

Van Dyne Crotty Company and United Rubber,
Cork, Linoleum & Plastic Workers of America,
AFL-CIO, CLC. Case 8-CA-21523

March 12, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On August 15, 1989, Administrative Law Judge Thomas C Ricci issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

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

The Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified² and set out in full below.

1 The Respondent has excepted to the judge's finding that it unlawfully discharged employee Harper. The Respondent contends that the judge failed to apply the standard set out in *Wright Line*, 251 NLRB 1083 (1980), enf'd 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), in his discussion of Harper's discharge, and that if a *Wright Line* analysis were applied, no violation would be found.³ In this regard, the Respondent asserts that the General Counsel failed to establish a prima facie case of unlawful discharge under *Wright Line* because the General Counsel failed to show that the Respondent knew of Harper's union activities before it decided to fire him. The Respondent therefore contends that its decision to discharge Harper could not have been motivated by antiun-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We note that the judge recommended a broad cease-and-desist provision ordering the Respondent to cease from violating the Act "in any other manner." We find that the broad order is not warranted in the circumstances of this case. Accordingly, we shall issue a narrow cease-and-desist order requiring the Respondent to refrain from violating the Act in "any like or related" manner. The judge inadvertently failed to include an expunction provision in his recommended Order. We include such a provision in our Order. Finally, we have modified other provisions in the recommended Order so as to conform to the Board's customary language.

³ In *Wright Line*, supra, the Board established a two-part causation test in cases alleging violations of Sec. 8(a)(3), turning on employer motivation. Under the *Wright Line* analysis, the General Counsel has the initial burden of establishing a prima facie showing that protected activity was a "motivating factor" in the employer's decision. Once the General Counsel has met this burden, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity.

ion animus. For the reasons set forth below, we find no merit in the Respondent's exception.

Initially, we note that the judge essentially applied a *Wright Line* analysis in his discussion of Harper's discharge, although he did not expressly use *Wright Line* terminology. In this regard, the judge set forth the factors requisite to the General Counsel's prima facie case. Thus, the judge's finding that Supervisor Prosser stated that Harper would be fired because the Respondent knew for a fact that he had started the "union business" at the plant and that "he would not be the only one to go," establishes that the Respondent knew of Harper's union activities before it decided to discharge him.⁴ Additionally, Prosser's comments provide evidence of the Respondent's animus toward the Union. Regarding the specific circumstances surrounding Harper's discharge, the timing of Harper's discharge, and the Respondent's departure from its own written rules in discharging Harper without warning⁵ also support a prima facie case that the Respondent's discharge of Harper was unlawfully motivated.

We also agree with the judge's finding, based largely on his credibility determinations, that the Respondent's asserted reason for terminating Harper, i.e., his poor performance, was pretextual.⁶

⁴ Absent specific evidence to the contrary, a supervisor's knowledge of union activity is imputed to the employer. See *Dr. Phillip Megdal*, 267 NLRB 82 (1983), cited by the judge in his decision.

⁵ As the judge notes, Harper was given a copy of the Respondent's "Plant rules and regulations for probationary employees" in October 1988 shortly after he began work. In his decision, however, the judge inadvertently quotes from a document entitled "Company Rules" instead of from the "Plant rules" that were given to Harper. The latter document provides that any of the offenses listed in sec. 2 "Other Offenses" will result in a written warning, that receipt of a second written warning within the 90-day probationary period will result in a 3-day suspension and that receipt of three written warnings within the 90-day probationary period will result in discharge. One of the offenses listed under sec. 2 is "Carelessness or faulty workmanship." Because the Respondent's "Plant rules and regulations for probationary employees," as well as its "Company Rules," incorrectly cited by the judge, provided for the issuance of written warnings for poor performance, and because in any event Harper received none, we find that the judge's inadvertent error does not affect the result of his analysis.

⁶ The Respondent excepts, inter alia, to the judge's finding that because there were only 25 telephone memos recording customer complaints about alleged discriminatee Harper, there were therefore only 25 total customer complaints about him. The Respondent contends that the judge's credibility resolutions must be reversed because they were based solely on this erroneous finding. Although we find some factual merit in the Respondent's exception, we disagree with its contention that the judge's credibility findings were erroneous. Thus, as the Respondent contends, the testimony makes clear that the Respondent made phone memos of customer complaints only when officials were not in the office to answer the complaint calls. Accordingly, the 25 phone memos may not be evidence of all the customer complaints that the Respondent actually received about Harper. We find, however, that the judge did not base his credibility resolutions primarily on the number of phone complaints that the Respondent received about Harper. Indeed, before discussing the memos, the judge stated his conclusion that the Respondent's defense that Harper was a poor employee was a "fabricated story" and that the Respondent's officials lacked credibility. The judge based his credibility de-

Continued

Because the Respondent has not demonstrated that it would have discharged Harper even absent his union activity, we find that it has failed to rebut the General Counsel's prima facie case of unlawful discharge. We, therefore, agree with the judge's conclusion that the Respondent violated Section 8(a)(3) by discharging employee Harper because of his union activities.

2 The Respondent has also excepted to the judge's finding of independent violations of Section 8(a)(1) because the charge contained no such allegations and that the 8(a)(1) violations alleged in the complaint are not closely related to the 8(a)(3) allegations contained in the charge. We find this exception without merit. In *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), which was issued subsequent to the judge's decision, the Board held that for an 8(a)(1) complaint allegation to be "closely related" to a charge allegation, the 8(a)(1) complaint allegation must "be factually related to the allegation in the underlying charge." In finding that such a factual nexus exists here, we emphasize that the alleged violations of Section 8(a)(1) occurred in the course of a conversation during which Supervisor Prosser specifically identified Harper, the alleged discriminatee, as an employee who would be discharged for engaging in union activity, that the Respondent discharged Harper only 2 days after Prosser threatened that he would be discharged, and that Prosser's conduct as well as the Respondent's discharge of Harper occurred at virtually the same early juncture of the union campaign and was aimed at undermining union support.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Van Dyne Crotty Company, Akron, Ohio, its officers, agents, successors, and assigns, shall

1 Cease and desist from

(a) Discharging or otherwise discriminating against its employees in retaliation for their protected concerted, union activities

termination on his finding that if Harper had actually stolen as much as the Respondent claimed he had through reporting excessive overtime, the Respondent would have discharged him long ago, for that reason. Thus, according to the judge, "No reasonable employer would keep a man who stole that much money from the company for so long a time." The judge also based his determination on the fact that, despite its asserted unhappiness with Harper's work, the Respondent failed to produce any evidence that it had issued warnings to Harper or counseled him about his performance although its own rules provided that written warnings be issued for unsatisfactory work. This factor only becomes more persuasive when considered in the context of the Respondent's claim in its exceptions that it received more customer complaints than the judge found.

(b) Coercively interrogating employees as to their knowledge of union activities, telling employees the Respondent has knowledge of their union activities, telling employees a unionizer would be discharged because of union activities, or telling employees other employees would be discharged because of their union activities

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

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

(a) Offer Michael Harper immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest to be computed in the manner prescribed in *F W Woolworth Co*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987)

(b) Remove from its files any reference to the unlawful discharge of Michael Harper and notify him in writing that this has been done and that the discharge will not be used against him in any way

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order

(d) Post at its facility in Akron, Ohio, copies of the attached notice marked "Appendix"⁷ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply

⁷ If 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."

APPENDIX

DECISION

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice

WE WILL NOT discharge or otherwise discriminate against our employees because of their union activities

WE WILL NOT question employees as to their knowledge of union activities

WE WILL NOT tell employees that we have knowledge of their union activities

WE WILL NOT tell employees a unionizer would be discharged because of his union activities

WE WILL NOT tell employees that other employees will be discharged because of their union activities

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

WE WILL offer Michael Harper immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest

WE WILL remove from our files any reference to the unlawful discharge of Michael Harper and notify him in writing that this has been done and that this disciplinary action will not be used against him in any way

All our employees are free to join or assist United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO, CLC or any other labor organization of their choice

VAN DYNE CROTTY COMPANY

Cathy Modic, Esq and *Susan E Fernandez, Esq* , for the General Counsel
Jonathan R Vaughn, Esq (Vorys, Sater, Seymour & Pease), of Columbus, Ohio, for the Respondent
Craig Hemsley, of Massillon, Ohio, for the Charging Party

STATEMENT OF THE CASE

THOMAS A RICCI, Administrative Law Judge A hearing on this proceeding was held at Akron, Ohio, on June 5 and 6, 1989, a complaint of the General Counsel against Van Dyne Crotty Company (the Respondent or the Company) The complaint issued on March 9, 1989, upon a charge filed by United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC (the Union) The main issue of the case is whether Michael Harper, an employee of the Respondent, was discharged because of his prounion activity, in violation of Section 8(a)(3) of the Act Briefs were filed by the General Counsel and the Respondent

On the entire record and from my observation of the witnesses, I make the following¹

I THE BUSINESS OF THE RESPONDENT

Van Dyne Crotty Company, an Ohio corporation, provides industrial clothing and laundry services out of its place of business in Akron, Ohio Annually in the course of its business it purchases and receives at that location products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Ohio I find that the Respondent is an employer within the meaning of the Act

II THE LABOR ORGANIZATION INVOLVED

I find that United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act

III THE UNFAIR LABOR PRACTICES

This entire case centers on the discharge of an employee who openly started a campaign among Respondent's approximately 35 rank-and-file employees Michael Harper was hired as a driver salesman on September 7, 1988, and worked until November 11 of that year He was to be a probationer for 90 days, paid at \$6 per hour for regular work and \$9 per hour for overtime work

On October 18 he prepared a petition for representation by the Union and circulated it among the employees Within 4 or 5 days, soliciting signatures to his petition in the plant during breaktime and when he was off duty, he succeeded in obtaining 16 signatures For November 5 he arranged to have a meeting of employees with a representative of the Union in his home About four employees came to meet the union representative The Union's agent, Michael Skipper, gave them union authorization and membership cards to be distributed Harper and the other employees then went about the plant talking up the Union and obtaining signatures On December 9 the Union filed a petition with the Board for an election, an election was held and later the Board

¹ After the close of the hearing the General Counsel filed a motion, without opposition, to withdraw those elements of the complaint which relate to the discharges of Kimberly Weaver and Tandra Williams The motion is granted

certified the Union as exclusive representative of all the employees

Marilyn Ball, an employee, testified, without contradiction by anyone that on November 9, Norma Prosser, an admitted supervisor, asked her if there was a union meeting to be held Ball answered she knew nothing about that Prosser then said, according to Ball's testimony, "I think there's a union meeting today and then she went on to state that she knew Michael was going to get fired because they knew for a fact he had started the union business And she said he would not be the only one to go" Prosser was not called as a witness Two days later, on November 11, with no advance indication of any kind, Harper was discharged

Decision here rests entirely on a question of credibility

Harper testified that throughout his employment he was not ever told by any supervisor that his work performance was unsatisfactory, that he was never given a warning of any kind, oral or written, that no member of management ever found fault with his work He added that when, on the night of November 10, Michael Frier-mood called him at home to tell him he was fired, all the boss said was "I know you don't like to work a lot of overtime Maybe this job isn't cut out for you"

One of the reasons why Harper started the movement towards being represented by the Union was that he felt the overtime which his job required was too great a burden on him Shalenberger, the route supervisor over Harper, admitted that Harper told him he favored a Union and about his dissatisfaction with having to do too much overtime work

The Respondent's essential defense is that Harper was an incompetent worker, that he made all kinds of mistakes in scheduled deliveries, that he had insufferable faults throughout his period of employment, and that these were among the many reasons why he was discharged

As stated above, I am presented with a pure question of credibility—do I believe Harper that he was not criticized, or warned in any way for his work performance, or do I believe the many defense witnesses who directly contradicted him? For reasons which will be explained below, I completely credit Harper and completely discredit the management representatives who gave contrary testimony

When Harper first started to work here, early in October, the receptionist gave him a copy of the Company's "Plant rules and regulations for probationary employees" The document was received in evidence One section lists a number of "dischargeable offenses," and another list "other offenses" The rules then read

Any of these offenses listed below will result in a written notice Upon receipt of *third* written warning notice in any 12 month period an employee will be given a (five) working day suspension Any employee who receives four written warning notices in any (12) month period will be discharged Note That the warning notices need not be given for the same offense in order for a suspension or discharge to result

Immediately below this statement in the rules and regulations is listed the following as an offense "unsatisfactory work performance"

The Respondent admits that Harper was never given any written warning, or any suspension, pursuant to the established rules A number of management witnesses, including those who had supervised Harper, said clearly they had power to issue warnings and disciplines to employees pursuant to the written rules Towards the close of the hearing, Frier-mood, the man who actually fired Harper, just said those rules do not apply to route drivers, such as Harper On this record it was a meaningless, completely unsupported statement

If this record showed no more than the foregoing facts—timing, complete disregard of its own rules of conduct, and Prosser's clear threat to discharge the prounioner, I would find a violation of Section 8(a)(3) of the Act in Harper's discharge

Respondent called six management representatives, all supervisors, who testified, some briefly and others at great length, about the man's complete incompetence, his disregard of the work rules, his indifference to the interests of the Company, and his overtime work which was completely unjustified To hear them say it, this was a man no rational employer would keep on his payroll for a single day He was not given the usual warning slips, he was not fired during the entire time he allegedly kept hurting the Company's business, but he was summarily discharged a matter of days after holding a union meeting in his own house The more the Company's witnesses talked, the less credible they became In my considered judgment, all of them were giving a fabricated story put together after the events, about the man's performance and their claim to have orally warned him about his undesirable performance

The work of the driver-salesman is to deliver to the customers laundered linen, towels, uniforms, mats, and clothes as well as new purchases They are given a set of delivery orders before leaving the plant They also act as salesmen for the Company, soliciting new business as they proceed along the scheduled route According to the company records in evidence, Harper worked only a partial week at the beginning of his employment and at the end In the interval he worked 8 full weeks—the weeks of September 16 to November 4 During this period he did overtime work—a minimum of 17 hours and a maximum of 28 25 hours His average overtime was 21 85 hours per week, for which he was paid at \$9 per hour—or at average weekly overtime pay of \$196 85 With his first 40 hours' pay being \$240 per week—at \$6 an hour—Harper was getting almost double the amount of pay the Company thought—as they said at the hearing 7 months later—he was suppose to receive! This went on for 8 weeks, while the Respondent gave him no written warning or any discipline of any kind

No reasonable employer would keep a man who stole that much money from the Company for so long a time What this means is that Harper correctly explained how the route delivery assignments simply required him to keep going until he was through, and that the overtime was necessitated by the number of orders he had to de-

liver during the day In the repeated testimony of the many supervisors about Harper's general and gross incompetence, there is the admission by one supervisor that it is not unusual for the driver—not only Harper—to have to do 10 or more hours of overtime work weekly! From the testimony of Edsel White

Q Do you have any idea with respect to route 183, Harper's route, how long that route should take to perform?

A It varies actually at a weekly basis, but we try to maintain a 50 hour a week route, okay? The guys generally doesn't [sic] like to work anymore. Sometimes we have no choice but to have them work 50 hours week

One final element of the alleged proof of Harper's incompetence will suffice to explain my fundamental credibility conclusion in this case. Supervisor after supervisor testified about calls received from customers who telephone in to complain about the service received. As they would have it, Harper was the cause of the greatest number of such complaints. From the testimony of Shalenberger

Q How did the number of complaints you received about Mr. Harper compare to the number you received about other drivers?

A I'd say high. Usually only a couple of calls maybe a week on an individual route. You know, I was getting four or five, six calls maybe a day, you know, at a time.

Q For Mr. Harper?

A That's correct.

From the testimony of Supervisor White

Q What was your opinion of his performance level?

A It was poor.

Q All right. In what way was it poor?

A On a scale of 1 to 10, probably 2.5, considering all the other drivers at a scale of 7.5.

JUDGE RICCI How soon after he started to work did you notice these things?

THE WITNESS About three weeks down the road, okay?

Q How often do you receive complaints about Mr. Harper's performance from his customers?

A On a daily basis, depending on how many accounts he had daily. Probably four to five on a daily basis.

JUDGE RICCI Everyday four or five customers called to say that he was wrong.

THE WITNESS On the—on the average, okay?

From the testimony of Warner Saerls, a general manager, who started work at this location on November 8, 2 days before Harper was discharged.

Q How many calls did you take from customers, not just pertaining to Harper, but on the whole during that day or two that you took calls?

A I would say about 20 calls.

Q How many of them, to the best of your recollection, pertained to Harper's route?

A It was half or more.

Finally, from the testimony of the manager, Frierhood, who made the decision to discharge Harper.

Q And did you, in fact, take calls on an occasional basis from customers complaining about any driver?

A Sure.

Q All right. With respect to Michael Harper, did you receive calls from complaining customers?

A Yes, I did.

Q How would you compare the number of calls you received about Michael Harper compared to other drivers at the Akron facility?

A Michael Harper's calls were probably three times as many as the rest of them.

Q Okay. Do you recall approximately how many calls you got on Michael Harper during the course of his employment there?

A I'd say at least 50.

Frierhood then said that memos about the complaint calls are maintained in the office, in the route driver's personnel file.

So much for the generalities spoken by the witnesses. As objective, documentary proof of the veracity of his witnesses, Frierhood placed into evidence the memos recorded of the complaints received from customers concerning Harper's work. There are 25 such "phone memos," the first dated September 9, 1988, 2 days after Harper started work, and the last dated November 11, the day he left the Company. The first very revealing fact shown by these documents is that between November 3 and 11, there were no complaints recorded about Harper's work. What does this do to the testimony of Warner Saerls, who came to Akron on November 8 and swore that 50 percent of the complaints he received involved Harper, that "half or more, of "about 20 calls" concerned Harper? Can there be any question but that this man was lying at the hearing, was simply repeating what he was told to say as a witness? I think not.

For the rest, the exhibits serve to destroy the testimony of all the witnesses who spoke of five complaints a day about Harper, about how from the start the complaints never stopped coming in. With these the Respondent's own objective proof, it means the Company received about three customer complaints each week from customers on Harper's route. The testimony abounds that complaints were received all the time involving all the routes. It was also admitted many of the customers' complaints did not relate to the driver's work at all. In fact, Frierhood, in trying to explain each of the phone memos he produced, said some of them he did not understand at all, and some of them did not involve Harper at all. Again, all this makes perfectly credible Harper's statement that his work was no less satisfactory than that of any of the other drivers, and that management did not, ever, warn him of wrongdoing or threaten him with discharge because of his work performance.

Consistent with all this I also credit Harper against Friermood as to the discharge conversation on November 10 on the telephone. To support his story of telling Harper he was fired for incompetence Friermood produced a handwritten slip in which he had listed all kinds of infractions of rules by Harper, including the many mistakes charged against the man by the other supervisory defense witnesses. Friermood testified that he read all these items off to Harper on the telephone when telling him he was discharged. The slip of notes is not a regular company record, there is nothing to convince me it was written at the time of the events. It does not prove the correctness of Friermood's testimony at all.

In sum, without belaboring the matter unnecessarily, I find that by discharging Michael Harper on November 11, 1988, the Respondent violated Section 8(a)(3) of the Act, as alleged in the complaint *Wright Line*, 251 NLRB 1083 (1980).

I also find that by Supervisor Norma Prosser's conduct in questioning employees as to their knowledge about union activities, telling employees that the Respondent had knowledge of a scheduled union meeting, telling employees the union organizer was going to be discharged because of his union activities, and telling employees other employees would be discharged because of their union activities, the Respondent violated Section 8(a)(1) of the Act. See also *D Philip Megdal*, 267 NLRB 82 (1983).

THE REMEDY

It having been found that Respondent discharged Michael Harper in violation of the statute, it must be ordered to reinstate the man to his prior employment and to make him whole for any loss of earnings he may have suffered because of the illegal discrimination against him. The make-whole formula must include not only the \$240

per week which Harper earned for his regular time, but must also include the weekly average of \$196.85 he earned for his continuing overtime work. The Respondent must also be ordered to cease and desist from committing further violations of Section 8(a)(1) of the Act. It is also important that the Respondent be ordered to cease and desist from in any other manner violating the statute.

IV THE EFFECT OF UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section 3, above, occurred in connection with the operations of its business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and this tends to lead to labor disputes burdening and obstructing commerce and their free flow of commerce.

CONCLUSIONS OF LAW

1 By discharging Michael Harper on November 11, 1988, the Respondent has violated and is violating Section 8(a)(3) of the statute.

2 By the foregoing conduct, by questioning employees as to their knowledge of union activities, by telling the employees the Respondent had knowledge of their union activity, by telling employees a unionizer was going to be discharged because of union activity, and by telling employees other employees would be discharged because of their union activity, the Respondent has engaged in and is engaging in violations of Section 8(a)(1) of the statute.

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

[Recommended Order omitted from publication]