, failed to

<sup>12</sup> Douthit's testimony that, after reviewing all the personnel files, Yielding's absentee record was the worst is refuted by exhibits received at the hearing showing that at least two employees had more absences, one more than twice as many as Yielding. Rutherford's testimony that other employees always called in, presumably in accordance with the "one hour rule," is totally refuted by exhibits showing that on at least 13 occasions both before and after Yielding's discharge employees called after their reporting time, or not at all.

call in; it is sufficient that a discriminatory motive was a factor in the employer's decision to discharge. *Winn-Dixie Stores, Inc. v. N.L.R.B.*, 448 F.2d 8 (C.A. 4, 1971). The discharge of Mark Yielding violated Section 8(a)(3) of the Act.

#### CONCLUSIONS OF LAW

1. Jurisdiction is properly asserted in this proceeding.
2. By telling its employees that in the event the Union were selected, it could cease its operation or operate under a different name, or as a Cartage Company, much as it had done at Fort Smith, operating with new employees; and by threatening its employees that it would be futile for them to select the Union by telling them Respondent would not have to sign a contract and could hold up the Union in court as long as it wanted, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.
3. By discriminatorily discharging and thereafter failing and refusing to reinstate its employee John Mark Yielding because of his union activities and to discourage union activities of its employees, Respondent has 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.
4. Respondent has not otherwise violated the Act.

#### THE REMEDY

Inasmuch as Respondent has been found guilty of violations of Section 8(a)(1) and (3) of the Act, it should be ordered to cease and desist from those or like violations, and to take certain affirmative actions in effectuation of the policies of the Act. The affirmative actions shall include the unconditional offer of immediate and full reinstatement to John Mark Yielding, to his former job, or, if that job no longer exists, to a substantially equivalent one, without loss of seniority and other rights and privileges, and make him whole for any loss of earnings suffered by reason of such discrimination, by paying him a sum of money equal to the amount he would have earned from the date of the discrimination against him to the date of Respondent's offer to reinstate, less his net earnings during the period in accordance with the Board's formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon at the rate of 6-percent per annum as set forth in *Isis Plumbing & Heating, Co.*, 138 NLRB 716 (1962).

Finally, Respondent should post the usual informational notice, attached hereto as an Appendix.<sup>13</sup>

<sup>13</sup> On May 12, 1977, counsel for the General Counsel filed a motion with the Board that upon issuance of this Decision, this case be consolidated with *Woodline, Inc., et al.*, Cases 26-CA-6226; 26-CA-6264 and 26-CA-6314, in which Administrative Law Judge Giannasi issued his Decision on April 4, 1977, and is now pending before the Board on exceptions. Should the Board grant that motion and adopt the remedy recommended by Administrative Law Judge Giannasi with respect to the mailing of copies of the notice to the homes of all its employees, I recommend that such be ordered in this case also.

<sup>14</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the

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

#### ORDER<sup>14</sup>

The Respondent, Woodline, Inc., Little Rock, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
  - (a) Threatening its employees that it will close its Little Rock Terminal, or change the name thereof, or operate as a Cartage Company with new employees.
  - (b) Threatening its employees that it would be futile for them to select the Union as their bargaining representative by telling them that it would not sign a contract until told to do so by its attorney and the attorney could hold it up in court as long as he wanted.
  - (c) Discharging employees and refusing to reinstate them in order to discourage employees from membership in or support of the Union or from engaging in any other union or protected concerted activities.
  - (d) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.
2. Take the following affirmative action which is necessary to effectuate the policies and purposes of the Act:
  - (a) Offer its employee, John Mark Yielding, immediate and full reinstatement to his former job, or, if that job is no longer available, to a substantially equivalent one, without prejudice to his seniority or other rights, including, but not limited to any and all raises given employees since his termination, and make him whole for any loss of earnings in the manner set forth in this Decision.
  - (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 determine the amount of backpay due under this Order.
  - (c) Post at its Little Rock, Arkansas Terminal, copies of the attached notice marked "Appendix."<sup>15</sup> Copies of said notice, on forms duly provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 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 said notices are not altered, defaced, or covered by any other material.

Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of those 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.

<sup>15</sup> In the event 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."

(d) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.