Parker-Robb Chevrolet, Inc. *and* **Automobile Salesmen's Union, Local 1095, affiliated with United Food & Commercial Workers Union, AFL-CIO.** Cases 32-CA-2644 and 32-RC-1044

June 23, 1982

DECISION AND ORDER

On May 20, 1981, Administrative Law Judge George Christensen issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

As found by the Administrative Law Judge, on or about April 8 or 9, 1980, Crew Chief Terry Doss, along with Crew Chief Langley, attended an organizational meeting conducted by the Union. At the meeting, Doss commented that he thought it was going to be difficult for the Union to represent Respondent's salesmen even if a majority selected the Union to represent them. During the course of the meeting, Doss' and Langley's eligibility for inclusion in the unit arose and they were advised they were ineligible.

Thereafter, on April 9, Respondent discharged employees Berger, Mitchell, and Perez. Upon learning of the discharge of Berger and Mitchell, Doss spoke with Used Car Sales Manager Parsons.[2] He asked Parsons why Mitchell was being fired since, "He's one of the best men we've got in the whole place." Parsons replied that Respondent had to "cut back." Doss then found New Car Sales Manager Greenberg, who also told him that Respondent had to cut back. When Doss persisted in demanding an explanation for the discharges, Greenberg told him Respondent was letting him go, too.

The Administrative Law Judge, relying on *DRW Corporation d/b/a Brothers Three Cabinets*, 248 NLRB 828 (1980), found that Respondent, "as part of its overall plan to discourage its employees' support of the Union," violated Section 8(a)(1) of the Act by discharging Crew Chief Terry Doss, an admitted supervisor. We disagree.

Whether and under what circumstances the discharge of a supervisor will violate the Act has been a recurring issue in recent years—an issue which has divided the Board[3] and has produced sometimes confusing and inconsistent decisions. As noted above, the Administrative Law Judge relied on *DRW Corporation, supra,* where a panel of the Board found that the respondent violated Section 8(a)(1) by discharging a supervisor as part of "a pattern of conduct aimed at coercing employees in the exercise of their Section 7 rights." After careful consideration, we conclude that the so-called "integral part" or "pattern of conduct" line of cases, as typified by *DRW Corporation, supra,* and cases cited therein, misread the intent of Congress when it amended the Act to exclude specifically "any individual employed as a supervisor" from the definition of the term "employee." Accordingly, we have determined to overrule *DRW* and similar cases. Rather than simply overruling *DRW*, however, we deem it advisable to review the development of the law in this area because we wish to emphasize that in certain circumstances the discharge of a supervisor may violate Section 8(a)(1) of the Act.

As noted above, the 1947 amendments to the National Labor Relations Act narrowed the definition of the term "employee" by excluding from Section 2(3) "any individual employed as a supervisor." As recognized by the U.S. Supreme Court, the practical effect of the amendments was to free "employers to discharge supervisors without violating the Act's restraints against discharges on accounts of labor union membership." *Beasley* v. *Food Fair of North Carolina*, 416 U.S. 653, 654-655 (1974). Indeed, down through the years the Board has consistently held that a supervisor may be discharged for union activity.[4]

Notwithstanding the general exclusion of supervisors from coverage under the Act, the discharge of a supervisor may violate Section 8(a)(1) in certain circumstances, none of which are present here. Thus, an employer may not discharge a supervisor for giving testimony adverse to an employer's interest either at an NLRB proceeding[5] or during

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] This constitutes Doss' sole involvement in organizational efforts. Although asked to sign an authorization card, Doss declined to do so.

[3] See, e.g., *Krebs and King Toyota, Inc.*, 197 NLRB 462 (1972), Member Kennedy dissenting; *Buddies Super Markets*, 223 NLRB 9[illegible] (1976), Member Walther dissenting; *Downslope Industries, Inc.*, 246 NLRB 948 (1979), Member Murphy dissenting; *DRW Corporation, supra*, Member Truesdale dissenting.

[4] *Stop and Go Foods, Inc.*, 246 NLRB 1076 (1979); *Long Beach Youth Center, Inc., a/k/a Long Beach Youth Home (formerly Trailback, Inc.)*, 2[illegible] NLRB 648 (1977); *Hook Drugs, Inc.*, 191 NLRB 189 (1971); *Royal Fork of Washington, Inc.*, 179 NLRB 185 (1969).

[5] *Better Monkey Grip Company*, 115 NLRB 1170 (1956), enfd. 243 F.2d 836 (5th Cir. 1957); *Modern Linen & Laundry Service, Inc.*, 116 NLRB

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the processing of an employee's grievance under the collective-bargaining agreement.[6] Similarly, an employer may not discharge a supervisor for refusing to commit unfair labor practices,[7] or because the supervisor fails to prevent unionization.[8] In all these situations, however, the protection afforded supervisors stems not from any statutory protection inuring to them, but rather from the need to vindicate employees' exercise of their Section 7 rights.

We are in full agreement that the discharge of a supervisor in the circumstances described above violates Section 8(a)(1) of the Act because such discharge interferes with the exercise of employees' Section 7 rights. However, the "integral part" or "pattern of conduct" line of cases unduly extends these circumstances. Examination of this line of cases discloses that they differ from the other categories of supervisory discharge cases in several respects. Supervisors in the "integral part" or "pattern of conduct" cases were, themselves, active for the union or participated in the concerted activity. Other than the fact that the supervisors were discharged contemporaneously with rank-and-file employees, it is difficult to distinguish these cases from those in which the Board has found that the discharge of a supervisor does not violate the Act.[9] The "integral part" or "pattern of conduct" line of cases has produced inconsistent decisions which cannot be reconciled with the statute, so that all concerned—employers, unions, and, indeed, supervisors, themselves—have no clear guidelines as to when supervisors may be lawfully discharged.[10]

The confusion in this area, in our judgment, stems from extension of the rationale of the seminal *Pioneer Drilling* case[11] to factual situations in which the only common denominator was a "pattern of pervasive unfair labor practices." In *Pioneer*, it was customary practice in the drilling industry for rank-and-file employees to depend on the continued employment of the drillers who had hired and supervised them. Thus, it was reasonable for the Board to find the discharge of the supervisors to be a mechanism to effectuate the employer's efforts to rid itself of union adherents in general, and to find it necessary to reinstate the driller, along with the employees, as an effective remedy.[12] Examination of the cases after *Pioneer Drilling* (except for *Sibilio's Golden Grill* and *United Painting Contractors*) shows that the factual situation in *Pioneer Drilling* has been unduly extended to apply the Act's protection to supervisors who merely join with rank-and-file employee protected activity and who are then subjected to the same discharge or other disciplinary treatment unlawfully meted out to those employees.[13] No matter how appealing from an equitable standpoint, the "integral part" or "pattern of conduct" line of cases disregards the fact that *employees*, but not *supervisors*, are protected against discharge for engaging in union or concerted activity. The results must be the same under the Act whether the supervisors engage in union or concerted activity by themselves or along with employees.

1974 (1956); *Dal-Tex Optical Company, Inc.*, 131 NLRB 715, 730–731 (1961), enfd. 310 F.2d 58 (5th Cir. 1962); *Oil City Brass Works*, 147 NLRB 627 (1964), enfd. 357 F.2d 466 (5th Cir. 1966); *Leas & McVitty, Incorporated*, 155 NLRB 389 (1965), enforcement denied 334 F.2d 165 (4th Cir. 1967).

[6] *Ebasco Services, Incorporated*, 181 NLRB 768 (1970); *Kohr Industries, Inc.*, 220 NLRB 1029 (1975).

[7] *Vail Manufacturing Company*, 61 NLRB 181 (1945), enfd. 158 F.2d 664, 666–667 (7th Cir. 1947); *Inter-City Advertising Company of Greensboro, North Carolina, Inc.*, 89 NLRB 1103 (1950), enforcement denied *sub nom. Inter-City Advertising Co. of Charlotte, N.C.*, 190 F.2d 420 (4th Cir. 1951); *Jackson Tile Manufacturing Company*, [illegible] NLRB [illegible] (195[illegible]); [illegible] *Company*, 140 NLRB 1359 (1963); *Belcher Towing Company*, 238 NLRB 446 (1978), enfd. 614 F.2d 88 (5th Cir. 1980).

[8] *Talladega Cotton Factory, Inc.*, 106 NLRB 295 (1953), enfd. 213 F.2d 209, 215–217 (5th Cir. 1954).

[9] A detailed comparison and analysis of these conflictive decisions appears in Member Truesdale's dissent in *DRW Corporation*, *supra* at 831–833.

[10] Compare, on the one hand, *Sibilio's Golden Grill, Inc.*, 227 NLRB 1688 (1977), and *Karl Kristofferson and Sigvald Kristofferson, Co-Partners, d/b/a United Painting Contractors*, 184 NLRB 159, 163 (1970) (no violation), with *Krebs and King Toyota, Inc.*, 197 NLRB 462, and *Fairview Nursing Home*, 202 NLRB 318 (1973) (violation found)—in all of which the discharge of the supervisors (1) was contemporaneous with the discharge of employees; (2) occurred in the context of other unfair labor practices; (3) was devoid of any evidence that the employer was motivated by the supervisors' participation in particular protected activity rather than general opposition to such activity; and (4) was part of a pattern of conduct aimed at penalizing employees for their exercise of Sec. 7 rights.

[11] *Pioneer Drilling Co., Inc.*, 162 NLRB 918 (1967), enfd. in pertinent part 391 F.2d 961, 962–963 (10th Cir. 1968).

[12] Because of its novel factual situation, we do not believe that the *Pioneer Drilling* rationale can or should be applied generally to supervisory discharge cases. In reaching the result herein, Chairman Van de Water finds it unnecessary to pass on the merits of the rationale expressed in *Pioneer Drilling*.

[13] For example, in *Krebs and King Toyota*, *supra*, the Board specifically found that the employer's shutdown of the body shop was unlawfully motivated [illegible] the employees' attempt to organize. However, it can[illegible] of the *Krebs and King* body shop foreman [illegible] the union was comparable [illegible] in the *Pioneer Drilling* case, and served as a conduit for the employer's unfair labor practices directed toward the employees. And if, as the Board found, the closing of the body shop was a result of the advent of the union, the Board's traditional remedy for a discriminatory closing of an operation should have been adequate to remedy the employer's unlawful conduct. From a remedial standpoint, if the body shop were reopened and the unlawfully terminated employees reinstated with backpay, there is no reason why reinstatement of the body shop foreman was necessary for these employees to be aware of their rights under the Act and the extent to which the Act will protect them.

Similarly, there is no reason why the discharged supervisors involved in *Fairview Nursing Home*, 202 NLRB 318; *VADA of Oklahoma, Inc.*, 216 NLRB 750 (1975); and *Donelson Packing Co., Inc.*, 220 NLRB 1043 (1975), were conduits any more than the body shop foreman in *Krebs and King*. And, as in *Krebs and King*, there is no reason why reinstatement of the supervisors was necessary to apprise employees of the extent to which their right to organize is protected.

In a number of decisions,[14] the Board has suggested that employer motivation in discharging a supervisor controls. That is, there is no violation if a supervisory discharge is motivated by disloyalty, but a supervisor's discharge is found to be unlawful if it is motivated by a desire to thwart organizational activity among employees.[15] However, the justification for finding a violation and reinstating a supervisor who would otherwise be excluded from coverage under the Act is grounded upon the view that the discharge itself severely impinged on the employees' Section 7 rights. As noted above, the Board has found that, when a supervisor is discharged for testifying at a Board hearing or a contractual grievance proceeding, for refusing to commit unfair labor practices, or for failing to prevent unionization, the impact of the discharge itself on employees' Section 7 rights, coupled with the need to ensure that even statutorily excluded individuals may not be coerced into violating the law or discouraged from participating in Board processes or grievance procedures, compels that they be protected despite the general statutory exclusion.[16] In contrast, although we recognize that the discharge of a supervisor for engaging in union or concerted activity almost invariably has a secondary or incidental effect on employees,[17] we believe that, when a supervisor is discharged either because he or she engaged in union or concerted activity or because the discharge is contemporaneous with the unlawful discharge of statutory employees, or both, this incidental or secondary effect on the employees is insufficient to warrant an exception to the general statutory provision excluding supervisors from the protection of the Act.[18] Thus, it is irrelevant that an employer may have hoped, or even expected, that its decision to terminate a supervisor for his union or concerted activity would cause employees to reconsider, and perhaps abandon, their own concerted or union activity. No matter what the employer's subjective hope or expectation, that circumstance cannot change the character of its otherwise lawful conduct.[19]

In the final analysis, the instant case, and indeed all supervisory discharge cases, may be resolved by this analysis: The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is *not* unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act. When this test is applied to the situation present here, we are unable to conclude that the discharge of Crew Leader Doss interfered with the right of employees to exercise their Section 7 rights or that his reinstatement is necessary to convey to employees the extent to which the Act protects these rights.[20]

Unlawfulness of the Discharge of Graham Reeves

The Administrative Law Judge found, and we agree, that Respondent discharged Graham Reeves as part of a pattern of discharges designed to undermine its employees' organizational efforts. However, he did not deal specifically with Respondent's contention that Reeves was discharged for failure to turn over a customer to a crew chief.

As fully detailed by the Administrative Law Judge, Respondent discharged five employees on April 9 and 10 and argued, in response to the complaint, that all of these discharges were necessitated by economic circumstances.[21] On April 12, Re-

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[14] *Sheraton Puerto Rico Corp. d/b/a Puerto Rico Sheraton Hotel,* 248 NLRB 867 (1980), reversed 651 F.2d 49 (1st Cir. 1981); *Nevis Industries, Inc., d/b/a Fresno Townehouse,* 246 NLRB 1053 (1979), reversed 647 F.2d 905 (9th Cir. 1981); *Stop and Go Foods, Inc.,* 246 NLRB 1076; *Downslope Industries, Inc.,* 246 NLRB 948.

[15] A subjective test which the Board followed at times in the "integral part" or "pattern of conduct" line of cases is clearly unworkable. See *Stop and Go Foods, Inc., supra* at fn. 17, wherein the Board conceded that widespread unfair labor practices by the employer may "irrevocably [illegible] the distinction between an employer's 'right' to prohibit a supervisor from participating in union or concerted activity and an employer's 'obligation' to permit employees to exercise the rights guaranteed by Sec. 7. Moreover, a subjective test is contrary to the Board's objective approach in analogous areas. Thus, the Board has held that, in effect, parties proceed at their peril as when an employer acts on its good-faith, but mistaken, belief (1) that an employee engaged in serious strike misconduct, see *N.L.R.B.* v. *Burnup & Sims, Inc.,* 379 U.S. 21 (1964); (2) that salesmen were not employees, see *N.L.R.B.* v. *Bardahl Oil Company,* 399 F.2d 365, 368–370 (8th Cir. 1968).

[16] There is no contention here that Doss was discharged for protesting the employer commission of an unfair labor practice against its employees.

[17] *Stop and Go Foods, supra* at 1078.

[18] By the same token, if a respondent discharges a supervisor for testifying at a Board hearing or grievance proceeding, etc., such discharge is unlawful regardless of whether the employees even know it took place, since it is the act itself and not just the fear that it may create among the employees that interferes with their Sec. 7 rights.

[19] Of course, if respondent thereafter seeks to utilize an otherwise not unlawful discharge to threaten employees, an 8(a)(1) violation may be found on the basis of such a threat and an appropriate cease-and-desist order would be warranted. *David-Anne Corporation, d/b/a Snyder Bros. Sun-Roy Drug,* 208 NLRB 628 (1974). The subsequent threat, however, would not change the character of the discharge itself.

[20] To the extent that they are inconsistent with our decision here today, *Krebs and King Toyota, Inc., supra; Buddies Super Markets, supra; Downslope Industries, Inc., supra; DRW Corporation, supra; Fairview Nursing Home, supra; VADA of Oklahoma, Inc., supra; Donelson Packing Co., Inc., supra; Sheraton Puerto Rico Corp., d/b/a Puerto Rico Sheraton Hotel, supra; Nevis Industries, Inc., d/b/a Fresno Townehouse, supra; Stop and Go Foods, Inc., supra;* and other decisions following the "integral part" or "pattern of conuct" line of cases are hereby overruled.

[21] We agree with the Administrative Law Judge, for the reasons set forth by him, that the employee discharges which occurred on April 9

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spondent discharged employee Graham Reeves. Respondent does not contend that his discharge was motivated by economic considerations, but rather by Reeves' violation of a company policy. Specifically, Respondent contends that on the day of his discharge Reeves did not refer two customers to a sales manager before allowing the customers to leave the dealership. Respondent asserts that this conduct justified his discharge because a company policy was in effect whereby salesmen were instructed to refer all customers to their superiors prior to allowing them to leave without making a purchase. We find no merit in this contention.

While Respondent did have a policy with respect to turning over customers, it was not a mandatory policy. Thus, General Manager David Robb testified that whether to refer customers was discretionary on the part of salesmen. Additionally, both Robb and Sales Manager Walter Greenberg,[22] who discharged Reeves, admitted that no one had ever been discharged by Respondent for not turning customers over, although there had been previous occasions of the same conduct on the part of other salesmen.

Further, Greenberg's testimony is inconsistent as to whether Reeves was ever issued a prior warning concerning turning customers over. Greenberg first testified that he had not given Reeves any prior warning about turning customers over to him, but then contradicted himself by testifying that he had warned Reeves several hours before the incident. Reeves testified that he had received no warning. Reeves also testified that he had tried to find an available crew chief[23] but, finding none available, had taken down the name, address, and telephone number of the customers. Greenberg conducted no investigation of Reeves' conduct prior to the dismissal. Nor did he seek an explanation from Reeves.

In concluding that Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Reeves on April 12, we view the discharge in light of Respondent's other unfair labor practices committed [illegible] days earlier. As fully described by the Administrative Law Judge, Respondent's conduct included the interrogation of two employees on April 8 and 9 about their and other employees' union sympathies; the creation of the impression of surveillance of the employees' union activities and a threat to close the business and discharge all sales personnel in the event they supported the Union; and, most significantly, the discriminatory discharges of five other salesmen on April 9 and 10, four of whom were terminated within 1 hour after the Union presented Respondent with a letter demanding recognition.

That Respondent's own testimony contradicts its asserted justification for Reeves' discharge makes it all the more apparent that his discharge was merely the last in a series of steps taken by Respondent in its efforts to dilute and discourage employee support for the Union. We therefore adopt the Administrative Law Judge's finding that Respondent discharged Reeves in violation of Section 8(a)(3) and (1).

Violation of Section 8(a)(5) and Appropriateness of Bargaining Order

For the reasons set out below, we also agree with the Administrative Law Judge's findings that the nature and pervasiveness of Respondent's unfair labor practices precluded the running of a fair election, and that a bargaining order is therefore warranted as part of the remedy for Respondent's unfair labor practices.

As previously indicated, by April 9, 1980, 13 out of a possible 17 employees had signed authorization cards for the Union. On that date the Union presented a letter to Respondent demanding recognition and an opportunity to bargain. During the 2 days prior to the presentation of this letter, one of Respondent's sales managers, Gene Parsons, individually and unlawfully interrogated two employees about their respective sentiments towards the Union. During the second interrogation, Parsons unlawfully asked the employee for names of other employees who supported the Union, and named two employees he suspected were behind the organizational efforts. Parsons unlawfully related to the employee that Respondent's general manager, David Robb, had told him of plans to close the dealership [illegible] staff rather than let the Union in. Beginning on April 9, after receiving the Union's recognitional letter, and continuing through April 12, Respondent unlawfully discharged six employee card signers.

We believe that Respondent's conduct before and after the Union presented Respondent with its letter on April 9 requesting recognition and bargaining inevitably tended to undermine the Union's majority status and impede the running of a fair election. *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 614 (1969). The interrogations, the threat of closure and discharge, and the creation of the

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and 10 were not motivated by economic concerns, but by a desire on the part of Respondent to undermine support for the Union, and to avoid recognizing and bargaining with the Union as the duly designated representative of a majority of its unit employees.

[22] It is undisputed that Greenberg is a supervisor within the meaning of Sec. 2(11) of the Act.

[23] Respondent operated with three crews, each with a set of salesmen and a crew chief. It was undisputed that crew chiefs are supervisors within the meaning of Sec. 2(11) of the Act.

impression of surveillance directed at two card signing employees on April 8 and 9 could not have failed to communicate to employees Respondent's displeasure at union activity and the lengths to which it would go to stifle the employees' right of self-organization. When Respondent followed these measures with the unlawful discharge of 6 card signers out of a total of 13 who signed cards, among a unit of 17 salesmen in all, the severity of Respondent's intentions and the jeopardy in which salesmen would put their jobs by supporting the Union were made all the more clear to the remaining employees. Such messages would not soon be forgotten.

We find that the possibility of erasing the effects of those unfair labor practices and encouraging a fair rerun election by the use of traditional remedies is slight, and that the authorization cards provide a more reliable measure of the employees' desire than would a second election. *Id.* at 614;[24] *Hambre Hombre Enterprises, Inc., d/b/a Panchito's*, 228 NLRB 136 (1977), enfd. 581 F.2d 204 (9th Cir. 1978). We therefore find that Respondent violated Section 8(a)(5) when it refused to bargain and we adopt the Administrative Law Judge's recommended order requiring Respondent to bargain with the Union.[25]

AMENDED CONCLUSIONS OF LAW

In accord with the above findings, we adopt the Administrative Law Judge's Conclusions of Law, with the following modifications:

1. Delete Conclusion of Law 4(c).

2. Insert the following as Conclusion of Law 6:

"6. Respondent violated Section 8(a)(5) of the Act and prevented a fair election by refusing, since April 9, 1980, to recognize and bargain with the Union as the majority representative of its employees while engaging in conduct which undermined the Union's majority status and prevented the holding of a fair election."

3. Renumber Conclusions [illegible] and [illegible] accordingly.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Parker-Robb Chevrolet, Inc., Walnut Creek, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(f) and reletter the subsequent paragraphs accordingly.

2. Substitute the following for paragraph 2(a):

"(a) Offer to Berger, Gentile, Jinkens, Mitchell, Perez, and Reeves reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, if necessary terminating any employees hired to replace them."

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

MEMBER JENKINS, concurring:

I agree with all of my colleagues' ultimate findings and conclusions, but am unable to join their rationale for finding the discharge of Crew Chief Doss lawful under the Act. In my view, the majority's overruling of the "integral part" or "pattern of conduct" line of cases,[26] established precedent for over 15 years, is overly hasty and ill-advised. Moreover, as will be shown below, that line of cases is not applicable to the facts of the instant proceeding.

The record in this case contains only sparse facts with regard to the particular circumstances of Doss' discharge. Succinctly stated, the record reveals that on or about April 8, 1980, an organizational meeting was conducted by representatives of the Union. In addition to a number of Respondent's employees, Crew Chiefs Doss and Langley attended the organizational meeting. During the course of the meeting, Doss observed that it would be difficult for the Union effectively to represent Respondent's salesmen. [illegible] during the meeting a question arose concerning Langley's and Doss' eligibility for inclusion in the unit. At that time, Langley and Doss were advised that they, as crew chiefs,[27] were ineligible for union representation. Thereafter, in the late afternoon or early evening on April 9, employees Berger and Mitchell

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[24] We have considered the facts in this case as presenting at least the second category, if not the first category, of situations which the Supreme Court in *Gissel* indicated make a bargaining order an appropriate remedy. This case does not present the third type of situation, as we do not view Respondent's unfair labor practices as having had only minimal impact on our election machinery. *Id.* at 614-615.

[25] Par. 2(d) of the recommended Order, while ordering Respondent to bargain with the Union at its request, does not contain the date from which the obligation to bargain shall commence. We find that the duty to bargain should extend retroactively to April 9, 1980, the day the Union both achieved majority status and made its demand for recognition and bargaining. *Trading Port, Inc.*, 219 NLRB 298 (1975); *Drug Package Company, Inc.*, 228 NLRB 108 (1977).

[26] As recently recognized by the Sixth Circuit in *N.L.R.B. v. Downslope Industries, Inc.*, 676 F.2d 1114 (6th Cir. 1982), enfg. 246 NLRB 948 (1979), the "integral part" test traditionally has encompassed the conceptually similar "conduit" theory. By their action today, the majority apparently does not disturb the pure "conduit" theory typified by *Pioneer Drilling Co., Inc.*, 162 NLRB 918 (1967).

[27] The parties agreed that Respondent's crew chiefs were supervisors within the meaning of Sec. 2(11) of the Act.

approached Doss on Respondent's sales floor and informed Doss that they had "just got fired." Doss became "extremely upset" and immediately began looking for New Car Sales Manager Greenberg in order to secure an explanation for the discharges. Unable to locate Greenberg, Doss spoke with Used Car Manager Parsons but was dissatisfied with Parsons' explanation and continued to look for Greenberg. Several minutes later, Doss located Greenberg and engaged him in a "heated" discussion concerning the discharges. Doss candidly admitted that during the course of his discussion with Greenberg he (Doss) lost his temper and used obscenities. Greenberg then informed Doss that he too was discharged.

Based on the foregoing, the Administrative Law Judge found, with little discussion or rationale, that Doss' discharge was part of Respondent's overall plan to discourage its employees' support of the Union in order to avoid recognizing and bargaining with the Union. Accordingly, the Administrative Law Judge further found that Doss' discharge violated Section 8(a)(1) of the Act, citing *DRW Corporation d/b/a Brothers Three Cabinets*, 248 NLRB 828 (1980). My colleagues apparently find, in agreement with the Administrative Law Judge, that Doss' discharge was part of Respondent's plan to interfere with its employees' Section 7 rights, but further find that since Doss was a supervisor such interference does not violate Section 8(a)(1), overruling *DRW* and similar cases. I cannot join either of these findings.

Initially, I must emphasize that there is no evidence in the record that Respondent had knowledge of Doss' or Langley's attendance at the Union's organizational meeting. Similarly, there is a like absence of evidence that Doss' discharge was contemplated by Respondent prior to his protestations to Parsons and Greenberg. Apart from the suspicious timing of his discharge in relation to the discharges of unit employees, therefore, there is no evidence that Doss' discharge was an "integral part" of Respondent's stratagem for destroying the Union's nascent organizational campaign. Indeed, the only evidence in the record reflective of Respondent's motivation for discharging Doss establishes that he was discharged solely because he was the "weakest" of Respondent's three crew chiefs, and that Respondent no longer required the services of three crew chiefs to supervise its reduced complement of salesmen.[28] In my opinion, the evidence presented by the General Counsel was insufficient to establish a *prima facie* case. In proceedings alleging that a supervisor's discharge was violative of Section 8(a)(1) under the "integral part" or "pattern of conduct" theory, it is incumbent upon the General Counsel to show that the supervisor's discharge was contemporaneous with or close in time to a respondent's discriminatory treatment of its employees, *and* that the action taken against the supervisor was in reprisal for the supervisor's participation in or support of the employees' actions.[29] While a respondent's motivation for discharging or taking other actions against a supervisor may, as in most "usual" 8(a)(3) cases, be established by reasonable inference,[30] the record in the instant case permits no such inference of proscribed motivation. This is neither a case where a respondent's discharge of a supervisor was "aimed at penalizing employees,"[31] nor a case where a supervisor's discharge was "a ploy to facilitate or cover up the contemporaneous and subsequent unlawful discharges of employees,"[32] nor even a case where a supervisor's discharge was "in furtherance of an unlawful plan to rid the employer's facility of any and all union adherents.[33] Under these circumstances, I find, in agreement with my colleagues in the majority, that Doss' discharge was not violative of Section 8(a)(1) of the Act.

I vigorously disagree, however, with my colleagues' decision to overrule that line of cases, typified by *DRW, supra*, where the Board has found discharges of supervisors as part of "a pattern of conduct aimed at coercing employees in the exercise of their Section 7 rights"[34] to be violative of Section 8(a)(1). It is, of course, well settled that the 1947 amendments to the Act excluded supervisors from the definition of "employee" contained in Section 2(3), and thus permitted employers to discharge or discipline supervisors for engaging in union activities.[35] This is not to say, however, that under all circumstances an employer may discharge his supervisors with impunity. As the majority real-

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[28] Although this reduced complement of salesmen resulted from Respondent's discriminatory discharges which all members of this Board agree violated Sec. 8(a)(3), Doss' discharge stands independently from those employee discharges. Thus, as noted above, there is no evidence that Doss was discharged for the purpose of stifling his or employees' union or protected concerted activities. Under these circumstances, the fact that Doss would not have been discharged absent the unit employees' union activities is not sufficient to bring this case within the narrow confines of the "integral part" or "pattern of conduct" exception to the general rule that supervisors are outside the protection of the Act.

[29] See *Downslope Industries, Inc. and Greenbrier Industries, Inc.*, 246 NLRB 948, 949.

[30] *Shattuck Denn Mining Corporation (Iron King Branch) v. N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966).

[31] *Stop and Go Foods, Inc.*, 246 NLRB 1076, 1078 (1979), and cases cited therein.

[32] *Sibilio's Golden Grill, Inc.*, 227 NLRB 1688, fn. 3 (1977).

[33] *Nevis Industries, Inc., d/b/a Fresno Townehouse*, 246 NLRB 1053, 1055 (1979), and cases cited therein.

[34] *DRW, supra* at 829.

[35] See, e.g., *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641, et al.*, 417 U.S. 790 (1974); *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653 (1974).

firms, in some situations the Board and the courts have found that discharges of supervisory personnel violate Section 8(a)(1) of the Act as encroachments on *employees'* Section 7 rights. Terming the "integral part" or "pattern of conduct" line of cases an undue extension of this principle, my colleagues now choose to abandon this doctrine *in toto*. They rationalize their decision by pointing out that in cases such as these the supervisors were, themselves, engaged in union or protected concerted activity. In doing so, the majority evidently misses the point. As our decisions have made clear,[36] the Board has not protected supervisors from reprisals for engaging in such activities; rather, it has acted to protect *employees* from actions motivated to coerce them in the exercise of their Section 7 rights. Protecting employees from such coercion is a primary obligation of the Board. I will not join in my colleagues' abdication of that responsibility.

The majority also seeks to rationalize their abandonment of the "integral part" doctrine on the ground that it has produced inconsistent decisions leaving no clear guideline as to when supervisors may be lawfully discharged. While, as was noted in response to a similar allegation in *DRW*,[37] Members of the Board may have differed on the legal significance of the facts of certain cases, I do not believe that merely because these cases may be difficult to resolve the Board should turn its back on them. Contrary to the majority's assertion, the Board has never disregarded the fact that employees, but not supervisors, are protected against discharge for engaging in union or concerted activity.[38] Even a cursory examination of the cases in this area reveals that, where the Board has found a violation of the Act based on a supervisor's discharge, the finding has been that a respondent violated Section 8(a)(1) by coercing its employees rather than Section 8(a)(3) by discharging the supervisor in reprisal for his union activities.

Equally without merit is the majority's assertion that reliance on an employer's motivation in discharging a supervisor "is both unworkable and contrary to the Board's objective approach in analogous areas." Indeed, in most cases involving discriminatory actions, an element of the General Counsel's *prima facie* case is a finding that the employer's action was impelled by a proscribed motive. Cases in the area under examination are no different.[39] Where the Board has found that a respondent's action against a supervisor was motivated by a desire to stifle its employees' Section 7 rights, the Board has further found such action to be violative of Section 8(a)(1).[40] On the other hand, where the Board has found that action motivated by a desire to retain the loyalty of the disciplined supervisor, by reprisal against the supervisor for siding with employees, or by reprisal against the supervisor for attempting to advance his personal job interests, it has refused to find a violation of the Act and has dismissed the complaint.[41] In determining that motivation is irrelevant in supervisory discharge cases, my colleagues in the majority are making the same crucial error made by then Members Murphy and Truesdale in their partial dissents in *Nevis Industries, Inc., supra*. As the Board majority explained in that case:

> They have, however, failed to consider the teachings of *N.L.R.B. v. John Brown, et al. d/b/a Brown Food Stores, et al.*, 380 U.S. 278 (1965), wherein the Supreme Court held that the determination of the legality of employer conduct which could tend to interfere with employee rights but which could also have a legitimate business purpose depends, first, on an evaluation of the employer's motive in engaging therein . . . .[42]

Carried to its logical extreme, my colleagues' refusal to consider motivation in supervisory discharge cases would lead to patently absurd results. Moreover, the cases relied upon by the majority in support of their abandonment of any consideration of motivation are clearly inapposite.

In sum, I concur with my colleagues' dismissal of the instant complaint with respect to the discharge of Crew Chief Doss on the ground that no violation has been shown under the "integral part" or "pattern of conduct" doctrine. Contrary to my colleagues, however, I would not abandon that doctrine, which reflects over 15 years of settled Board precedent.

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[36] See, e.g., *Downslope Industries, Inc., supra; Nevis Industries, Inc., supra*.

[37] *DRW, supra* at fn. 10. Accord: *Downslope Industries, Inc., supra* at fn. 10.

[38] *Id.*

[39] This is not to suggest, however, that improper motivation is an indispensable prerequisite to finding a supervisor's discharge illegal. There may be a rare case, for example, where the clearly foreseeable consequences of an employer's action is such as to require reinstatement of a supervisor in order to avoid circumvention of the Act.

[40] *Sheraton Puerto Rico Corp. d/b/a Puerto Rico Sheraton Hotel*, 248 NLRB 867 (1980); *DRW, supra; Nevis Industries, Inc., supra; Downslope Industries, Inc., supra; VADA of Oklahoma, Inc.*, 216 NLRB 750 (1975); *Fairview Nursing Home*, 202 NLRB 318 (1973); *Krebs and King Toyota, Inc.*, 197 NLRB 462 (1972); *Pioneer Drilling Co., Inc.*, 162 NLRB 918. Also, see *Miami Coca-Cola Bottling Company d/b/a Key West Coca-Cola Bottling Company*, 140 NLRB 1359 (1963).

[41] *Stop and Go Foods, Inc., supra; Sibilio's Golden Grill, Inc., supra; Karl Kristofferson and Sigvald Kristofferson, Co-partners, d/b/a United Painting Contractors*, 184 NLRB 159 (1970).

[42] *Nevis Industries, Inc.*, 246 NLRB at 1055.

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 found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees concerning their views about union representation.

WE WILL NOT interrogate our employees concerning their and other employees' activities on behalf of Automobile Salesmen's Union, Local 1095, affiliated with United Food & Commercial Workers Union, AFL-CIO.

WE WILL NOT give our employees the impression we are maintaining a surveillance of their activities on behalf of Local 1095.

WE WILL NOT threaten our employees with closure of our business, discharge of our employees, and reopening of our business with new employees in the event they seek and secure representation by Local 1095.

WE WILL NOT discharge any of our employees to discourage employees from supporting Local 1095 and to avoid recognizing and bargaining with Local 1095 as the duly designated collective-bargaining representative of a majority of our employees in the following unit:

> All full-time and regular part-time automobile salesmen employed by Parker-Robb Chevrolet, Inc. at its Walnut Creek, California facility; excluding all crew chiefs, office clerical employees, professional employees, finance and insurance employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with Local 1095 at its request concerning the rates of pay, wages, hours, and working conditions of our employees within the above unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL offer to S. Berger, G. Gentile, J. Jinkens, W. Mitchell, R. Perez, and G. Reeves reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, if necessary terminating their replacements, and WE WILL make the above six employees whole for any losses in wages and benefits they have suffered by virtue of our discrimination against them, with interest on the amounts due them.

WE WILL recognize and bargain with Local 1095 at its request concerning the rates of pay, wages, hours, and working conditions of our employees within the above unit.

PARKER-ROBB CHEVROLET, INC.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge: On November 12 and 13, 1980,[1] I conducted a hearing in Oakland, California, to try issues raised by a complaint issued on June 11[2] and the Union's objections to a May 21 election.

On June 23 the Regional Director for Region 32 issued a report and order consolidating the issues raised by the objections and the complaint for purposes of hearing and resolution.[3] The election objections and the complaint allege the Respondent, Parker-Robb Chevrolet, Inc., violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (hereafter referred to as the Act), dissipating the Union's majority representative status within an appropriate unit of the Respondent's employees and prevented a fair election by:

1. Interrogating an employee concerning his and other employees' sentiments toward the Union.

2. Interrogating another employee concerning his and other employees' membership in and activities on behalf of the Union.

3. Giving an employee the impression that the Respondent was maintaining a surveillance of its employees' activities on behalf of the Union.

4. Threatening an employee with closure of the business, termination of the Respondent's present employees, and reopening of the business with new employees if the employees sought and secured union representation.

5. Discharging six employees and a crew chief to discourage employee support of the Union and to avoid recognizing and bargaining with the Union.

6. Failing and refusing to bargain in good faith with the Union as the duly designated representative of a majority of its employees within an appropriate unit and engaging in conduct designed to discourage employee support of the Union, to dissipate the Union's majority representative status, and to avoid recognizing and bargaining with the Union, necessitating the issuance of a remedial bargaining order.

The Respondent denied it committed the acts alleged, denied it violated the Act, and moved for dismissal of

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[1] Read 1980 after all further date references omitting the year.

[2] On the basis of a charge filed by the Union, Automobile Salesmen's Union, Local 1095, affiliated with United Food & Commercial Workers Union, AFL-CIO, on April 10 as amended on April 14, April 16, May 20, and June 5.

[3] The Union withdrew a portion of its election objections after the original filing; with that withdrawal, the objections and complaint allegations are identical.

the complaint and the objections, plus certification of the election results.[4]

The issues created by the foregoing are whether, prior to commission of the acts alleged, the Union represented a majority of the Respondent's employees within an appropriate unit; whether the Respondent committed the acts alleged; and whether, by such commission, the Respondent interfered with employees' free choice in the election and dissipated the Union's majority representative status, warranting the entry of findings that the Respondent violated the Act, prevented a fair election, and that issuance of a bargaining order was necessary to remedy the Respondent's unlawful conduct.

The parties appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Briefs were filed by the General Counsel and the Respondent.

Based upon my review of the entire record, observation of the witnesses, perusal of the briefs, and research, I enter the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all pertinent times the Respondent was an employer engaged in a business affecting commerce and that the Union was a labor organization within the meaning of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES AND ELECTION MISCONDUCT

A. *The Unit*

The complaint alleges, the answer admits, and I find that at all pertinent times the following constituted and constitutes a unit appropriate for collective-bargaining purposes within the meaning of Section 9 of the Act:

> All full-time and regular part-time automobile salesmen employed by the Respondent at its Walnut Creek, California facility; excluding all crew chiefs, office clerical employees, professional employees, finance and insurance employees, guards and supervisors as defined in the Act.

B. *The Union's Representative Status Within the Unit*

On April [illegible], the Union presented David Robb, the Respondent's general manager,[5] with a letter wherein the Union stated it represented a majority of the Respondent's employees within the unit specified above and requested that the Respondent recognize and bargain with the Union as their duly designated representative for collective-bargaining purposes, concerning the rates of pay, wages, hours, and working conditions of the unit employees.

On that date there were 17 employees within the unit; i.e., Berger, Bodon, Gentile, Gosney, Imwalle, Ivey, Jenkins, Jinkens, Mitchell, Muttera, Perez, Quesada, Reeves, Roybal, Sullivan, Tank, and Wenneberg.

On April 7, 8, and 9, 13 of those 17 employees[6] signed cards authorizing the Union to represent them for collective-bargaining purposes. Their signatures were solicited and secured by Gentile,[7] who contacted the Union, arranged meetings between union representatives and the Respondent's sales personnel at his home, and generally led the union campaign to organize the Respondent's sales force. Gentile also solicited and secured the signature of a crew chief, Art Langely, to a card, and Langley solicited another crew chief (Terry Doss) and a salesman (Gosney) to sign, though both declined.

Langley and Doss attended an organizational meeting conducted by representatives of the Union; their participation was limited to comments by Doss that it was going to be difficult for the Union to effectively represent Respondent's salesmen in the event a majority of its sales personnel selected the Union to represent them. In the course of the meeting, the question of Langley's and Doss' eligibility for inclusion within the bargaining unit arose and they were advised they were ineligible and the Union could not represent them.[8]

In essence, the Respondent's case rests on the proposition that Langley's unsuccessful solicitation of one salesman and the attendance of Langley and Doss at one union organizational meeting influenced a majority of the sales personnel who signed cards authorizing the Union to represent them to execute their cards in the belief the Respondent favored their doing so.

I find the contention lacks substance; neither Langley nor Doss were instrumental in the Union's securing of majority representative status, but rather it was Gentile who was the prime mover in the Union's successful organizational effort. In addition, it is clear that their participation in the campaign was minimal (unsuccessful solicitation of one card and attendance at one meeting), negative (Doss' remarks at the meeting), and both they and the sales personnel who attended were openly advised that Langley and Doss were not eligible nor included within the Union's representational ambit. In similar circumstances, the Board has rejected similar contentions[9] and I do so here.

On the basis of the foregoing, I find and conclude that since April 9 the Union has represented a majority of the Respondent's employees in the unit.

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[4] The majority of those participating in the election voted against union representation.

[5] The complaint alleges, the answer admits, and I find that at all pertinent times David Robb was a supervisor and agent of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

[6] Berger, Bodon, Gentile, Imwalle, Ivey, Jenkins, Jinkens, Mitchell, Muttera, Perez, Reeves, Sullivan, and Wenneberg.

[7] Gentile affixed his signature on each card he solicited and secured, together with the date he secured it. He initiated discussions to stimulate interest in union organization, however, commencing in mid-March.

[8] The complaint alleges, the answer admits, and I find that at all pertinent times Langley and Doss were crew chiefs, supervisors, and agents of the Respondent acting on its behalf within the meaning of the Act and therefore excluded from unit coverage.

[9] *N.L.R.B.* v. *Manufacturers Packaging Co., Inc.*, 645 F.2d 223 (4th Cir. 1981), affg. 247 NLRB 1117 (1980); *American Pistachio Corporation*, 249 NLRB 1193 (1980); *Sourdough Sales, Inc., d/b/a Kut Rate Kid and Shop Kwik*, 246 NLRB 106 (1979); *El Rancho Market*, 235 NLRB 468 (1978); *Tribuianis Detective Agency, Inc.*, 233 NLRB 1121 (1977); *Orlando Paper Co., Inc.*, 197 NLRB 380 (1972), enfd. 480 F.2d 1200 (3d Cir. 1973).

C. *The Alleged Jinkens-Parsons Interrogation*

The complaint alleges that in early April Gene Parsons, the Respondent's used-car sales manager,[10] interrogated an employee concerning his and other employees' sentiments about the Union.

Salesman John Jinkens testified that a few days before his discharge[11] he and Parsons went to lunch at a restaurant near the Respondent's premises; that in the course of their discussions during lunch Parsons asked him what he thought about the Union;[12] and that he replied it was both good and bad.[13] Parsons stated that the Union did not do anything for employees and more money could be made in nonunion dealerships. He replied that, in union-represented dealerships, the employees had job security and benefits, including a "draw."[14]

Parsons did not testify, so Jinkens' testimony is undisputed. His demeanor was straightforward and his testimony is credited.

Based on the foregoing, I find that on or about April 8 Parsons interrogated Jinkens concerning his views about union representation and thereby violated Section 8(a)(1) of the Act and prevented a fair election.

D. *The Alleged Jenkins-Parsons Interrogation, Impression of Surveillance, and Threat*

The complaint alleges that in early April Parsons interrogated an employee concerning his and other employees' membership in and activities on behalf of the Union; gave that employee the impression the Respondent was maintaining a surveillance of its employees' union activities; and threatened that employee with closure of the Respondent's operations, termination of its present employees, and reopening of the business with new employees in the event the employees sought and secured union representation.

As noted above, on April 9 the Union served on David Robb its notification that it represented a majority of the Respondent's sales personnel and its demand for recognition and bargaining. Shortly after service thereof, sales personnel Berger, Mitchell, and Perez and Crew Chief Doss were discharged.

Jenkins testified that after he finished work that same day (about 9:30 p.m.), he went to a local bar frequented by the Respondent's sales personnel; that his crew chief (Ray Cyr) and Parsons joined him there shortly after his arrival and that two other friends of his also joined the group [illegible] together that in the course of their conversation Parsons expressed amazement that the Respondent's sales personnel would desire union representation, and asked Jenkins who he thought would support it; that he replied Gentile was the only one to contact him about union representation, but he thought everyone supported the Union; that Parsons commented he thought Gentile and Muttera were trying to bring the Union in and that Dave Robb told him the Respondent would close the dealership for a month and start over with a new crew rather than let the Union in.

Parsons, Cyr, and Jenkins' two friends (neither of whom were employees of the Respondent) did not testify.

I credit Jenkins' testimony; while initially he gave a date of April 12 or 13 for the conversation, he testified that date was erroneous and April 9 was correct, inasmuch as he remembered feeling very guilty on April 10 over Gentile's discharge that date, thinking his identification of Gentile as the person who solicited his support of the Union the previous evening may have triggered Gentile's discharge. Jenkins impressed me as a sincere witness.

On the basis of the foregoing, I find and conclude that on April 9 Parsons interrogated Jenkins concerning who supported the Union, by his comments concernings who was behind the Union's organizational effort, gave Jenkins the impression the Respondent was maintaining a surveillance of its sale personnel's union activities, and, by his comments concerning David Robb's alleged plans in the event the employees secured union representation, threatened Jenkins with closure of the business and discharge of all the sales personnel in the event they supported the Union, thereby violating Section 8(a)(1) of the Act and preventing a fair election.

E. *The Alleged Discriminatory Discharge*

It is undisputed that the Respondent discharged unit employees Berger, Mitchell, and Perez, and Crew Chief Doss, on April 9; unit employees Gentile and Jinkens on April 10; and unit employee Reeves on April 12.

The General Counsel contends that the seven were discharged by the Respondent to discourage the remaining unit employees' support of the Union, and thus to avoid recognizing and bargaining with the Union as their duly designated collective-bargaining representative. He [illegible] Respondent that business was good and no reduction in the work force was contemplated immediately prior to the discharges, the Respondent's knowledge of and interest in the extent of union support among its employees and hostility to their representation by the Union, and the timing of the discharges—immediately after receipt of the Union's declaration it represented a majority and demand for recognition and bargaining.

The record supports the General Counsel's contentions.

It is undisputed that on April 9, *shortly before* David Robb's receipt of the Union's assertion of majority representative status and demand for recognition and bargaining, the Respondent's new-car sales manager, Walter

[10] The complaint alleges, the answer admits, and I find that at all material times Parsons was a supervisor and agent of the Respondent acting on its behalf.

[11] He was discharged on April 10.

[12] Langley testified that prior to lunch Parsons informed Langley he heard from one of Langely's friends about the Union's organizational campaign and asked Langley the extent of employee interest in union representation; that testimony is undisputed.

[13] Jinkens worked for auto dealers whose employees were represented by the Union prior to his employment by Respondent.

[14] Respondent's sales personnel were paid on a straight-commission basis; Jinkens was referring to a contract provision normally sought and secured by the Union providing for a minimum guarantee each pay period in the event commissions failed to reach the guarantee figure for the period.

Greenberg,[15] conducted a meeting of the Respondent's sales personnel at which he asserted business was good and the Respondent was not contemplating any cutback in its sales staff; findings have been entered that, *shortly before* the Respondent received the union communication asserting its majority representative status and demanding recognition and bargaining, the Respondent sought to identify the number and names of those of its employees supporting the Union and expressed its hostility to union representation of its sales personnel (see C and D, above); and it is undisputed that the seven discharges occurred suddenly, without prior notice, *shortly after* the Respondent's receipt of the union assertion of majority representative status and demand for recognition and bargaining.

The Respondent argues the discharges were instituted for purely economic reasons, i.e., a too rapid expansion of the work force at a time business was declining, upon receipt of March figures confirming that trend; and that the fact the Union's assertion and demands were received at the same time was coincidental.

The March figures show that 101 vehicles were sold during the month of March. Respondent's owner, Ralph Robb,[16] testified that, when he received that report,[17] he noted there were 20 sales personnel on the payroll on March 31, determined they averaged 5 sales per person during March, decided to reduce the sales force,[18] and instructed his son, General Manager David Robb, to cut staff. Ralph Robb also stated he was aware of declining sales at the end of March and at that time discussed with David Robb both that decline and anticipated further declines.

David Robb testified that on April 7 he informed New-Car Sales Manager Greenberg and Used-Car Sales Manager Parsons they were going to have to reduce the sales staff and left it to them to decide which persons to lay off, that Greenberg and Parsons made their decisions on the basis of seniority and productivity, and that the layoffs began the afternoon of April 9.

The above-recited testimony is not credible: sales of vehicles by the Respondent over the time period March 1978 through March 1980 show the sales force did not average 8-10 sales per person per month;[19] David Robb testified he believed in March that sales would *increase* in April; the Respondent, in anticipation of increasing sales in April and on into the summer months, *expanded* its sales force between March 26 and April [illegible],[20] and while two recent hires were laid off between April 9 and 12—Berger and Mitchell—Bodon, Roybal, Imwalle, and Quesada, recent hires with no sales record, were retained, while their seniors—Perez, Gentile, Jinkens, and Reeves—were laid off, despite average or above-average production records.

On the basis of the foregoing, I find and conclude that the defense that the layoff was necessitated by economic circumstances is without merit and was advanced as a pretext to cloak the real reason—Respondent's desire to discourage its sales staff from supporting the Union and to avoid recognizing and bargaining with the Union concerning their wages, hours, and working conditions.

On the basis of the foregoing, I find and conclude that the Respondent discharged unit employees Berger, Mitchell, Perez, Gentile, Jinkens, and Reeves to discourage its employees from supporting the Union and to avoid recognizing and bargaining with the Union as the duly designated representative of a majority of its unit employees concerning their rates of pay, wages, hours, and working conditions, thereby violating Section 8(a)(1) and (3) of the Act. I further find and conclude that the Respondent discharged Crew Chief Doss as part of its overall plan to discourage its employees' support of the Union and to avoid recognizing and bargaining with the Union and thereby violated Section 8(a)(1) of the Act.[21] I further find that by the aforesaid discharges the Respondent rendered and renders a fair election impossible and the serious and substantial violations of the Act found herein warrant the issuance of a remedial bargaining order.[22]

CONCLUSIONS OF LAW

1. At all pertinent times the Respondent was an employer engaged in commerce or in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times Ralph Robb, David Robb, Greenberg, Parsons, Doss, Langley, and Cyr were supervisors and agents of the Respondent acting on its behalf within the meaning of Section 2 of the Act.

3. Since April 9 the Union has been the duly designated collective-bargaininig representative of a majority of the Respondent's employees within the following unit:

> All full-time and regular part-time automobile salesmen employed by the Respondent at its Walnut Creek, California facility; excluding all crew chiefs, office clerical employees, professional employees, finance and insurance employees, guards and supervisors as defined in the Act.

4. The Respondent violated Section 8(a)(1) of the Act and prevented a fair election by:

(a) Parsons' April 8 interrogation of Jinkens concerning his views on union representation.

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[15] The complaint alleges, the answer admits, and I find that at all pertinent times Greenberg was a supervisor and agent of the Respondent acting on its behalf.

[16] I find that at all pertinent times Ralph Robb was an officer, supervisor, and agent of the Respondent acting on its behalf.

[17] He testified he received the report on April 14.

[18] On the ground the sales personnel previously average 8-10 sales per person and the better sales personnel would leave if the staff was not reduced and those remaining thereby have increased sales per person.

[19] Sales ranged from a low of 5.4 sales per person in February 1979 to a high of 10.0 sales per person in October 1979 and over the 25 months averaged 7.25 sales per person.

[20] In mid-March, the Respondent employed two crew chiefs (Doss and Langley) with an average of seven in each sales crew; Ray Cyr was hired on March 31 and began work April 1 as a third crew chief; Bodon and Roybal were hired for sales on March 26; Berger and Imwalle were hired on April 3; Mitchell was hired on April 4; and Quesada was hired on April 7—the same day the sales managers allegedly were told to cut back.

[21] *DRW Corporation d/b/a Brothers Three Cabinets*, 248 NLRB 828 (1980).

[22] *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

(b) Parsons' April 9 interrogation of Jenkins concerning his and other employees' union activities, giving Jenkins the impression the Respondent was maintaining a surveillance of its employees' union activities, and threatening Jenkins with closure of Respondent's business, discharge of its current employees, and reopening the business at a later date with new employees rather than recognize and bargain with the Union in the event a majority of the employees supported the Union.

(c) Respondent's discharge of Crew Chief Doss as part of its overall plan to discourage its employees from supporting the Union and to avoid recognizing and bargaining with the Union as the duly designated representative of a majority of its unit employees.

5. The Respondent violated Section 8(a)(1) and (3) of the Act and prevented a fair election by discharging unit employees Berger, Mitchell, Perez, Gentile, Jinkens, and Reeves to discourage employee support of the Union and to avoid recognizing and bargaining with the Union as the duly designated representative of a majority of its unit employees.

6. The serious and substantial nature of the unfair labor practices and election interference of the Respondent rendered and renders a fair election impossible and warrants the issuance of a remedial bargaining order.

7. The aforesaid unfair labor practices and election interferences affected and affect commerce within the meaning of Section 2 of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent discharged seven of its employees to discourage its employees from supporting the Union and to avoid recognizing and bargaining with the Union as their collective-bargaining representative, I shall recommend that the Respondent be directed to reinstate those seven employees to their former position or, if those positions no longer exist, to substantially equivalent positions, if necessary terminating any employees hired to replace them, and to make those seven employees whole for any losses in wages or benefits they have suffered [illegible] against them, with the amounts due to each employee calculated in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and any interest thereon computed in accordance with the formula set out in *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Having found that by serious and substantial violations of the Act and interference with its employees' free choice the Respondent prevented a fair election, I shall recommend that the Union's election objection be sustained, the election set aside, the petition therefor dismissed, and the Respondent ordered to recognize and bargain with the Union at its request concerning the rates of pay, wages, hours, and working conditions of its employees in the unit found appropriate herein.

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

ORDER[23]

The Respondent, Parker-Robb Chevrolet, Inc., Walnut Creek, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their views about union representation.

(b) Interrogating its employees concerning their and other employees' activities on behalf of Local 1095.

(c) Giving its employees the impression it is maintaining a surveillance of their activities on behalf of Local 1095.

(d) Threatening its employees with closure of its business, discharge of its employees, and reopening the business at a later date with new employees in the event they seek and secure representation by Local 1095.

(e) Discharging its employees to discourage other employee support of Local 1095 and to avoid recognizing and bargaining with Local 1095 as the duly designated collective-bargaining representative of a majority of its employees within the following unit:

> All full-time and regular part-time automobile salesmen employed by Parker-Robb Chevrolet, inc. at its Walnut Creek, California facility; excluding all crew chiefs, office clerical employees, professional employees, finance and insurance employees, guards and supervisors as defined in the Act.

(f) Discharging its crew chiefs as part of its overall plan to discourage its employees' support of Local 1095 and to avoid recognizing and bargaining with Local 1095 as the duly designated collective-bargaining representative of a majority of its employees within the aforesaid unit.

(g) Refusing to bargain with Local 1095 concerning the rates of pay, wages, hours, and working conditions of its employees within the aforementioned unit.

(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purpose of the Act

(a) Offer to Doss, Berger, Mitchell, Perez, Gentile, Jinkens, and Reeves reinstatement to their former position or, if those positions no longer exist, to subsantially equivalent positions, if necessary terminating any employees hired to replace them.

(b) Make whole the discriminatees named above in the manner set forth in The Remedy section of this Decision.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all

[23] 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.

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) Recognize and bargain with Automobile Salesmen's Union, Local 1095, affiliated with United Food & Commercial Workers Union, AFL-CIO, at its request, concerning the rates of pay, wages, hours, and working conditions of all full-time and regular part-time automobile salesman employed by Parker-Robb Chevrolet, Inc., at its Walnut Creek, California, facility, excluding all crew chiefs, office clerical employees, professional employees, finance and insurance employees, guards and supervisors as defined in the Act.

(e) Post at its premises at Walnut Creek, California, copies of the attached notice marked "Appendix."[24] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by its authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 32, 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 Union's objections to the election held in Case 32-RC-1044 are sustained, the election is set aside, and the petition is dismissed.

[24] In the event that 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."