Cavalier Olds, Inc. *and* **Professional Automobile Salesmen Association**

Cavalier Olds, Inc. *and* **George V. Paul.** Cases 8–CA–4610, 8–CA–4611, 8–CA–4687, and 8–CA–4657

June 28, 1968

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZAGORIA

On December 27, 1967, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision 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 powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as herein modified.

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 Trial Examiner and hereby orders that the Respondent, Cavalier Olds, Inc., Akron, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Amend paragraph 1(a) to read as follows:

"(a) Discharging, laying off, or otherwise discriminating . . ."

2. Amend the second indented paragraph of the notice as follows:

> WE WILL NOT layoff, discharge, threaten to discharge, or harass any employee . . . .

Member Fanning, dissenting:

I do not agree with my colleagues' adoption of the findings of the Trial Examiner that the Respondent violated Section 8(a)(3) of the Act by laying off Michael Pace and Daniel Ellisin on April 5, 1967, and by "constructively" discharging James and Michael Pace on May 19, 1967.

In my view, a clear preponderance of the evidence does not support the Trial Examiner's conclusion that the layoffs were unlawful. Respondent's financial position at the time of the layoffs was not impressive. In the circumstances, cutting the sales force to achieve overhead savings in reduced salaries, bonuses, and commissions appears to have been an appropriate form of economic retrenchment.

The evidence in support of the alleged unlawful constructive discharges is likewise, in my opinion, insubstantial. The record does not demonstrate by a clear preponderance of the evidence that the Respondent took the offensive in creating and maintaining the unsettled labor situation at the agency. Rather, the record shows a definite pattern of insubordination and obstruction on the part of the employees. Although the Respondent may not have been blameless in compounding the situation, the salesmen's conduct, coupled with the Respondent's weak financial position, in my opinion, renders the Trial Examiner's 8(a)(3) findings as to the Paces unsupportable. Accordingly, I would dismiss all the 8(a)(3) allegations of the complaint. Moreover, I would also dismiss the allegations of independent 8(a)(1) violations inasmuch as they form the major part of, and are cumulative to, the 8(a)(3) allegations which I would dismiss.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

FREDERICK U. REEL, Trial Examiner: These consolidated cases were tried at Akron, Ohio, on October 26 and 27, 1967,[1] pursuant to charges filed the preceding May 22, June 22, and July 18, complaints issued July 7 and 26 and August 23, answers duly filed, and an order consolidating cases issued August 23. The complaints, as amended at the hearing, alleged that Respondent, herein called the Company, violated Section 8(a)(1) of the Act by various acts of interference, restraint, and coercion, and violated Section 8(a)(3) and (1) by laying off, discharging, or constructively discharging several employees because of their union activity.

Upon the entire record, including my observation of the witnesses, and after consideration of the

[1] All dates herein refer to the year 1967

briefs filed by the General Counsel and the Company, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY AND THE LABOR ORGANIZATION INVOLVED

The pleadings establish that the Company, an Ohio corporation engaged at Akron in the operation of an automobile dealership, annually receives over $500,000 from the retail sale of automobiles and annually purchases materials valued in excess of $50,000 from points directly outside the State. On these facts, the Company admits, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The pleadings further establish, and I find, that Professional Automobile Salesmen Association, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Employees Join the Union and Go on Strike*

Early in 1967 the Union was engaging in organizing activity in the Akron area. When this fact came to the attention of Company President John Cavileer he urged his employees to attend a union meeting and to find out what they could about the organization. In mid-February a number of the Company's salesmen signed union cards, and the Union filed with the Board's Cleveland office a petition for certification. The Cleveland Regional Office duly informed Cavileer of the filing of this petition, whereupon Cavileer called a meeting of the employees, berated them for being "stupid" and "idiots" to sign union cards, and said he felt "stabbed in the back" by their having signed cards without letting him know.

A few weeks later, on March 16, without prior notice to the Company, the six salesmen employed by the Company went out on strike, as did many of the other salesmen employed by other automobile dealers in the Akron area. During the strike, the employees picketed the Company, carrying signs announcing that the Company was "unfair." The record does not clearly reveal the purpose of the strike, although there is evidence that the Union had demanded recognition, and also that several of the pickets told Cavileer they were not angry at him. Cavileer, who admitted that his pride had been hurt by learning from an outside source (the Board) rather than directly from his employees that they had joined the Union, also admitted that he felt irritated at the men and the Union because of the strike. The day after the strike started the Company filed a civil suit against four of the six salesmen, alleging that their picketing was unlawfully interfering with its customers and other employees, and seeking damages in the amount of $22,375 plus $875 for each day the picketing continued.[2]

B. *The Layoff of M. Pace and Ellisin on April 5*

The strike ended April 5 and four of the Company's six salesmen returned to work; the remaining two (Pearson and Schoonover) quit, and are not involved in this case. On the morning of April 5 when the men returned to work they were taken to the office of the Company's attorney to give depositions in the civil suit against them. They returned to the salesroom that afternoon. Shortly after their return, the Company laid off its two junior salesmen (Michael Pace and Daniel Ellisin), telling them, individually, that the Company had to "tighten its belt" as business was bad, but that if it improved, they would be recalled. The two remaining salesmen, James Pace and George Paul, worked from April 5 to May 5, when Paul was discharged (whether for just cause or for union activity is at issue here), and Michael Pace was recalled on May 9. The Pace brothers both left on May 19, and at issue here is whether they were "constructively discharged" for union activity. The Company then hired other salesmen but did not recall Ellisin, who, however, saw a "help wanted" advertisement the Company had placed in the newspapers early in July, applied for the job, and was hired.

Turning first to the April 5 layoff, this was for all practical purposes a failure or refusal to reinstate two economic strikers, as the men were laid off the same day they returned, and almost immediately after their return from giving depositions at the Company's behest. The normal rule is that unreplaced economic strikers are entitled to reinstatement upon application. In the ordinary case if an employee, apparently satisfactory and necessary to the business before a strike, is not reinstated after the strike, the inference is reasonable, if not inescapable, that in the absence of other explanation the reason for his separation is his having participated in the strike, a statutorily protected activity.[3] In this situation, the Employer may rebut this presumption by a showing that the discharge, layoff, or failure to reinstate was caused by some other circumstance, such as the unavailability of work or need to retrench. This appears to be the Employer's contention here.[4] In dealing with it, we

[2] At the time of the hearing before me, the civil suit in question had been dismissed, with leave to the plaintiff to appeal or to plead further

[3] The protection normally attaching to a strike may be dissipated, of course, by unprotected misconduct or by some illegality inherent in the strike No such contention is raised before me The suggestion that the strike was unwise, or was "unfair" in that the Company had no warning and had done no wrong, does not affect its character as protected activity *N L R B* v *Mackay Radio & Telegraph Co* , 304 U S 333, 344

[4] This point is not discussed in the Company's brief, which does not discuss the legality of the layoffs I attribute this defense to the Company in the light of the evidence it adduced at the hearing

bear in mind the holding of the Sixth Circuit in a similar situation that "Proof that jobs were unavailable was an affirmative defense, and the burden of establishing it rested upon respondent company." *N.L.R.B.* v. *Cambria Clay Products Company*, 215 F.2d 48, 56.

The testimony adduced by the Company falls far short of sustaining that burden. Mike Baitz, vice president and general manager, testified that Company President Cavileer when he laid off Ellisin "told Danny that things weren't that good right now and that he couldn't afford to have him as a salesman because during the strike we three sold as many cars as the eight salesmen did before and they would just figure they might keep the minimum crew so the guys could make money instead of a lot of guys there." On cross-examination, Baitz admitted that car sales were better in March and April than they had been in January and February. The cross-examination continued:

> Q. Perhaps you didn't understand my question, sir.
>
> It isn't how many cars these gentlemen sold, but my question is that, from your own figure, business picked up. At the time business was picking up you were telling two people you couldn't keep them on because business was bad.
>
> A. It wasn't that bad, but not that good either. We should make about 25 or 30 thousand dollars a month. We don't do it.
>
> Q. What I am asking you is simply this: The reason you gave for laying off these men wasn't the truth. It wasn't really the reason for their layoff?
>
> A. Well, Jack said, "Keep the men down to so many, a few guys. We have to make some money." It was slow and we figured it was that slow.
>
> Q. Going back to my question again, you haven't answered. The real reason for these men being laid off was not because of some economic condition that existed with the Company at that particular time, was it?
>
> A. Well, maybe not at that particular time. That came up.
>
> Q. The reason they were laid off was because they were on strike?
>
> A. No.
>
> Q. What was the reason then?
>
> A. We just wanted to cut down the sales crew.
>
> Q. Why did you want to cut down the sales crew?
>
> A. So the other men could make money. If three men could sell as much as eight men, we figured, well, it is best to do it that way.

Later Baitz adhered to this explanation in answering questions of the Trial Examiner:

> TRIAL EXAMINER: All right. You said several times that one of the reasons for cutting the sales force in April from what it had been before the strike was so that salesmen could make more money and, of course, it is perfectly clear if the same number of cars are sold by two salesmen as formerly were sold by four salesmen that they are going to be selling more cars and making more money. It didn't cost the Company any more once they had dropped that $50 guarantee.
>
> THE WITNESS: It was only in concern for the salesmen, we didn't think we needed them.
>
> TRIAL EXAMINER: I know, but it wasn't economy from the Company's standpoint when you got rid of that $50 salary, was it?
>
> THE WITNESS:I don't know what you mean.
>
> TRIAL EXAMINER:What I am trying to say is: the labor costs to the Company didn't go up or down, depending on the number of salesmen, once you got rid of that $50 salary, because the labor cost to the Company was computed on the percentage of the cars sold; is that right?
>
> THE WITNESS: Yes, that is right.

Company President Cavileer likewise testified as to the reasons for the April 5 layoff. Explaining that the Company had suffered losses in January and February although it showed a profit for March and a net profit for the 3 months, Cavileer continued:

> A. The automobile industry as a whole was down, I believe, if I recall, sir, about 20 or 30 per cent, in that vicinity. Our overhead crept up, and everything considered, I thought economically we would cut down our sales force to a very small sales force. By doing this we cut out many of our overhead things like demo expense, our various insurances, fringe benefits and everything like that, because I am in business to try to make money, and—
>
> Q. Go ahead.
>
> A. It was just that simple. Basically it was economics.
>
> Q. Prior to the strike, up to March 15, had the employees' sales and individual earnings been high? Could you characterize them as high?
>
> A. Not as high as I would hope them to be, because actually the more they make, the more gross we make.
>
> Q. Would these base sales earnings on the part of the salesmen who are working prior to the strike have any bearing on your decision to operate with two salesmen?
>
> A. I didn't understand.
>
> Q. The fact that the salesmen before the strike were not earning what you considered to be a lot of money, did that have any bearing on your decision to cut the men down?
>
> A. Yes, it actually did. I always wondered if we didn't have too many salesmen for them economically to make out themselves.
>
> Q. How does having less salesmen affect this situation of low earnings?
>
> A. Very simply. I mean, it is a matter of

whether two fellows cut the pie or whether six cut the pie.

As I understand the Company's position with respect to the April 5 layoff (see fn. 4, *supra*), it seems fair to state that the Company asserts a dual basis for its action: declining business, and the desire to spread available sales among a smaller force to enhance the income of the remaining salesmen. The second of these reasons appears suspect, as the Company even without the layoffs would have reduced its complement from six to four, and the record is devoid of evidence that the salesmen, even when there were six, were urging that the staff be reduced. Cf. *Forest Dodge, Inc.*, 145 NLRB 1463, 1466, 1470. As to the alleged decline in business, the financial statement shows that sales were on the increase, as indeed would not seem unusual at the start of the spring season.[5] In this connection it may be noted that when Ellisin returned in July, the Company was again employing four salesmen. Cf. *N.L.R.B.* v. *Kingsford*, 313 F.2d 826, 830 (C.A. 6). , where the court observed, "It is significant that the discharged body shop employees were never replaced."

As the *Kingsford* case emphasized (313 F.2d at 830, 831), it is not for the Board to substitute its "business judgement . . . for that of the employer," whose "wisdom or business acumen" is not "determinative of whether there is a violation." And the court's statement, as an appellate tribunal, must be reechoed with real fervor by the trier of fact: "In a case such as this, the task of determining motivation is truly difficult, when the employer advances economic reasons of any substance as that which brings about the change." The proof of financial difficulty in *Kingsford* (313 F.2d at 829), was far more convincing than that introduced here; the proof of antiunion feeling on the employer's part is at least as strong in the instant case; and the fact that the layoffs here, unlike those in *Kingsford*, coincided with the end of a strike would appear to shift the burden of proof (see *Cambria Clay*, *supra*), and at the least permits an inference that the layoffs were related to strike activity.

I conclude, after considering all the factors, that in laying off two of the strikers on the date of their return from the strike, the Company was motivated in substantial part by Cavileer's admitted irritation at the men over their having joined the Union and gone out on what he regarded (perhaps correctly, but see *Mackay*, *supra*), as an unjustified strike. It follows that the layoffs of Michael Pace and Ellisin violated Section 8(a)(3) and (1) of the Act.[6]

C. *The Discharge of Paul*

On May 5 the Company discharged salesman George Paul, handing him a letter that set forth the following five grounds for the action:

1—Lack of creating any business
2—Lack of sales performance
3—General attitude
4—Moral character
5—Lack of cooperation with other employees

As noted above, Paul was replaced by Michael Pace, who was recalled from layoff. Later Paul applied for unemployment compensation. According to the decision of the appeals referee in that proceeding, Company President Cavileer stated that he "had no personal knowledge of the infractions alleged in the letter of discharge," and Paul eventually obtained a finding that he was discharged "without just cause" as the Company "did not present any evidence to substantiate the alleged reasons . . . ." Whatever Cavileer may have told the appeals referee, he testified before me in some detail as to the grounds for Paul's discharge. As Cavileer's testimony was corroborated by other witnesses, I am inclined to place little weight on the decision of the appeals referee.

The evidence before me as to Paul shows that in several of the matters mentioned in the discharge letter his performance was as good or better than that of James Pace, who was the only other salesman employed between April 5 and May 5. In two respects, however, the Company had specific fault to find with Paul. In the first place, Paul had from time to time engaged in sketching cartoons bordering on the pornographic side. One of these Paul himself showed to Company President Cavileer on April 6, and the latter testified that he wanted to fire Paul at once, but was dissuaded by company counsel, who suggested that a discharge so soon after the strike might be construed to be a reprisal for union activity. One month later, however, Paul voiced complaint to the telephone operator over her failure to route sales calls to him on the floor, and his manner was so offensive that after he left her office she broke into tears and went home for the rest of the afternoon. As soon as Cavileer learned of this episode from another office employee, and without checking with Paul, he ordered Paul's discharge.

On this record, there is ample ground for suspicion that Paul's support of the Union and of the strike played a significant role in his discharge, and that had Paul been antiunion the Company would

[5] Moreover, analysis of the statement discloses that the losses to which Company President Cavileer referred are not necessarily attributable to the sales department In the lower right-hand corner of p 1, the statement shows number of new units sold per month and profit or loss per month, but the latter figure refers to overall operations (including the parts and service departments), and not merely to new- and used-car sales This can be verified by noting that the net profit for May ($827 84) is shown there and again at the bottom of p 2, where it is derived from the "operating profit," which is computed in the next column by adding the profit or loss of *all* departments and subtracting *all* expenses of the business Hence the "losses" to which Cavileer testified as having occurred in January and February may reflect losses in the service or parts departments

[6] Assuming *arguendo* that the layoff was not discriminatory, the failure to recall Ellisin when a job became available after May 19 violated the Act, as I find it attributable to his union activity and not to a mere "oversight "

have overlooked his transgressions or at the least would have given him some warnings and would have sought his version of the telephone operator episode. But when the Company fired Paul, it recalled Michael Pace, whose union activity was at least as great as Paul's and as well known to the Company. I cannot therefore conclude that the Company's motivation in discharging Paul was to rid itself of a union adherent, for it replaced him with another, as it well knew. The complaint as to Paul should therefore be dismissed.

D. *The "Constructive Discharge" of James and Michael Pace*

The Pace brothers both "quit" on May 19. The question is whether the Company, in reprisal for union and strike activity, made working conditions so disagreeable as to force them to quit, thereby "constructively" discharging them in violation of Section 8(a)(3) and (1) of the Act. See *N.L.R.B.* v. *Tennessee Packers, Inc.*, 339 F.2d 203 (C.A. 6).

1. The deterioration in conditions of employment

As noted above the Company resented the fact that the employees had gone on strike, and indeed had filed a lawsuit against some of them for so doing. One week after the strike ended, the salesmen (at that time James Pace and Paul) suffered a substantial wage cut. A few weeks prior to the strike the Company, in an effort to adjust to the Fair Labor Standards Act newly applicable to automobile dealers, had instituted a weekly salary of $50, and as part of the adjustment had reduced the bonus paid for selling cars. For example, prior to the change, a salesman received a bonus of $300 for selling 17 cars and after the salary plan was effective he received only $150 bonus for that many sales. One week after the strike ended, the $50 salary was eliminated but (according to the Company), the lower bonuses were left in effect. According to the employee witnesses, all bonuses were eliminated, but even if the Company's witnesses are credited, the employees sustained a substantial loss of pay.

Also undisputed is the fact that the salesmen, who prior to the strike were given new Oldsmobiles to drive as "demonstrators," were required after the strike to drive seccond-hand cars of inferior quality. This, along with the salary cut, ranked among the major grievances of the poststrike situation. Of lesser importance to the employees, but annoying, was the poststrike requirement that they punch a timeclock rather than merely record their hours on a sheet of paper as they had done before the strike.

The salesmen testified that after the strike the Company no longer routinely referred to the salesmen on the floor telephone calls from potential customers, but instead routed such calls to the sales manager or the general manager, thereby decreasing the salesmen's chances for making sales, and earning the accompanying commissions. The witnesses called by the Company disagreed among themselves as to whether the system was changed after the strike, but both the general manager and the sales manager testified that the change was instituted, although not immediately after the strike.

Both before and after the strike the Company required the salesmen to spend some time soliciting business by making telephone calls. On May 18, however, the last day the Paces worked, the Company directed them to make telephone calls all day long, alternating between them at 1-hour intervals, so that each would spend 1 hour telephoning, the next hour on the sales floor, and then back to the telephone, etc.

After the strike the sales manager repeatedly read a list of rules to the two salesmen, a practice he had not theretofore followed. He and the general manager frequently referred to the salesmen as "Black Muslims" or "Malcolm X" or "hod carriers," the last of which apparently referred to the efforts of the Union to affiliate with the Hod Carriers International. The supervisors in question on several occasions asked the salesmen why they did not quit. On or about May 15 when the Pace brothers asked the sales manager when the salary program would be straightened out and when the "abuse and harassment and so forth" would end, the sales manager replied: "I didn't tell you to go on strike."[7]

2. The Company's explanation of the changed conditions; concluding findings

The Company's answer to the employees' two principal complaints (the loss of salary without restoration of the old bonuses and the loss of their new demonstrators) is that these changes were dictated by business considerations unrelated to the strike or the Union. With respect to the demonstrators, the Company introduced in evidence a letter it had received from its finance corporation which noted that the Company had "an excessive amounts of units with mileage on them" and asking it "to curtail the excessive usage of these new units." In the light of this evidence I cannot find that the failure to give the employees their former "demonstrators" after the strike must be attributed to their union or strike activity, although it must be noted that by reducing the sales force from six to two the Company necessarily made a substantial curtail-

[7] Both James and Michael Pace so quoted Sales Manager Upton who, called as a witness, did not recall having said that, and remembered that he "was very careful as to what [he] said to them." In other respects Upton was quite ready categorically to admit or to deny statements attributed to him. I derived the impression that Upton's alleged "failure to recall" was conscious equivocation on his part, and I credit the Paces' testimony in this regard.

ment in the "usage of these new units" which might well have satisfied its obligations in this regard. The assertion that economic conditions necessitated the salary cut, however, is without any evidentiary support. The salary plan itself was merely an experiment, vigorously opposed throughout by Sales Manager Upton, and its abandonment would not necessarily have been an act of reprisal had the Company restored the presalary arrangement with its more generous bonuses. But the action taken by the Company was an outright and deep slash at the employees' earnings, explicable only as an act of retaliation for their union or strike activity. Any doubts as to this matter were removed by the sales manager's comment when the employees inquired into the matter: "I didn't tell you to go on strike."

The company witnesses who admitted that after the strike general telephone inquiries were not routed to the sales floor for handling by the salesmen explained that this change was necessitated by the change in attitude among the salesmen themselves. After the strike, so the company witnesses testified, the salesmen were surly and did not make proper efforts to sell cars. The Company contends that this same uncooperative attitude, extending to rudeness and even to more offensive conduct toward the supervisory hierarchy and office personnel, led to much of the name calling, bickering, and general "abuse and harassment" of which the employees complained. For example, the supervisors, who said to the salesmen "Why don't you quit," testified that their comments were made only after the salesmen taunted them with open disrespect, refusal to follow instructions, and lewd gestures, repeatedly saying, "If you don't like it, fire me." At one time the sales manager complained to the company president, "Who is getting harassed?"

This aspect of the matter is extremely difficult to evaluate. Whether the Company made working conditions more difficult because of the salesmen's attitude, or whether the attitude worsened because of the deterioration of conditions, is a conundrum somewhat similar to the seniority dispute between chicken and egg. Cf. *St. Louis Typographical Union, No. 8*, 149 NLRB 750, 753, footnote 9. Undoubtedly the open resentment displayed by each group fed the maltreatment it received from the other. Nevertheless certain facts do suggest that the Company took the offensive in reprisal for the union and strike activities which irritated the company hierarchy. The Company started a suit for damages against the salesmen, laid some of them off, and reduced the salary or earning potential of those remaining. This was hardly calculated to improve the esprit de corps. Moreover, I find it difficult to believe that the salesmen, consciously at least, were striving to alienate customers and curtail sales, for their sole source of income was their sales commission. (The Company however, made sales through supervisory personnel and there is some suggestion in the record that the sales manager, in particular, enjoyed a substantial increase in commissions during this period.) And, at the risk of running a single item into the ground, I must again note that it was in part responsive to James Pace's complaint about "abuse and harassment and so forth," that the sales manager stated, "I didn't tell you to go on strike."

This is not to say that the salesmen's conduct was above reproach, or that all the matters about which they complained were intended as reprisals. The poststrike requirement that they punch the timeclock may well be explained by their failure, before the strike, to keep accurate records of hours worked. The abandonment of the prestrike practice of letting them have access to information as to the wholesale cost of cars may well be explained as arising from a belief (apparently well founded in Ellisin's case but not in that of James Pace) that a salesman can be more effective if he does not let that item influence his dealings with potential customers.[8] But on the whole, and on balance, I find that working conditions and relationships substantially deteriorated after the strike, that to a significant extent these changes were instituted as reprisals against the salesmen for having struck, and that they caused the Pace brothers to quit on May 19, so that their terminations should be viewed as "constructive discharges" within the meaning of *Tennesse Packers*, *supra*, and the cases there cited.[9]

E. *Other Interference, Restraint, and Coercion*

The complaints allege various acts of interference, restraint, and coercion by company officials and supervisors. For the most part, the issues are factual in that the supervisor involved denies making the statement attributed to him. In a sense, the entire matter is cumulative as the discriminations found above are violative of Section 8(a)(3) and (1) and carry in their wake a remedial order interdicting any further interference, restraint, or coercion. Moreover, in view of the manifest resentment the Company harbored toward the Union and the strike, resolution of the issues as to particular unlawful statements is not necessary to establish the antiunion animus underlying the violations already found. Nevertheless, as the allegedly unlawful state-

[8] The Company explains the telephone call requirements likewise as sound business I find it unnecessary to decide the point, but the requirement that the only two salesmen in the dealership spend alternate hours on the telephone all day long is at least mildly suggestive of punishment rather than sales promotion

[9] Michael Pace returned to work of his own volition on May 9 (after being unlawfully laid off on April 5), and was "constructively discharged" 10 days later It may be argued that he was, or should have been, aware of the conditions prevailing when he voluntarily returned Apparently, however, his brother James had not fully apprised him, and in any event matters further deteriorated between May 9 and 19, as witness the Pace brothers' conversation with Upton on May 15, frequently referred to above Also, insofar as the Company argues in its brief that the men could have continued at work and filed unfair labor practice charges alleging discriminatory treatment, this would be true in all "constructive discharge" cases

ments are put in issue, I deem it incumbent upon me to make findings thereon.

The harassing tactics described above in which company supervisors engaged, including the ridiculing and name calling, constituted unlawful interference with the employees' right to engage in union or concerted activity free of employer reprisal. The sales manager's open implication that the employees were suffering under deteriorating conditions of employment because they had gone on strike was likewise calculated to interfere with the right to do so.

On the other hand, I find no violation in the Company's taking the depositions of the employees for use in the civil suit, and such interrogation as there occurred into their union membership was both privileged and innocuous, as they had all been seen on the picket line. Also, I credit Company President Cavileer's denial that he threatened to close his doors rather than deal with a union. I do find, however, that General Manager Baitz asked Mike Pace in mid-May whether Pace was going to attend a union meeting, and that on April 29, the day after the Board-conducted election, Sales Manager Upton asked employee Paul how the latter had voted.[10] Under all the circumstances of this case such interrogation into the employees' exercise of their Section 7 rights amounted to employer interference therewith. The testimony as to Sales Manager Upton's conversation with Mike Pace, in which the supervisor referred to the possibility of "open and leasing" as a means of dispensing with salesmen altogether, is too unclear to permit a finding that Upton on that occasion was threatening reprisals against these employees.

CONCLUSIONS OF LAW

1. By laying off Daniel Ellisin and Michael Pace on April 5, 1967, by constructively discharging Michael and James Pace on May 19, 1967, and by reducing salaries and otherwise imposing harsh terms and conditions of employment because of the employees' union and concerted activity, 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 telling employees that their conditions of employment had deteriorated because they had engaged in union or concerted activity, by subjecting employees to personal invective and other harassment because of such activity, and by interrogating them as to whether they attended a union meeting or voted for the Union in a Board-conducted election, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

THE REMEDY

I shall recommend that the Company be ordered to cease and desist from its unfair labor practices, and from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. Affirmatively I shall recommend that the Company offer to reinstate James and Michael Pace, that it make them and Daniel Ellisin whole in accordance with the formulas approved in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716, and that it post appropriate notices. The computation of backpay, which is left to "subsequent compliance proceedings" (*N.L.R.B.* v. *Cambria Clay Products Co.*, 215 F 2d 48, 56 (C.A. 6)), may be fraught with some difficulties but need not be explored here. Cf. *Forest Dodge, Inc.*, 145 NLRB 1463, 1473.

Accordingly, upon the foregoing findings and conclusions, and upon the entire record in this case, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

ORDER

Respondent Cavalier Olds, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees for having engaged in concerted activity for mutual aid or protection, or for membership in, or support of, Professional Automobile Salesmen Association.

(b) Telling employees that their working conditions have suffered because of their union or concerted activity, interrogating employees as to their attendance at union meetings or as to how they voted in Board elections, or in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to reinstate James Pace and Michael Pace to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them and Daniel Ellisin whole in the manner described in the section of the Trial Examiner's Decision entitled "The Remedy" for any loss of earnings suffered by reason of the discrimination against them.

(b) Notify James and Michael Pace if either or both are serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service

[10] The Union won the election, 2–0, but the ballots were not counted until May 5 The Company challenged the validity of the election, and that matter is now pending before the Board For reasons not disclosed on the record (possibly because of the pendency of the representation case before the Board, but cf *Hill-Behan Lumber Company*, 162 NLRB 745 (TXD, section III, A), the complaint does not allege a refusal to bargain, nor does General Counsel seek a bargaining order as remedy for the violations alleged and found

Act, as amended, after discharge from the Armed Forces.

(c) 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 Decision.

(d) Post at its plant at Akron, Ohio, copies of the attached notice marked "Appendix."[11] Copies of such notice, on forms provided by the Regional Director for Region 8, after being duly signed by an authorized representative of the Respondent, shall be posted immediately upon receipt thereof, and shall 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 the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Decision, what steps the Respondent has taken to comply herewith.[12]

[11] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order "

[12] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith "

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL offer James Pace and Michael Pace their former jobs and pay them and Daniel Ellisin for wages they lost as a result of their layoff or discharge in the spring of 1967.

WE WILL NOT discharge or threaten to discharge or harass any employee because of his membership in or support of Professional Automobile Salesmen Association or for having engaged in a strike or other concerted activity.

WE WILL NOT tell employees that their working conditions have deteriorated because of their having engaged in union or concerted activity, or question them as to whether they attended union meetings, or as to whether they voted for a union, or in any other manner interfere with their right to join or assist a union.

CAVALIER OLDS, INC.
(Employer)

Dated By
(Representative) (Title)

Note: We will notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Office Building, 1240 East 9th Street, Cleveland, Ohio 44199, Telephone 522-3725.