

Wix Corporation and Warehouse, Mail Order and Retail Employees, Local Union 853, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Cases 20-CA-10639 and 20-RC-12932

December 9, 1976

**DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION**

**BY CHAIRMAN MURPHY AND MEMBERS
FANNING AND PENELLO**

On August 17, 1976, Administrative Law Judge James S. Jenson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-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 record¹ and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, 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, Wix Corporation, San Leandro, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice shall be substituted for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

IT IS FURTHER ORDERED that the challenge to the ballot of George Cudiamat be sustained, that Objections 3 and 4 be overruled, that Objections 2 and 5 be sustained, and that the election held on September 17, 1975, be set aside.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

¹ The election in Case 20-RC-12932 was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was two for, and two against, the Petitioner; there were two challenged ballots, a sufficient number to affect the results. Thereafter, the Regional Director for Region 20 issued a Report on Challenges and Objections in which she recommended that Petitioner's Objections 1 and 6 be overruled and that the challenge to the ballot of Kurt Heinberg be sustained. The Regional Director further ordered that a hearing be held to resolve the issues raised by

Petitioner's Objections 2, 3, 4, and 5 and the Employer's challenge to the ballot of George Cudiamat, and ordered consolidation of the representation case with Case 20-CA-10639 for hearing before an Administrative Law Judge. No exceptions to the Regional Director's report were filed. By order dated February 10, 1976, the Board adopted the Regional Director's recommendations as contained in her report.

² The General Counsel and the Respondent have 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), enf. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board has found that we have violated the National Labor Relations Act, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collective through representatives of their own choosing
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any such activities.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT tell our employees that we will not allow a union to represent them.

WE WILL NOT threaten to move or close our warehouse facility if the Union comes in.

WE WILL NOT threaten to discharge employees because of their union activities.

WE WILL NOT threaten to change our method of distribution and eliminate a job because of union activities.

WE WILL NOT create the impression with our employees that a fellow employee has been terminated because of his union activities.

WE WILL NOT interrogate our employees regarding their union activities and sympathies or the union activities and sympathies of their fellow employees.

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

WIX CORPORATION

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. These cases were heard before me in San Francisco, California, on April 1, 1976. The complaint, which was consolidated with a hearing on challenge and objections to election, was issued on January 23, 1976, pursuant to a charge filed on September 18, 1975.¹ The complaint alleges that agents of Respondent made various statements in violation of Section 8(a)(1) of the Act, and that Respondent discharged employee George Cudiamat and reduced the number of work hours of its employees because of their membership in or activities on behalf of the Union in violation of Section 8(a)(3) of the Act. The objections to the election, which were also filed on September 18, allege conduct substantially similar to that alleged to constitute unfair labor practices in the complaint. Respondent denies that it engaged in the conduct alleged to be unlawful and objectionable and contends that Cudiamat was terminated and the number of work hours of its employees was reduced, for lawful reasons which had nothing to do with the Union.

All parties were given full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACTS

I. JURISDICTION

Wix Corporation, herein called Respondent, with its principal office located in Gastonia, North Carolina, and a warehouse facility located in San Leandro, California, is engaged in the manufacture of air filters. During the last calendar year, Respondent purchased goods and supplies for its North Carolina facility valued in excess of \$50,000 directly from suppliers located outside the State of North Carolina. On these facts it is found that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Warehouse, Mail Order and Retail Employees, Local Union 853, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *A Picture of Respondent's Operations*

Respondent is engaged in the manufacture in Gastonia, North Carolina, of a variety of filters for combustion engines which are marketed under the brand names "Wix" and "NAPA." Wix brand filters are sold directly by Respondent's own sales organization, while NAPA brand filters are manufactured for members of the National Automotive Parts Association and are marketed by Gard Corporation, a wholly owned subsidiary of Respondent. The four primary warehouses operated by Respondent in the United States are located in Los Angeles and San Leandro, California, Dallas, Texas, and Des Moines, Iowa. The San Leandro warehouse operation is the only one involved in these proceedings. The National Automotive Parts Association, herein called NAPA, has from 35 to 40 distribution centers located throughout the United States, of which 10 are located on the West Coast and 1 in Hawaii. With the exception of shipments to the 10 West Coast and Hawaii distribution centers, prior to August 1975, Respondent shipped the NAPA brand filters from Gastonia directly to the NAPA distribution centers on pallets containing cartons of filters about which had been shrunk a plastic film or covering, herein called "shrink pack." In contrast, prior to August 1975, the 10 West Coast and Hawaii distribution centers were supplied from the San Leandro warehouse. This meant that the cartons of filters were shipped via "piggyback" from Gastonia to San Leandro where they were unloaded by hand, stored, and then later handpacked, labeled, and reshipped in loose cartons to the 11 distribution centers where they were again unloaded and worked by hand.

The evidence shows that in late 1973 Respondent was considering shipping filters to all of the NAPA distribution centers directly from Gastonia, with the possible consequence of completely phasing out the San Leandro warehouse. Consideration was also given to installing a "shrink packing" facility at San Leandro. The evidence further shows that, in early 1975, the western NAPA distribution centers were complaining about the time and money lost through unloading, counting, and stocking loose cartons, and asked that Respondent work out some way of shipping palletized shrink pack shipments to them directly from Gastonia as it did to the vast majority of the NAPA distribution centers. Following cost savings studies, Respondent determined that substantial savings in time and money could be made, and service improved, by making palletized shrink pack shipments directly to the West Coast NAPA distribution centers from Gastonia. Accordingly, Respondent made arrangements with B and P Motor Lines, Inc., a contract carrier, to handle shipments of merchandise from Gastonia to the West Coast and, on March 18, application for temporary authority to operate as a contract carrier was made with the Interstate Commerce Commission. On June 27, Respondent received a copy of the temporary authority applied for, and was informed that the carrier was required to await a telegram from the ICC

¹ All dates hereafter are in 1975 unless otherwise stated

authorizing the commencement of operations, which would probably be sent about July 30. On August 6, Respondent's general sales manager advised the NAPA distribution centers in Spokane and Seattle, Washington, and Portland, Oregon, that Respondent was ready to commence shipping "shrink film pallets" of NAPA filters directly from Gastonia with the week of August 18, and that the first shipment, which would be shipped on August 21, should arrive on or about Monday, August 25. Procedures for placing future orders were also set forth.² On August 13, Herbert Price, Respondent's vice president in charge of manufacturing and director of outside warehousing, wrote Frey that, since Spokane, Seattle, and Portland would be served directly from Gastonia, the following week, the number of cartons being shipped to the San Leandro warehouse was being reduced, "since you won't be needing quite as much inventory." The final paragraph of the letter reads:

Max will be talking with you about reducing the allowed inventory levels of NAPA items and these reduced figures should be fed to IBM shortly. In the meantime, we will have you handle this by hand as shipments leave Gastonia. Our new contract carrier for the West Coast has greatly shortened direct time and so far, our experience with him to Dallas and to Des Moines has shown this will save us a great deal. Because of shorter direct time, the trailers he is picking up from Gastonia this week may be arriving simultaneously with the piggyback trailers that left here last week. If this is true, you may have an awfully busy week during the week beginning 8/18 because the trailers will have bunched to a great extent. Somewhat offsetting this, however, will be the reduction of one trailer load which we have just created today and will be the fact that you are no longer serving Spokane, Portland, and Seattle. After next week's extraordinarily busy week, you should find that for the week beginning 8/25 and thereafter, you will be handling 30-40% less NAPA volume—both in and out, and you will have to manage your work force accordingly. It is necessary that we continue to keep our cost per element shipped as low as possible.

Thus, during the transition period, it was expected that there would be some overlap in "piggyback" shipments to the San Leandro warehouse under the old method, and the direct shipments by B and P Motor Lines, Inc., resulting in more than the usual number of trucks to be unloaded during the week of August 25.³ Price and Frey had discussed the effect of the change on the San Leandro warehouse a few days earlier, and Price told Frey that, since 30 to 40 percent of the NAPA volume would bypass the San Leandro warehouse, after the week of August 25 he would have to adjust the work force by cutting out overtime, eliminating all casual labor, and reducing the work force by one person. Frey testified that he then made the decision to terminate Cudiamat since he was the least senior employ-

ee.⁴ Inasmuch as the contract carrier was late a day or two in arriving in San Leandro on the first week's shipment, Frey obtained authorization from Price to delay the reduction in the work force until the middle of the following week. Frey testified, and Cudiamat denied, that he had told Cudiamat the week before that he was to be terminated at the end of the week of August 25 and, on August 29, that he wouldn't be terminated until September 3.

The evidence makes it clear that Cudiamat was the least senior of Respondent's five permanent employees, having become permanent on January 13, 1975. The next senior employee, Cutshall, had become permanent approximately 11-1/2 months earlier. The evidence also shows that two casual laborers were eliminated the week ending August 3, and David Frey, the warehouse manager's son, who worked as a casual laborer through the summer months of 1975, worked only 12 hours the week ending September 7, and did not work again until he returned the week ending October 12, after which he performed janitorial work formerly performed by a janitorial service.⁵ Testimony and exhibits show a 91-percent reduction in NAPA shipments from San Leandro following institution of direct shipments from Gastonia to the West Coast NAPA distribution centers, which caused a 62-percent decrease in the overall volume of cartons shipped from San Leandro. The evidence also shows a reduction of 45 percent in the average weekly hours expended by San Leandro employees to move merchandise after the change to shipping directly from Gastonia to the NAPA distribution centers.

B. *Advent of the Union*

On the evening of July 23, employees Richard Watkins, John Ortiz, and George Cudiamat went to the union office and obtained authorization cards. The following evening, the same three men met at Watkins' home, along with one of Respondent's casual employees, and signed the cards. At that time Respondent had five permanent employees, Watkins, Ortiz, Cudiamat, Robert Cutshall, and Foreman Joe Drinkard, and three casual employees, Kurt Humberg,⁶ Anthony Miller, and David Frey, the son of the warehouse manager. The authorization cards were apparently turned over to the Union, which, on July 28, filed a representation petition with the Board in Case 20-RC-12932. The parties stipulated that a copy of the petition was received by Warehouse Manager Frey on or about July 29. Ortiz testified that he picked up the mail the morning the petition was received and, as was customary, was sitting in Frey's office while the latter went through the mail. David Frey was also present. Ortiz testified that when Frey opened the letter containing the petition, Frey stated, without looking up from the letter, "What's this, the men trying to get the Union in here again?" Ortiz testified that although he didn't know whether Frey was talking to himself or directing a question to him, responded, "Yes, we went down the other day and signed pledge cards for the Union." There is no

² A copy of the letter was sent to Roy Frey, manager of the San Leandro warehouse.

³ It took 10-14 days for a trailer shipped "piggyback" from Gastonia to reach San Leandro, whereas Respondent expected B and P Motor Lines to reduce the time to about 4 days.

⁴ Company policy on terminations was to compare the ability and

performance of all employees and, if all things were equal, to follow seniority. Frey testified that he checked the amount of cartons each warehouseman pulled daily, and they averaged about the same.

⁵ The General Counsel made no claim that Cudiamat should have been given the janitorial work in place of David Frey.

⁶ The challenge to Humberg's ballot was sustained by the Board.

evidence in the record that Frey responded or reacted to the remark. Frey's statement appears to me to have been a gratuitous remark, as opposed to a question directed to employee Ortiz. As the complaint fails to allege that Frey's comment constituted an unlawful interrogation, I make no unfair labor practice finding with respect thereto.⁷

Paragraph VI(a) of the complaint alleges that, on or about August 4, Frey threatened an employee that Respondent would not allow a union to represent the San Leandro warehouse employees, and that Respondent might close that facility if the Union were selected as the employees' collective-bargaining representative. Paragraph VI(d) of the complaint and Objection 2 allege that Frey threatened to close and/or move the San Leandro warehouse operation if the Union won an election. In support of these allegations Watkins testified that, around the end of July, he had a conversation with Warehouse Manager Frey in the latter's office and that Frey stated "that the Company would not stand for a union being in there, and they might be tempted to, like move the warehouse out of state, or possibly turn it — there was some conversation also about possibly turning to a public warehouse." Ortiz' testimony, corroborating Watkins, was that, around the end of July, he and Watkins were standing outside Frey's office discussing the Union and Frey came out and "he asked us what we thought we would gain by going union." Ortiz responded by asking Frey if he wouldn't do the same thing if he got better benefits, and Frey replied that he would, or else get a job with a company "already union." Cudiamat testified that, around the end of July, Frey approached him in the warehouse and made the statement that, if the Union came in, the warehouse would move. I credit the more specific testimony of Watkins, Ortiz, and Cudiamat over Frey's denial that he made the statements attributed to him in paragraphs VI(a) and (d) of the complaint and Objection 2. In this regard, Frey failed to testify with respect to any of the conversations referred to by the employees.

Paragraph VI(b) alleges that, on or about August 5, Frey threatened employees with discharge because of their union activities. Watkins, whose testimony was corroborated by Cudiamat, testified that about that date he, Cudiamat, Ortiz, Cutshall, Drinkard, and David Frey were standing in the "break area," when Frey came out and announced that he had received notice from the Company that they were improving the medical plan, but that he didn't have a "complete rundown on the program." Several questions were asked regarding the coverage, "then I believe the conversation got over to it being comparable to the Union and something about if we didn't . . . knock off the union talk out there, maybe one of us would have to go." Again, I credit the specific testimony of Watkins and Cudiamat over Frey's general denial that he threatened an employee that he would be discharged because of his union activities.

Paragraph VI(c) alleges that, on or about August 28, Frey threatened employees that Respondent would change its method of distribution of products and thereby eliminate unit work because of the union activities engaged in by its employees. Ortiz testified that, about August 28, Frey told

him that Respondent was going to start shipping shrink packs directly from the factory in Gastonia to Spokane, Seattle, and Portland, which would cut down on the work "and then he warned me about my absenteeism and told me that they were going to have to get rid of a man and he didn't want it to be me." Cudiamat testified that, about August 22, he, Watkins, and Drinkard were approached by Frey, who told them the Respondent was "going to start going shrink pack and Richard [Watkins] asked him why . . . and he goes, 'It's because of the union activities going on around here.'" The gist of Watkins' testimony was that after telling Drinkard, Cudiamat, and him that changing to shrink pack would reduce the workload, which might permit a reduction in the output, the subject of the Union was brought up, and Frey stated that, if the union talk persisted in the warehouse, this might determine who in the crew would be "cut back." Again, Frey denied generally that he ever told employees the Company would change its method of distribution and thereby eliminate unit work because of the union activities of its employees. I am convinced from the testimony of Cudiamat and Watkins, whom I credit, that, regardless of the precise words used by Frey, his statement amounted to a veiled threat which was obviously intended to discourage union activity, and I so find.

Paragraph VI(e) alleges that, on or about September 3, Frey told an employee that the available hours were being reduced because of employee union activities. Paragraph VII(b) alleges the reduction in the number of work hours on an unknown date in August because of the Union, and Objection Number 3 alleges a change in employee working conditions about August 8 in order to discourage employee union activities. True motivation always requires consideration of all the relevant factors. Those factors which led up to the change in Respondent's method of shipping its products to customers has been set forth heretofore, and convince me that the change was not unlawfully motivated because of the union activities of its employees. Union activity among the employees did not commence until late July, whereas concrete steps to implement the change to direct shrink pack shipments from Gastonia had been taken months before.⁸ As pointed out before, the West Coast customers were demanding direct factory shrink pack shipments which would reduce their expenses, and Respondent had determined the new method of delivery would result in "tremendous cost savings" to itself and better service to its customers. The effect of the change was as anticipated. A 91-percent reduction in NAPA shipments from San Leandro, and an overall decrease of 62 percent in the volume of both Wix and NAPA cartons shipped from San Leandro resulted. As a consequence, there has been a 45-percent reduction in the average weekly hours worked by the San Leandro warehouse employees. The labor records show the elimination of all casual labor from the week ending September 7 until the week ending October 12, when David Frey commenced doing janitorial work. In addition, the regular warehouse employee complement was reduced an additional man when Ortiz was on sick leave

⁷ Par. VI(g) of the complaint and Objection Number 5 allege that Price interrogated employees regarding the Union on or about September 15. That allegation will be dealt with hereafter.

⁸ See application for temporary authority, dated March 18 [Resp Exh 5], and correspondence of March 28, April 3 and 21, and June 25 and 27 [Resp Exh 6, 7, 8, 9, and 10], all of which predate organizational activity.

from October 12 until the second week of December, and the labor records show that he was not replaced during that time by a casual employee. In light of the foregoing, I find that the General Counsel has failed to prove by a preponderance of the evidence that the Respondent violated the Act as alleged in paragraph VII(b) of the complaint, or engaged in the conduct alleged in Objection 3.

Resolution of paragraphs VI(e) and VII(a) and Objection 4 depends not only upon a consideration of the foregoing factors, but also upon individual credibility.

Frey admitted without hesitation that he knew Watkins and Ortiz had been active on behalf of the Union, that Cudiamat "might have possibly" signed an authorization card, and that Cutshall had not signed a card. He testified credibly that he and Price had discussed the forthcoming switch in delivery operations and that he would have to decrease the permanent work force by one man, and, after concluding the work performance of all of the permanent employees was not a significant factor, he selected, in accordance with company policy, the least senior permanent employee who happened to be Cudiamat.⁹ Frey testified he told Cudiamat early in the last week of August that he was going to be terminated at the end of the week, and that, after getting clearance from Price, he told him on August 29 that he would not be terminated until the following Wednesday.¹⁰ He further testified that, on September 3, "I told him that he was permanently terminated. That's as far as I left it." He denied he told Cudiamat the hours had been reduced because of union activities or that he was being terminated for that reason. Cudiamat denied he had any warning of his discharge prior to September 3, and that after lunch on Wednesday, September 3, he was approached by Frey and the following dialogue took place:

A. He said, "George?" I go, "Yeah." And he goes, "George, I am going to have to terminate you because the Company has cut it and the Company has cut down our workload to something like 45 percent; and, since you are low man on the totem pole, I am going to have to let you go." And, I asked him why.

Q. And what did he say?

A. Because of the Union.

When asked to explain the reason for asking Frey, "Why?" after having already been given a reason for the termination, Cudiamat testified:

Now, I figured—I figure I wasn't—Well, you know—in union things, I figured that the person that starts there first is not the low man on the totem pole. Is not, you know, less seniority. I figure that the one—I figure, you know, the one like, say, I started before—I figure I started before Bob Cutshall, and I figured he was the man to be the one to be terminated, not I.

⁹ The General Counsel contends that Cutshall should have been terminated in place of Cudiamat because he was not a good employee and had worked for Respondent less time than Cudiamat. As shown before, Cutshall was senior to Cudiamat by 11-1/2 months. Further, the fact he filled in for Warehouse Manager Frey during the latter's absence due to a heart attack in early 1975 convinces me that Cutshall was more highly regarded as an employee than was Cudiamat.

Q. All right, and then what did he say after you said why, and he said because of the Union? Then, what did you say then?

A. I just said, Okay. What could I say? There was nothing I could do.

He admitted he didn't ask Frey why Cutshall wasn't terminated in his stead.

I have gone over the testimony of both Cudiamat and Frey repeatedly and must say that I do not believe the total testimony of either. While I find it inconceivable that Frey told Cudiamat only that he was being permanently terminated, without giving any further explanation, I find it equally inconceivable that Cudiamat would have asked Frey "why" he was being terminated, after having already been given a reason. Cudiamat's purported reason for asking "why" is totally unconvincing. Rather, I am convinced it is an afterthought and conceived by him only for the purpose of establishing a violation in this case. His reason for asking "why," if true, would most certainly have been completed by asking: "Why not Bob Cutshall instead of me because he has less seniority?" In sum, I do not believe Frey told him on September 3 that available work hours were being reduced because of employee union activities as alleged in paragraph VI(e); or that Cudiamat was terminated because of his union membership or activities or because he engaged in other concerted activities, as alleged in paragraph VII(a) and Objection Number 4. In that regard, Cudiamat's only union activity was the signing of a union authorization card. Watkins and Ortiz appear to have been the employees who were vocal for the Union.¹¹ Section 8(a)(3) of the Act prohibits discrimination in regard to tenure or other conditions of employment for the purpose of discouraging union membership and activities. A finding of violation of this section normally turns on the employer's motivation. *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 316 (1965). The question is not whether there existed a valid basis for discharge but whether the stated basis was the real one. *J. P. Stevens & Co. v. N.L.R.B.*, 380 F.2d 292 (C.A. 2, 1967).

I am convinced and find that Respondent herein discharged Cudiamat for the reason it advanced, that such reason was not sham nor pretextual, and that the discharge was not motivated in whole or in part by Cudiamat's union or protected activity.

Paragraph VI(f) alleges that on September 8 Frey told employees that a fellow employee had been fired because of his union activities. Ortiz testified that on September 8 he talked to Frey in the warehouse and asked if Frey had noticed a 'slowdown in his work. Frey replied that he hadn't, but that he had noticed a slowdown in Watkins' work. On the following day, Ortiz, Watkins, and Cutshall were unloading a trailer and having "a pretty heated discussion" about Cudiamat's termination. Frey walked up and told Watkins that he had been timed pulling an order the day before, and it had taken him too long. Ortiz then

¹⁰ Monday, September 1, was a holiday and no one worked.

¹¹ It is not uncommon "to believe some and not all" of a witness' testimony. *N.L.R.B. v. Universal Camera Corporation*, 179 F.2d 749, 754 (C.A. 2, 1950)

testified, "And, then at that time, Richard Watkins came out point blank and told him that the truth behind George Cudiamat's termination was not because of lack of work but was because of his union activities." Roy Frey said, "Yes, but there's nothing we can do about that now." Watkins' version was that the three men were talking loudly about the Union and its benefits while they were unloading a trailer, when Frey walked up and said he had checked Watkins the day before, "And that . . . since the union talk and everything was going about, that my efficiency and output had dropped and he timed me on this one specific order and it just wasn't up to par; that I had better get on the stick or something was going to happen and at that time I told him that as far as I was concerned, the condition of the warehouse was such that my work couldn't help but be slowed down. We had so much work piled up, nobody was able to stock the shelves like they were supposed to; pallets were in the way and there was obstacle after obstacle and I wasn't purposely, to my way of thinking, slowing down just because of this union thing, and it became a kind of a heated conversation and then I made the statement myself that this whole thing was a bunch of B.S. about George being terminated for the workload. I said, look around us, it's everywhere. I said, I know, and you know, and we all know that George was terminated for his union activity and not for lack of work around here; he said, Yeah, but there is nothing we can do about that now and I want this talk about the Union dropped right now and he wanted us to get back to work, which we were. I guess we stopped for something like 10 minutes during this discussion or whatever, to talk." Without testifying concerning this conversation, Frey denied he ever told any employee that another employee had been fired because of union activities. While I am convinced, as stated heretofore, that Cudiamat was not unlawfully terminated, I am equally convinced that the conversation reported by Ortiz and Watkins occurred, and that Frey sought to thwart the Union's organizational success by confirming the suspicions of the employees regarding the reason for Cudiamat's termination. By so doing, he engaged in conduct violative of Section 8(a)(1) of the Act.

Paragraph VI(g) and Objection 5 allege that on or about September 15 Price interrogated employees regarding their union activities and sympathies. It appears from the record that on occasions when Price visits the San Leandro warehouse, he customarily talks to employees on an individual basis. Ortiz testified that on September 15, 2 days prior to the scheduled election, he and Price had a conversation in the coffeebreak area. He testified that Price discussed the new company health plan and "they had so much more to offer us than the Union did in this new health plan. He also told me he knew that I felt committed to Richard Watkins as far as the union activity thing. I told him no. He told me that when the election took place, which was only a couple of days after that, that he was hoping for four votes against the Union, and I reminded him, then, that there would be five votes including Cudiamat's. And, he told me, 'Well, Cudiamat's won't count because we're going to challenge it. This vote will be challenged.' And he also told me that by looking over the warehouse, in general, he could see that there was quite a

bit of safety hazard, and what have you, backlog on orders, backlog on trailers, and he said we might have jumped the gun by terminating George Cudiamat."

Watkins testified that he had two individual conversations with Price. The first occurred on September 15 at the coffeebreak area. According to Watkins, Price stated he was under the impression that Watkins was the instigator of the Union, and the other employees appeared to be following him, which Watkins denied by stating, "It was all a group decision," that the employees hadn't gotten anywhere in resolving problems in the past and decided to try to organize the Union again. He testified that Price went over the medical benefits program, asked why he felt so strongly about the Union, and suggested that Watkins find other employment if he wasn't satisfied with his present employment. Watkins testified that Price asked him if he was going to vote for the Union, that he would like to have four votes against the Union, and that the Company would "do everything in our legal power to keep the Union out." It appears that on September 15 Price told the employees that he wanted to take them to lunch on September 16. As Watkins had a toothache that morning, he told Price he wouldn't be able to go to the luncheon since he had to have the tooth taken care of. According to Watkins, Price stated he wanted to talk to him again individually, and they went again to the coffeebreak table where Price "again stated . . . probing me about how I would vote. Why I wanted the Union, things of that nature . . . the Company did not intend to have a union in the place. They didn't want an outside power or an outside force. They wanted to be able to handle their problems . . . within the Company. But even if . . . we got the Union in . . . that they would, under no terms, as far as he was concerned, sign a contract and without a contract, we had no more than we have right now."

Price's version of the conversation with Ortiz on September 15 was to the effect that he had three special items which he had to discuss with each of the employees—one was a general list of the company benefits for the outside warehousemen, the second was the "basic thrust" of the new insurance policy, and the third was the "latest benefit level and the retirement plan." He testified they also discussed Ortiz' absenteeism. He denied he asked Ortiz how he or anyone else intended to vote. With respect to his September 15 conversation with Watkins, Price stated he had difficulty getting to the three special items he wanted to discuss with each of the employees because of Watkins' concern and questions on the health insurance and retirement plans. He testified he knew Watkins' feelings about the Union, because Watkins had expressed them that morning in a group meeting to the point of being disruptive, and had reiterated them in the individual meeting. He denied he asked Watkins who the union leader was, or how he or anyone else was going to vote. With respect to September 16, Price testified he had a brief conversation with Watkins in the warehouse and that the primary point of it was to see if anybody had any questions about matters covered or not covered in the previous meetings. While not recalling whether the Union was discussed with Watkins, he thought it probably was because whenever he talked to Watkins, "he was very much concerned with this thought."

I have carefully reviewed the testimony of Ortiz, Watkins, and Price and note that Ortiz failed to support the allegation that Price interrogated him about his union activities or those of his fellow employees. His testimony boils down to the fact that Price expressed the thought the Respondent's health plan was better than the Union's, that he knew Ortiz felt committed to Watkins insofar as the Union was concerned, that he hoped everyone voted against the Union, and that Respondent would challenge Cudiamat's ballot. Watkins, on the other hand, testified with preciseness with respect to incidents of interrogation on both September 15 and 16. While Price testified in great detail with respect to other facets of this case, his testimony regarding his conversations with Watkins were vague and he spoke in generalities, indicating to me that there was more to be said than he was saying. In these circumstances, I credit the testimony of Watkins over that of Price and find that Respondent engaged in the conduct alleged in paragraph VI(g) of the complaint and Objection 5.

D. *The Challenged Ballot*

The ballot of George Cudiamat was challenged by Respondent on the ground that he had been unlawfully terminated prior to the election. I have found that Respondent did not terminate Cudiamat because of his membership in or activities on behalf of the Union or because he engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Accordingly, I recommend that the challenge to his ballot be sustained.

E. *The Objections*

I have found that Respondent violated Section 8(a)(1) of the Act in numerous respects, including the conduct alleged in Objections 2 and 5. Such conduct having occurred prior to the election held in Case 20-RC-12932, I find that it interfered with the employees' free choice of representatives and was of sufficiently substantial nature to affect the results of the election and to require that the election be set aside and a new election be held. As I have found that Respondent did not engage in the conduct alleged in Objections 3 and 4, I recommend their dismissal.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

¹² 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.

V. THE REMEDY

Having found that Respondent has engaged in, and is engaging in, certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. By threatening employees that the Company would not allow a union to represent them, by threatening to move or close its warehouse facility if the Union came in, by threatening to discharge employees because of their union activities, by threatening to change its method of distribution and eliminate a job because of union activities, by creating the impression with employees that a fellow employee had been terminated because of his union activities, and by interrogating employees regarding their union activities and sympathies, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of 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 recommended:

ORDER¹²

The Respondent, Wix Corporation, San Leandro, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees that the Company would not allow a union to represent them, threatening to move or close its warehouse facility if the Union came in, threatening to discharge employees because of their union activities, threatening to change its method of distribution and eliminate a job because of union activities, creating the impression with employees that a fellow employee had been terminated because of his union activities, or interrogating employees regarding their union activities and sympathies.

(b) In any like or related 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 which is necessary to effectuate the policies of the Act:

(a) Post at its facility in San Leandro, California, copies of the attached notice marked "Appendix."¹³ Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by an authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places

¹³ In the event the Board's 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"

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.

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

IT IS FURTHER RECOMMENDED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the

Act not found herein, specifically paragraphs VI(e), VII (a) and (b).

IT IS FURTHER RECOMMENDED that the challenge to the ballot of George Cudiamat in Case 20-RC-12932 be sustained, that Objections 3 and 4 be dismissed, that Objections 2 and 5 be sustained, and the election held on September 17, 1975, be set aside and that a new election be conducted at such time as the Regional Director deems appropriate.