

**Cherokee Heating and Air Conditioning Co. and
Cody Ann Moran. Case 10-CA-21072**

18 June 1986

DECISION AND ORDER

**BY MEMBERS JOHANSEN, BABSON, AND
STEPHENS**

On 21 November 1985 Administrative Law Judge Hutton S. Brandon issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed exceptions and a supporting brief.

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

The Board has considered the decision and the record 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 modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cherokee Heating and Air Conditioning Co., Chamblee, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(e).

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

2. Substitute the attached notice for that of the administrative law judge.

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 The judge included a visitatorial clause in his recommended Order authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure subject to the supervision of the United States Court of Appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we have modified the judge's recommended Order. We have also modified the notice to conform to the Order.

APPENDIX

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

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

WE WILL NOT discharge or otherwise discriminate against any employees because they engage in concerted activity protected under the Act for mutual aid or protection.

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

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

WE WILL notify Cody Ann Moran that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

**CHEROKEE HEATING AND AIR CON-
DITIONING CO.**

Ann Leslie Unger, Esq., for the General Counsel.
*Malcolm D. Young Jr. and Carter Reid, Esqs. (Peterson,
Young, Self and Aslan)*, of Atlanta, Georgia, for the
Respondent.

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge. This case was tried at Atlanta, Georgia, on 3 and 4 October 1985.¹ The charge was filed by Cody Ann Moran (Moran), an individual on 10 July. The complaint issued on 22 August alleging that Cherokee Heating and Air Conditioning Co. (Respondent or the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) in discharging its employees Moran and Julia Ann Lee (Lee) on 21 and 25 June, respectively. The issues presented are whether Lee was a supervisor within the meaning of Section 2(11) of the Act and not entitled to the protection of the Act, and whether the discharge of Lee and/or that of Moran was based on their involve-

¹ All dates are in 1985 unless otherwise indicated.

ment in concerted activity protected under Section 8(a)(1) of the Act.²

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Georgia corporation with an office and place of business located at Chamblee, Georgia, where it is engaged in the selling and servicing of heating and air-conditioning equipment. Respondent during the past calendar year received gross revenues in excess of \$50,000 directly from suppliers located outside the State of Georgia. The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The underlying dispute which, according to the General Counsel, gives rise to this case grows out of the discontent of Respondent's service sales department employees with Respondent's method of paying commissions to such employees. While Respondent had for some time prior to January sold service contracts under which it undertook periodic preventive heating and air-conditioning maintenance service for customers, it had no group organization for such sales. Many such contracts were sold by service technicians who on completing repairs on customer air-conditioning and heating systems would frequently solicit and sell customers service contracts. Although such contracts were not viewed by Respondent as being greatly profitable in themselves, they were viewed as providing an avenue for other sales and business with the customer. Moreover, such contracts were desirable from Respondent's view because they provided Respondent with "up front" money for operating expenses, and gave Respondent flexibility in the use of its employees since they could be scheduled for service contract work when work was slack in other phases of Respondent's business.

In an effort to bolster service contract sales in September 1984, Respondent hired Moran.³ Moran was trained by Lee, who had been employed by Respondent in 1981, and who also sold service sales contracts. However, Lee had in the past primarily sold equipment and accessories.

Both Lee and Moran were paid on a 10-percent commission basis. Lee received a 2-percent override on Moran's sales. Moran received a draw of \$250 per week

against commissions, but prior to January Lee did not receive a draw.

Lee and Moran worked under Carlin O. Hodges, the service manager. Hodges testified herein that in late December 1984, he had reservations about the profitability⁴ of the service contract sales work noting that Moran was not frequently meeting her draw, i.e., earning commissions equivalent to or exceeding her draw. However, after discussing the matter with Harold Harmon, president of Respondent, it was concluded that Respondent would continue in service contract sales after 1 January making it a specific department to be "headed up" by Lee with the idea of increasing the volume of the sales. As an inducement to greater sales it was concluded that the commission rate would be increased to 15 percent, and the draw increased to \$300 per week. However, the draw could be reduced on the Company's determination that the employee was not making sufficient sales effort. Contrary to earlier practice, and in order to alleviate cash flow problems Respondent was experiencing, it was concluded that commissions on sales would be paid only after payments on the contracts were received rather than on execution of the contract by the customer. Lee was to continue to receive a 2-percent override for service contract sales.

Although the above terms were effective as of 3 January, a specific agreement containing those terms was not executed by Moran until 5 April. Lee signed a similar sales agreement on 5 April. In the meantime, a new employee, Debbie Blanchard, was hired into the department in February to do the same sales work as Moran. However, Blanchard received a draw of only \$200 per week until 13 June when at Lee's request it was raised to the same level as Moran's draw.

B. The Alleged Concerted Activity

Respondent's payment of commissions on receipt of contract payment by the customer rather than on execution of the contract was a source of problems and discontent for service sales employees. Thus, Moran testified that billings were not being sent out in a timely fashion so that service sales employees encountered substantial delays in receiving commissions. Moreover, commissions were decimated and delayed by customers who paid on a monthly, quarterly, or semiannual basis. Such payment arrangements also made it difficult for the service sales employees to keep up with commissions due them. As a result the "draw" of the service sales employees built up substantially against unpaid commissions. Further, according to Moran, in May, she, Blanchard, and Lee began to discuss these problems among themselves and decided that the payment system should be changed. Moran offered to talk to Harmon on the subject and the other two accepted. Moran met with Harmon, showed him what she had sold compared with what had been collected, and asked that Respondent

² Sec. 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." The rights guaranteed in Sec. 7 include the right "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

³ Respondent had hired two men, Holloway and Fisher, in the summer of 1984 to sell service contracts but neither was particularly successful and did not stay in Respondent's employ beyond July 1984.

⁴ Concerns over profitability of the service contract sales was based in part on the overhead expenses of the sales. Such overhead was estimated as being between \$800 to \$1000 a month for each sales employee. This overhead included an automobile provided Moran, attendant expenses, and the cost of employee fringe benefits.

return to the old way of paying commissions, i.e., on execution of the sales. She further suggested that if this was not acceptable, some compromise should be reached. Harmon responded that he would have to take the matter up with Hodges. However, Moran testified there was no subsequent response from Harmon.

In late May or early June the employees again discussed the matter among themselves and decided to propose a compromise solution to their problems. They agreed to propose that commissions be paid on sale but if the sale proceeds were not collected within 90 days the commission would be deducted from other commissions due the employee. Lee was to propose the solution to Harmon and Hodges.

Lee testified she took the proposal to Hodges who rejected it saying no commissions would be paid in advance of sales collections. Lee reported Hodges' response to Moran and Blanchard. This time Blanchard suggested she talk to Hodges and see if she could make him understand their problems. Subsequently, Blanchard reported to Lee and Moran that Hodges had agreed to pay one-half the commissions on service contract sales to installment payment customers on payment of the first installment. This procedure was in fact implemented, and Moran and Blanchard were paid back commissions for such sales. However, a further dispute arose between Lee and Hodges around 1 June with Hodges contending in effect that he had double paid Moran and Blanchard. Harmon was brought into the discussion. While it was concluded that Moran and Blanchard had not received any double pay, Harmon said he was going to devise a form for reporting commission sales which would solve all the problems.

On 18 June Harmon provided Lee with the new reporting form. It did not reflect any changes in the way commissions were being paid. Lee reported the matter to Moran and Blanchard. They concluded that nothing had been resolved so Moran suggested that they put their complaints in writing so they would be more understandable and perhaps persuasive. The other two agreed, and Moran prepared a letter dated 18 June in which she set forth the objections of herself and Blanchard to the way sales commissions were being paid. She attached to the letter a summary of her sales, both paid and uncollected to substantiate her arguments against Respondent's method of paying commissions. In the letter Moran stated she and Blanchard "are not asking that you pay us on signed contracts with the intention of never collecting the money," and "we are only asking that we be given the opportunity to be rewarded for our sales effort." According to Moran, both Lee and Blanchard read the letter before it was submitted to Harmon on 18 June and agreed with its contents.

The testimony of Moran and Lee related above is consistent and mutually corroborated. Moreover, it is not specifically contradicted by Respondent. Such testimony is credited.

C. The Closing of the Service Sales Department

On the morning of 19 June, Hodges delivered to Lee a letter he had drafted in response to Moran's letter to Harmon. In the letter, Hodges noted that "paying com-

missions on signed contracts (not collected) continues to be an issue," and then proceeded to reply to Moran's letter almost paragraph by paragraph. Hodges' letter then stated:

After careful review of Miss Moran's letter as well as all the benefits of a service sales department with great regret I must announce my decision to close down the *Service Sales Department*. My reasons for doing so are multiple and are not up for discussion.

Without specifying the reasons for the decision, the letter provided instructions for termination of Moran and Blanchard as of 21 June and granted them each a 2-week draw against commissions. Lee was to remain, if she chose to do so, in the service department selling replacements (equipment) and add-ons (accessories). The letter concluded with a statement of appreciation for the efforts of Moran and Blanchard and added that if the service sales department were ever reestablished they would be at the top of the rehire list.

When Moran was advised of her termination by Lee on 19 June, she went to Harmon to discuss the matter. She testified she asked Harmon if she was being fired because of the letter and Harmon replied affirmatively. Moran then told Harmon he was violating her rights, but he denied it and said he was just tired of having to deal with the problems, and he did not have time to deal with them any longer.

Lee also testified that she had a discussion with Harmon and Hodges the afternoon of 19 June. Hodges initially refused to discuss the firing of Moran and Blanchard. However, Lee asked whether the two were fired because of the letter. Hodges answered yes, that he was tired of the "bitching," that he did not have time to spend on it anymore and that he had solved the problem.

The discharges of Moran and Blanchard were effectuated. However, Blanchard was rehired by Respondent on 8 July as a service contract renewal clerk. Her duties in this position were not set forth in the record.

Based on the foregoing evidence, the General Counsel contends that Moran, Blanchard, and Lee were involved in protected concerted activity in their effort to resolve their problems with Respondent over the commission payments. Moran's letter to Harmon, it is further contended, was a continuation of their protected and concerted effort. It is argued that Respondent's decision to close the service sales department and terminate Moran and Blanchard was based directly on the letter and hence, the protected conduct of Moran and Blanchard. Accordingly, the General Counsel asserts the discharges violated Section 8(a)(1) of the Act.

D. The Discharge of Lee

Lee was admittedly upset over the discharge of Moran and Blanchard. She testified that in her discussion with Harmon and Hodges on the afternoon of 19 June she asked Hodges what her position was in light of the discharges. He replied she could stay on as a sales representative. She then asked Harmon if there was a position available in production sales explaining she did not want to work under Hodges. Harmon remarked that Hodges

was his manager and he backed his managers. Lee thereafter declined making a decision on staying and said she needed time to think about it. According to Lee, Respondent imposed no deadlines on her decision.

Lee continued to work on 20 and 21 June. During that time she talked to Bob Sherrill, production manager and part owner of Respondent. Sherrill encouraged her to stay with Respondent and advised her to take time to think about her decision. On 21 June Lee decided to take the following Monday as a day off to further consider whether to stay with Respondent. She testified she related this decision to Sherrill who thought it was a good idea. She arranged with Sherrill to cover any specific jobs that Lee was working on. Lee further told the receptionist that she would be off on the following Monday. Finally, Lee left a note on Hodges' desk saying she would not be in on Monday but would be back Tuesday (25 June), but she admittedly made no effort to orally communicate her intentions to Hodges even though he was her direct superior.

On 25 June Lee went to her work and attended a weekly sales meeting. Afterwards Hodges came to her office and terminated her leaving a separation notice on her desk. The separation notice signed by Hodges stated in essence that Lee had told him that she would let him know on 21 June whether she would remain as an employee, but that she had not done so, and he had decided to discharge her.

The General Counsel argues that the discharge of Lee was unwarranted and unjustified and that the discharge was in actuality based on Lee's involvement in protected activities with Moran and Blanchard.

E. Respondent's Evidence and Defense

Respondent claims that the decision to close the service sales department was economically motivated. While conceding that the decision was responsive to Moran's letter, Respondent claims the decision flowed only from the information on Moran's sales revealed in the letter and not from the fact the letter was written. Thus, Harmon testified that while Hodges had voiced concerns about the profitability of the service sales work as early as December 1984, Harmon had concluded that any problems in this regard would be solved by more sales volume. He further testified in essence that he and Hodges agreed that each service sales employee would have to sell contracts totaling \$180,000 each per year to make such sales profitable.⁵ He added that while he had asked Hodges for monthly reports of progress by the service sales department he never got such reports. Further, whenever he inquired of Lee regarding such

⁵ Harmon testified at some length about the necessity for maintaining a gross profit margin of 60 percent on the service contracts but the record does not show how this figure was utilized to project the \$180,000-\$200,000 annual volume of sales per employee to achieve profitability. Moreover, if the purpose of service contract sales was to increase "up front" cash flow, improve scheduling flexibility, and serve as an avenue for other business, it is unclear why it would be necessary for Respondent to apply the same standard of profitability to such sales as applied to other sales. In any event, Respondent concedes that no specific analysis of profitability of the service sales department was undertaken before the decision was made to close the department. Nor does the record show any detailed analysis of profitability after the department closure.

progress she reported things were going well. Only when he saw the figures in Moran's letter and attachments showing the extent of her sales did he realize that Moran was not producing sales at a rate which would approach meeting the projected volume of \$180,000 for the year calculated to be necessary for profitability. Accordingly, after discussing the matter with Hodges, it was concluded that they could not economically keep the department open. Harmon denied that this decision was prompted by the employees pressing for more rapid collection of their commissions or other wage concerns.

Hodges' testimony was in substantial accord with that of Harmon. However, Hodges contradicted Harmon in one area by testifying that Harmon knew the service sales employees were not making their quotas each month because Hodges told him. Further, Hodges related that he knew all along that the service sales department was not producing well because he saw Lee's sales reports on a weekly basis. However, Hodges admitted that he did not tell Harmon, "I am going to close it down or you can run it," until after reading Moran's letter. Further, Hodges denied telling Lee that he decided to shut the department down because of Moran's letter.

Respondent's defense to the discharge of Lee was related primarily in Hodges' testimony. Hodges testified with corroboration from Harmon that on 19 June, Lee had said she would let them know on Friday (21 June) whether she would continue in her employment with Respondent. However, by Friday she had given no response. Instead, she took the following Monday off with no notice other than the note to Hodges which he saw after she had left on Friday. According to Hodges, Lee's absence on Monday left a number of sales leads unfolded. He therefore decided during the weekend that he could not tolerate Lee's actions and that he would discharge her. Harmon concurred in the decision although Harmon admitted herein that Hodges' decision to fire her surprised him, since Lee did a "good job" and was a valued employee.

In addition, Respondent contends that Lee was employed as a supervisor, so that any involvement by her in concerted activities with other employees was unprotected. To establish Lee's supervisory status, Respondent relies on evidence that Lee "headed up" the service sales department, that she received a 2-percent override commission on all sales by Moran and Blanchard, that she hired Blanchard, that she hired or fired other employees in the past including Danny Holloway, Eugene Williams, and Robert Fisher, that she effectively recommended an increase in draw for Blanchard, that she approved sales reports and commission payments, that she approved reimbursements for gasoline purchases, and that she approved employee time off.

D. Analysis and Conclusions

The Board's application of the Act in "concerted activity" cases is based on the principles enunciated in *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), as follows:

In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by or on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the protected nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity. [Footnote citations omitted.]

Applying these principles to the instant case, it is clear that Moran was engaged in protected concerted activity with Blanchard in the attempt to resolve their perceived problem with Respondent concerning their commission payments. Employee mutual support for betterment of their working conditions including improvement in pay constitutes classic concerted activity protected under the Act. See *Maaco Auto Painting v. NLRB*, 646 F.2d 1273, 1274 (8th Cir. 1981). Here, the uncontradicted and credible testimony of Moran shows that Moran's complaint on the timing of payment of sales commissions was shared by Blanchard.

I reject Respondent's contention that Moran could not have been engaged in concerted activity with Blanchard because Blanchard, as Moran admitted, refused to authorize Moran's inclusion of her name in the charge herein and declined involvement in the case. The unrefuted facts show that Blanchard was involved in the commission pay dispute and was supportive of the joint effort of the employees to resolve it. More specifically, Moran's testimony that Blanchard supported and authorized Moran's 19 September letter not only was uncontradicted but it was also supported by Lee. Further, that Blanchard shared Moran's concerns over Respondent's manner of paying commissions was shown by Blanchard's own discussions with Hodges on the subject which led to a partial concession by Hodges. Hodges did not deny that Blanchard had such discussions with him. In view of the direct, unimpeached, and uncontradicted testimony of Moran and Lee on this point which appears to be consistent with the other circumstances noted, I find no merit in Respondent's argument that an inference should be made that if called as a witness Blanchard would not support the testimony of Moran and Lee. In addition, Blanchard's refusal to be involved in the charge is immaterial and neither detracts from the occurrence of the protected concerted activity in which she participated nor otherwise negates its protected nature. I find that, as a matter of fact, in writing her 18 June letter, Moran was acting on the authority of Blanchard. Accordingly, I conclude that Moran was involved in protected concerted activity in her efforts, including the writing of the 18 June letter, to bring about a change regarding sales commission payments. Moreover, I conclude that Respondent was well aware of the concerted nature of Moran's efforts for in the 18 June letter Moran specifically alluded to what she and Blanchard were seeking from Respondent. Any doubt the concerted nature of Moran's efforts must necessarily have been removed by the state-

ment in her letter that, "Although I am the author of the letter and my sales are used as examples throughout, please understand that this is a mutual concern of both your service sales contract representatives."

The critical issue to be decided then is whether the decision to close down the service sales department was motivated by the employees' concerted activity. In *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board decided on a causation test to be applied to all cases alleging violations of Section 8(a)(3) and (1) turning on employer motivation. Under this test the General Counsel must first make a prima facie showing sufficient to support the inference that protected activity was a "motivating factor" in the employer's decision adversely affecting the employee involved. Once such a showing is made, the burden shifts to the employer to demonstrate that the same decision would have been reached even in the absence of involvement of the employee in protected conduct. *Wright Line* is applicable to independent 8(a)(1) violations also when motivation is in issue. See also *Ann's Laundry*, 276 NLRB 269 (1985); *Hoboken Shipyards*, 275 NLRB 1507 (1985).

In assessing the General Counsel's prima facie case as well as Respondent's motivation, one must determine initially which witnesses are to be believed when their testimony contradicts each other, particularly with respect to statements attributed by Moran and Lee to Hodges regarding the basis for the termination of the service sales department. Overall, the testimony of Moran and Lee was consistent and plausible. Both impressed me as truthful. Lee, in particular, appeared to have good recall and she possessed a detailed knowledge regarding operation of the service sales department. On the other hand, the testimony of both Hodges and Harmon was vague at times and lacking in specifics. Answers of both were frequently long and not directly responsive. Moreover, although Hodges denied that he told Lee he closed the department because of Moran's letter, a canvas of the record fails to disclose a denial of her testimony that he said he was tired of the employees "bitching" and his claim that he had solved the problem. Harmon likewise failed to specifically deny the statements attributed to him by Moran to the effect the discharge was because he was tired of the problem and did not have time to deal with it further. Finally, Hodges' prehearing statement to the effect that the decision to close the department was made after evaluating the profitability of the department as compared to other departments was contradicted by admissions by Respondent that there was no such analysis of profitability undertaken. Accordingly, I find the testimony of Moran and Lee more reliable and credible wherever it contradicts that of Harmon and Hodges.

In view of the above findings that Moran was engaged in protected concerted activity, that Respondent was aware of such activity, and that the credited testimony of Lee and Moran shows that the discharges were in response to Moran's letter and the continuing dispute about commission payments, I conclude the General Counsel has made out a prima facie case on the discharge of Moran.

The burden therefore shifts to Respondent to demonstrate that Moran would have been discharged even in the absence of her protected concerted activity. I am persuaded that Respondent has not sustained its burden. The timing of the discharge decision clearly reflects its responsiveness to the concerted complaint of the employees about the commission payments. Harmon's explanation of the timing as related to the revelation in Moran's letter of her gross volume of sales I find incredible. It is true that sales through mid-June were no where near Respondent's claimed goals projected for the year. But Respondent, I conclude, was well aware of the volume of sales long prior to mid-June. It is undisputed that Lee made weekly reports to Hodges on sales of herself, Moran, and Blanchard. Contrary to Harmon, Hodges testified he frequently reported on the extent of sales to Harmon. Further, Lee testified that she maintained a graph on sales in her office which showed at all times the total sales. Respondent's operation was not so large, Harmon's office was not so distant, and the lines of communication so useless to substantiate Harmon's claim that he had no idea the sales service department was doing poorly if in fact it was.

Other evidence raises doubt of Respondent's claim that its actions in this case were based on economic considerations. First, Hodges' failure to express any economic concerns in the 19 June letter or otherwise explain the basis for his decision. Second, there is the fact that notwithstanding Respondent's claim that service sales were bad from the outset, Respondent hired Blanchard in February. If increased overhead was a truthful concern of Respondent, Blanchard's hiring could not be justified. Third, the evidence shows Blanchard received an increase in draw approved by Hodges as of 13 June. Such an increase is inconceivable if either Blanchard or the department was doing poorly. Last, Respondent reached its decision to eliminate the department without conducting an analysis of the profitability of the department. Harmon's testimony regarding standard gross profit margins and overhead costs makes little sense in the absence of a profit analysis and application to specific examples. There is no clear record explanation for, or substantiation of, Harmon's claim that for the service sales department to be profitable each service sales employee had to have sales in excess of \$180,000 annually.

While the record reveals an analysis of the profitability of a single residential contract sale prepared by Respondent's accountant after the instant case arose such analysis was based on an unrepresentative model and failed to establish the overall unprofitability of the service sales department. Residential service contract sales, on the basis of credited testimony and other record evidence, constituted a small part of the department's overall sales. Nor does the testimony herein of Respondent's independent accountant James Shirley provide a reasonable explanation for Respondent's decision to shut down the service sales department. Shirley testified he met with Harmon on 31 May and 6 June and during the latter meeting after some broad discussions regarding Respondent's operations including the service sales department Shirley expressed a general concern over the profitability of the department. However, from Shirley's testimony which

was vague and generalized, it is clear Shirley made no detailed study of the department, interviewed no employees of the department, made no specific determinations regarding its profitability, and made no specific recommendations regarding its continuance. Accordingly, I find this record fails to establish that the department was not profitable.

That profitability was not Respondent's real concern in eliminating the department was also shown by its failure to consider cuts in overhead costs as an alternative to elimination of the department. Instead of cutting costs, Respondent on 13 June increased the draw of Blanchard as already related. Further, and again with relation to profitability, service sales contracts according to Moran's testimony, uncontradicted in this regard, were considered a "break even" operation at best. They served other purposes already set forth herein beyond providing an immediate profit to Respondent. Under these circumstances, Respondent's sudden concern with the profitability of the department is more understandable in terms of an angry response to employee concerted activity perceived as "bitching" and "threatening" rather than "economic concerns."

Finally, the decision to eliminate the department in the admitted busiest season of the year for the department indicates Respondent's hidden agenda. Even assuming the department had been unprofitable in the past, its elimination during a period when it might prove most productive, profitable, and likely to ensure recoupment of prior costs is inexplicable except as a response to the protected concerted activity of the service sales department employees.

Considering all the foregoing, I find and conclude that Respondent has failed to rebut the General Counsel's prima facie case with respect to Moran's discharge. I find that the discharge of Moran for her concerted activity violated Section 8(a)(1) of the Act as alleged.

Turning to the issue of Lee's supervisory status, Section 2(11) of the Act defines a supervisor as one "having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action," if the exercise of such authority is not of a merely routine or clerical nature, but "requires the use of independent judgment." Possession of any one of the authorities specified in Section 2(11) is sufficient to establish supervisory status. *George C. Foss Co.*, 270 NLRB 232 (1984), enf. 752 F.2d 1407 (9th Cir. 1985). It matters not whether such authority is exercised. *Mid Allegheny Corp.*, 233 NLRB 1463 (1977). Conclusions of employer officials are insufficient to establish supervisory status. *Republic Corp.*, 260 NLRB 486, 507 (1982). And a title does not in itself convey supervisory authority. See *Spring Valley Farms*, 272 NLRB 1323 (1984). "[T]he decisive question is whether [the individual disputed has] been found to possess authority to use [his or her] independent judgment with respect to the exercise by [him or her] of some one or more of the specific authorities listed in § 2(11) of the Act." *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331, 334 (1st Cir.

1948). Caution must be observed in determining supervisory status, however, because "the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cert. denied 400 U.S. 831 (1970).

In the instant case, it is clear that Lee believed that she had supervisory status. She acknowledged that she understood that she was to "head up" the service sales department. Moran acknowledged that when the service sales department was established, Hodges told her that Lee would be her "supervisor," and she regarded Lee as her supervisor. Further, Lee signed the sales agreement between Respondent and Moran as "supervisor." That Respondent viewed Lee as being in charge of the service sales department is reflected in Hodges' letter to Lee on 19 June in which Hodges stated:

My first concern is why [Moran's letter of 6/18/85] was written to Harmon rather than to you. There has never been a question that Ms. Moran worked under your direction as service sales manager. Therefore, the letter should have been written to you, not Harmon.

Obviously then, Respondent viewed Lee as a supervisor and held her out to employees as such. This in itself would be sufficient to make Respondent responsible for Lee's conduct as its agent if the General Counsel were seeking to hold Respondent responsible for some unlawful conduct attributed to Lee. See *Pilgrim Life Insurance Co.*, 249 NLRB 1228, 1229 (1980). However, this is not an issue here. Lee's actual possession of supervisory authority is the issue, and one must look to other evidence to resolve it.

It is undisputed that Lee received a 2-percent override commission on the sales of Moran and Blanchard. Lee had received such an override on service contract sales by earlier employees and, although the apparent justification for the override was based on her training functions, there were no limitations on the training period. These overrides for the sales of Moran and Blanchard were continuous. Moreover, it is clear that Lee had reporting functions for Moran and Blanchard. It was Lee who collected and turned in the commission claims and expense claims to Hodges. However, Lee credibly testified that she did not edit these reports so such reporting appears to have been ministerial in nature.

The fact that Lee received an override commission on the sales of the service sales employees is, as Respondent's brief points out, indicative of her supervisory status. See *Abilene Sheet Metal v. NLRB*, 619 F.2d 332, 343 (5th Cir. 1980). However, it is not dispositive. *Hydro Conduit Corp.*, 254 NLRB 433 (1981). The additional commission for Lee is more warranted for her recordkeeping, clerical and training functions than any responsibilities she may have had in connection with the possession or exercise of supervisory authority. The override commission is more understandable in this case as compensation to Lee for the performance of these duties which detracted from

her own sales time and effort resulting in losses of commissions she might otherwise have earned. Moreover, since Lee was not paid a salary or hourly rate higher than the two other service sales employees, it is possible that for any given period she could actually earn less than the others with her override commission. Under these circumstances, I find Lee's receipt of override commissions does not evidence her supervisory status.

Lee also testified that she did not direct the other employees in their work nor did she assign specific work to them. On the other hand, Lee testified that she was involved in her own independent sales work 90 percent of the time. And even the sales agreement with Respondent executed by Lee provides only that as service sales manager she was required to be in the office between 8 and 9 a.m. and between 4 and 5 p.m. Her presence in the office for such a limited time coupled with the absence from the office of the other sales employees leaves little opportunity for the exercise of effective supervision.

There is a dispute in the record regarding Lee's hiring of employees. Thus, Lee testified she had no authority to hire employees, and that while she hired Blanchard at Harmon's suggestion, she was subsequently chastised for it by Harmon for not having it initially approved by Hodges. In addition, Hodges changed the terms of hiring Lee had initially set for Blanchard. I credit Lee's testimony regarding the circumstances of Blanchard's hiring. She was corroborated by Moran who testified she was present when Harmon suggested that Blanchard be hired. It is incredible that Lee would have suddenly hired someone for the department without either direction or approval of Harmon since she must have known that Hodges, her own direct supervisor, was by his testimony opposed to any expansion of the department. I conclude that the circumstances of Blanchard's hiring therefore do not support a finding that Lee was a supervisor for Lee was simply carrying out what she considered to be directions of Harmon. In short, there was no exercise of independent discretion in hiring Blanchard.

Hodges and Harmon attributed other hirings and even a discharge to Lee prior to the time she became head of service sales. Hodges initially testified Lee had hired Eugene Williams, Danny Holloway, and Robert Fisher. Harmon, however, contradicted Hodges with respect to Holloway saying that he and Hodges had recruited Holloway. In rebuttal testimony, Lee testified that she had never interviewed Holloway. She conceded that she had sat in on the interviews between Hodges and Williams, Fisher, and Moran, but she explained this was at Hodges' request so that she might answer other questions of the interviewee. Contrary to the testimony of Harmon that she had discharged Holloway, Lee testified that such discharge was at Hodges' direction. The record does not reflect that she had any input in that decision. On the other hand, Lee testified that she recommended the discharge of a service technician for falsely claiming to have made a service call he did not in fact make. Hodges admitted Lee's recommendation in this regard but decided against it due to Hodges' inability to confirm that the service call was not in fact made. He also admittedly rejected a request by Lee that the employee not be

used to service any of her customers. Based on Lee's testimony on the foregoing which is credited, I find that Lee's possession of authority to hire and fire or effectively recommend such action has not been established.

Lee, in late May, granted Moran 3 days off. According to Lee, Harmon and Hodges reprimanded her for doing so without Hodges' approval. Hodges, Lee credibly testified, told her she did not have authority to do it and that he had to know when people were going to be off. In view of this, it appears that Lee had no discretionary authority to grant employees time off.

It is undisputed that Lee recommended in writing that Blanchard's draw be raised in early June. Lee related that she initially orally made the request to Hodges after Blanchard had asked for the increase. Hodges asked Lee to put it in writing which she did and he approved it. But Hodges claimed that the raise was based on an earlier commitment made to Blanchard that she would be given her raise "down the road." Thus, this incident does not establish possession by Lee of authority to make effective recommendations on employee wages.

There is evidence to suggest that Lee did participate with Hodges in reaching a decision on setting sales service employees' commissions at 15 percent rather than 10. Thus, in his letter of 19 June, Hodges stated:

As far as paragraph 6 [of Moran's letter] is concerned, we have discussed the situation more than once and if you will remember, one of the reasons you and I came up with the 15 percent commission rather than the 10 percent in the past was due to the fact that . . . we would need additional support for the service sales department. [Emphasis added.]

On the other hand, however, Lee was not consulted at all with respect to the decision to terminate the service sales department even though she "headed" it.

Although the issue is a close one, and in spite of Lee's "override commission" and the fact that she was held out to employees as a supervisor, I am not persuaded that Lee possessed any of the authorities specified under Section 2(11) of the Act which would constitute her a supervisor. Rather, I find that the record reflects no evidence of the exercise of supervisory authority by Lee requiring independent discretion. Her recordkeeping, reporting, and expense reimbursement authorizations were essentially routine and ministerial in nature. Moreover, the record does not reveal any specific grant of supervisory authority to Lee by Harmon or Hodges. Accordingly, I conclude that Lee was not a supervisor and she was therefore not deprived of protection under the Act.

Notwithstanding the finding that Lee did not possess supervisory authority, the record contains little evidence to establish that she was discharged because of her involvement in activity protected under the Act. There is no direct evidence to connect Respondent's decision to discharge Lee with any action in which she participated with Moran and Blanchard. While the record may show that Respondent was aware of Lee's sympathy with Moran and Blanchard in the commission payment dispute as well as her dissatisfaction with the decision to discharge them, the record will not establish that Re-

spondent knew that Lee was involved in the writing of Moran's letter which prompted Respondent's decision to shut down the service sales department. Lee, contrary to the truth, admittedly denied to Harmon that she had seen Moran's letter before he showed it to her. And Moran's letter did not refer to support by Lee. It was the letter which, according to Lee's uncontradicted and credible testimony Harmon told her was "threatening" and written as if Moran had an attorney assisting her. Accordingly, Respondent had no basis for believing that Lee participated in preparation of the letter or otherwise specifically supported it. Further, if Respondent was intent on retaliating against Lee for involvement in the same activity which provoked the discharges of Moran and Blanchard, it is likely Lee would have been discharged at the same time as they when the decision to shut down the department was made. In spite of that decision, Lee was asked to stay. Knowing that Lee was sympathetic to Moran and Blanchard is not the equivalent of knowing that she was actively encouraging, supporting, and promoting collective action with them to resolve the commission pay dispute. It was only after Lee took a day off without advising Hodges in advance and without telling him she intended to retain her employment that Respondent decided to terminate her. Although Hodges may well have had a lingering resentment towards Lee as a result of her sympathy for Moran and Blanchard, I believe he was more irritated by her taking the day off without his prior approval and without letting him know her future intentions (even assuming she had not promised to let him know such intentions by 21 June), because he was clearly Lee's direct supervisor. Under these circumstances, I find the General Counsel has not established that Lee was discharged for her involvement in protected concerted activity with Moran or Blanchard. Accordingly, I find no violation of Section 8(a)(1) of the Act in Lee's discharge, and I shall recommend that the complaint allegation with respect to Lee be dismissed.

CONCLUSIONS OF LAW

1. Respondent Cherokee Heating and Air Conditioning Co. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. By discharging Cody Ann Moran on 21 June 1985 because of her involvement in concerted activity with other employees protected under Section 8(a)(1) of the Act, Respondent violated Section 8(a)(1) of the Act.
3. Respondent did not violate Section 8(a)(1) of the Act in discharging Julia Lee on 25 June 1985.
4. Respondent did not violate the Act in any other manner specified in the complaint.
5. The unfair labor practices set forth in paragraph 2, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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

Having found that Respondent unlawfully discharged Cody Ann Moran, it will be recommended that Respondent be ordered to reinstate her and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of her discharge to the date of a proper offer of reinstatement, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).⁶ Consistent with the Board's decision in *Sterling Sugars*, 261 NLRB 472 (1982), it will also be recommended that Respondent be required to remove from its records and files any reference to the discharge of Moran and notify her in writing that this has been done and that evidence of the unlawful discharge will not be used for future personnel actions against her.

The General Counsel argues in her brief that any remedy provided herein should include a visitatorial clause authorizing the Board to engage in discovery under the Federal Rules of Civil Procedure (FRCP) so that it will be able to monitor compliance with the Board's order as enforced by a court of appeals. Such a clause, according to the General Counsel, would permit the agency to examine books and records of Respondent, and to take statements from officers and employees and others for the purpose of determining or securing compliance with a court's judgment. The discovery rules of the FRCP provide a mechanism for achieving the objectives of a visitatorial clause. It appears, as argued by the General Counsel, that inclusion of a visitatorial clause would facilitate compliance because it allows avoidance of delays inherent in both applications to a court of appeals for a discovery order and enforcement of investigatory subpoenas under Section 11 of the Act in Federal district courts. A visitatorial provision also appears to be a regular inclusion in remedial orders sought and obtained by a number of other Federal agencies. *NLRB v. Steinerfilm, Inc.*, 702 F.2d 14 (1st Cir. 1983). See also *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 725-726 (1944). The order sought by the General Counsel here, I conclude, reasonably tends to effectuate the purposes of the Act and to preclude the evasion of the order deemed necessary to remedy the violation found. Accordingly, the recommended Order will include the requested visitatorial clause.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommendation⁷

⁶ See generally *Isis Plumbing Co.*, 138 NLRB 716, 716-721 (1962).

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Cherokee Heating and Air Conditioning Co., Chamblee, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because of their involvement in concerted activity protected under the Act.

(b) 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 Cody Ann Moran immediate and full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights and privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any references to the unlawful discharge of Cody Ann Moran, and notify her in writing that this has been done and the discharge will not be used against her 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 Chamblee, Georgia, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 10, 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.

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

⁸ 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"