

**Rockland Chrysler Plymouth, Inc. and Local 259,  
United Automobile, Aerospace and Agricultural  
Implement Workers of America**

**Rockland Chrysler Plymouth, Inc. and Local 259,  
United Automobile, Aerospace and Agricultural  
Implement Workers of America. Cases  
2-CA-12887, 2-CA-12966, 2-CA-12974, 2-CA-  
13016, and 2-RC-16053**

April 3, 1974

### DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND  
PENELLO

On November 14, 1973, Administrative Law Judge Bernard Ness issued the attached Decision in this proceeding. Thereafter, only the Charging Party filed exceptions and a supporting brief. The Respondent filed a memorandum in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Rockland Chrysler Plymouth, Inc., Nanuet, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that Case 2-RC-16053 be, and it hereby is, severed from this proceeding and remanded to the Regional Director for Region 2 for such action as he deems appropriate.

<sup>1</sup> The Charging Party 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, unfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

### DECISION

#### STATEMENT OF THE CASE

BERNARD NESS, Administrative Law Judge: These cases

arose as a result of an organizational campaign instituted the beginning of December 1972, by Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, herein called the Union. On December 7, 1972, Respondent refused to recognize the Union. The Union filed a petition on December 12 (Case 2-RC-16023) which it withdrew on December 26. The Union subsequently filed the petition in the instant representation case (Case 2-RC-16053) on February 7, 1973. An agreement for consent election was executed by the parties and approved by the Regional Director on February 20 and an election was conducted on March 14. The tally of ballots showed that 19 ballots were cast, of which 8 votes each were cast for and against the Union, with the remaining 3 ballots being challenged. The challenges were sufficient in number to affect the results of the election. Thereafter, the Union filed timely objections to conduct affecting the results of the election, based upon allegedly improper conduct by the Employer.

The original, first and second amended charges in Case 2-CA-12887 were filed on February 21, March 13, and March 26, 1973, respectively. The charges in Cases 2-CA-12966, 12974, and 13016 were filed on May 2, May 14, and June 27, respectively. The consolidated complaint, based upon the above-mentioned charges, issued on July 6. The issues raised therein are whether or not Respondent (1) offered, promised, and granted benefits, offered, promised, and granted a promotion to an employee, threatened to discontinue incentive pay, threatened discharge and other reprisals, gave less favorable job assignments to two employees, and discharged six employees because of their activities on behalf of the Union in violation of Section 8(a)(1) and (3), and; (2) by the above conduct. Respondent tried to undermine and destroy the majority status of the Union in an appropriate unit of Respondent's employees, and refused to recognize the Union as the statutory bargaining representative of employees in the said unit, in violation of Section 8(a)(5) of the Act.

It appearing to the Regional Director that the objections and challenges in Case 2-RC-16053 raised substantially the same issues of fact and law as are involved in the allegations in the consolidated complaint, he issued his order consolidating the hearing on objections and challenges with the trial of the alleged unfair labor practices.

This matter was heard at Brooklyn, New York, on July 16-20 and July 24-27, 1973. Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by General Counsel and Respondent, I make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE EMPLOYER

The facts herein are based upon the pleadings and admissions of Respondent.

Rockland Chrysler Plymouth, Inc., the Respondent, is and has been at all times material herein, a New York corporation, with its office and place of business at Nanuet, Rockland County, State of New York, where it is engaged in the sale and service of new and used

automobiles and related products. Respondent, during the past year, in the course and conduct of its business, derived gross revenues therefrom in excess of \$500,000, and purchased and caused to be transported and delivered directly from points outside the State of New York to its place of business, automobiles and other goods and materials valued in excess of \$50,000.

Based upon the foregoing, it is concluded and found that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Introduction

The principal owners of Respondent are William Perretti and Morton Jelling, president and secretary-treasurer, respectively. They also own and operate three other automobile agencies not involved in this proceeding; one in Totowa, New Jersey, which is unorganized and two in New York—Atlas Chrysler in the Bronx and Bayside Chrysler in Bayside, Queens. The Union represents the service department employees, porters, and parts department employees at Atlas and Bayside. The Respondent moved to its present location in Nanuet in early November 1972. James Martin has been Respondent's general manager for the past several years. Hank Diaz was the service manager until December 5, 1972, when Perretti appointed Murray Rothenberg to replace him.<sup>1</sup> At the old location, the mechanics were on a flat rate. When the store was moved to Nanuet, an incentive rate system was put into effect.

### B. *The Advent of the Union; The Majority Status and Request for Recognition*

In the first week in December 1972, employee Richard O'Brien contacted the Union and a meeting was held at employee James Rose's home on December 6, 1972. Business Representatives Carlo Oliveri and Joe Lewis<sup>2</sup> met there with 10 of the employees. Oliveri discussed the benefits of union organization with the employees and explained that he needed a majority of the employees to sign cards in order to seek recognition. Absent voluntary recognition by the Respondent, he told the employees he would file a petition with the Board together with the authorizations. It was also pointed out that signing cards

would give them protection in the event they were discharged. The employees were also told the Respondent would not be shown the cards. The 10 employees all signed authorization cards that night at the meeting. It was arranged that the union representatives would present themselves at the store the following morning at 10 a.m. to seek recognition. An employee committee was selected, consisting of O'Brien, Francis Craven, and Donald Moggio.<sup>3</sup> The following morning, before the union representatives arrived, three more employees signed authorization cards.<sup>4</sup> These cards in turn were given to Oliveri when he first appeared on the scene.

Oliveri and Lewis, together with the employee committee, met with Perretti.<sup>5</sup> The union representatives introduced themselves and said they represented the service department employees and desired recognition. Perretti replied he would see his attorney, that he never had a union come into his operation and whatever union he presently dealt with he had inherited when he purchased the operation.<sup>6</sup> He added that he beat the Union before and would do it again.<sup>7</sup> Oliveri then handed him a Board pamphlet describing the rights of employees and employers. (G.C. Exh. 4.) Perretti replied he knew what the rules were. He also said that by the time he was done he would have the three committeemen sitting there voting for the Respondent.<sup>8</sup>

Later that day, the Union sent a telegram to Respondent, confirming its request for recognition as bargaining representative of "the shop employees in your service department." At the hearing, Respondent denied receipt of the telegram. I place no reliance on the telegram and find it unnecessary to resolve the question of its receipt by Respondent because of my finding that earlier that day the Union orally had told Perretti it claimed to represent the service department employees.

The complaint alleges the appropriate unit to be all service and parts department employees and alleges that a request for recognition as bargaining representative of the employees in said unit was made on December 7 and the Respondent refused recognition on that date.<sup>9</sup> This is the description of the unit as subsequently agreed upon in the Consent Election Agreement entered into by the parties on February 20, 1973, in the instant representation case. Respondent's answer to the complaint denies that a request for recognition was made for this unit, apparently relying on the fact that nothing was said about the parts department. Respondent appears to have abandoned this argument because the excellent brief counsel submitted makes no further reference to this contention. In any event, I find that although only the service department employees were mentioned as descriptive of the body of men sought, the parties nevertheless understood this to include the parts department employees. In this regard, I have noted that

recognition.

<sup>1</sup> Jelling was also present at the meeting but did not testify at the hearing. Martin was not present during the entire meeting. His recollection of what was said while he was present was obviously hazy.

<sup>2</sup> His name appears in various parts of the transcript as Luiz.

<sup>3</sup> The above facts are found from a composite of credible testimony of Oliveri, O'Brien, Rose, and Craven.

<sup>4</sup> White, Comporetto, and Guido Falsetti. I have not considered the card of Coffi who commenced his employment that morning. His testimony was that he signed the card that morning after the Union's request for

<sup>5</sup> Referring to an aborted union campaign at Totowa the year before.

<sup>6</sup> The above facts are based upon the composite credited testimony of Oliveri, O'Brien, Craven, Moggio, and Perretti.

<sup>7</sup> Paras 9 and 10.

there is no evidence that Respondent expressed any doubt that parts department employees were to be included. Moreover, the Union has represented the parts department together with the service department employees at Perretti's other operations—Atlas and Bayside.<sup>10</sup> Accordingly, I find, as alleged by the General Counsel, that on December 7, the Union requested and was refused recognition as the exclusive bargaining representative of Respondent's service and parts department employees.

The parties stipulated that there were 17 employees in this unit on December 7. Authorization cards, signed by 13 of these 17 employees were in the Union's possession at the time it requested recognition on December 7.<sup>11</sup> Respondent does not challenge the authenticity of the cards but argues that they should not be considered as valid authorizations for the purpose of determining the Union's majority.

Respondent contends that the Union made material misrepresentations to the card signers at the December 6 meeting. He argues that the import of the testimony was that the employees understood the cards would be used only for filing with the Board, would protect them from discharge, and that the cards would not be shown to Respondent. I find no merit to this argument. As I have found above, the employees were told at the meeting that the Union needed cards signed by a majority of the employees in order to seek voluntary recognition. Absent such recognition, the cards would then be furnished to the Board with a petition requesting a Board-conducted election. Thus, I cannot agree that employees were told that the purpose of the cards was only to seek an election. With respect to Respondent's further argument concerning the validity of the cards, it is true that employees were told at the meeting that the cards would not be shown to the Respondent and execution of the cards would give them protection against discharge. But I do not agree with Respondent that such comments affected the validity of the cards. Accordingly, I find a majority of the service and parts department employees had designated and selected the Union as their representative for the purpose of collective bargaining at the time it requested and was refused recognition on December 7, 1972.

### C. *Alleged Interference, Restraint, and Coercion*

#### 1. Perretti meetings with the employees

During the month of December 1972, beginning on December 7, again on December 8, and on various dates thereafter, Perretti conducted a series of meetings with the employees concerning their efforts to being in the Union. On December 12, the Union filed a representation petition with the Board's Regional Office.<sup>12</sup> Following a number of meetings the employees had with Perretti, they met at Rose's house and decided to give Perretti another chance, without the Union. O'Brien was designated to inform the

Union. Several days later, on December 19, O'Brien telephoned Oliveri and told him of the wishes of the employees.<sup>13</sup> The petition was thereafter withdrawn on December 26.

The General Counsel alleges in his complaint that at the December meetings Perretti held with the employees, he offered and promised them benefits, and threatened to drop the incentive pay system. The General Counsel further alleges that during this same period, he granted additional paid holidays to induce the employees to abandon their support of the Union.

Perretti held a meeting with the employees on December 7, following the Union's unsuccessful attempt to obtain voluntary recognition. He held another meeting concerning the Union on the following day, December 8. Thereafter, during the month of December, further meetings were held. The testimony was such that it is impossible to determine from the record the precise dates of the later meetings or what was said at specific meetings.

At the December 7 meeting, Perretti told the employees he did not see why the employees needed a union and that the employees made a mistake in bringing in a union. He remarked that the Company had just moved in to the new building and the employees had not given the Company a fair chance. Perretti said his door was always open and if employees had problems they should have brought them to him. He cautioned them that he could not negotiate with the men now that the Union was in the picture—that it would be unlawful for him to promise them anything. Perretti also declared that even if the Union was brought in, the Union would still have to bargain with him and before any of the union demands were to be adopted, he would first have to agree to them.<sup>14</sup>

On December 8, Perretti held another meeting with the employees where the Union was again discussed. The General Counsel alleges at this meeting Perretti threatened to drop the incentive pay system if the employees continued to support the Union.

In support of this allegation, the General Counsel presented a number of witnesses. O'Brien testified Perretti said that if the Union came in, the employees would lose their incentive pay. Comporetto, Rose, and Cioffi corroborated O'Brien. Comporetto placed this event as occurring at the December 7 meeting. Rose and Cioffi were uncertain as to the meeting in which Perretti made this alleged threat. Cioffi, on cross-examination, testified that at the union meeting on December 6, the Union had discussed wage rates with the employees, based both on straight salary and on incentive, and that \$5.37 an hour on straight salary was mentioned as the rate at one of the union shops.<sup>15</sup> Cioffi's further testimony on cross-examination is quoted below:

Q. . . . Didn't Mr. Perretti say that if the union was demanding a rate of \$5.35 or some such thing on a salary basis that that would mean the end of the incentive pay?

<sup>10</sup> Noted too is the stipulation by the parties that there were only two employees in the parts department on December 7—Panas and White. White's signed authorization card was in the Union's possession at the time of the request for recognition.

<sup>11</sup> As noted *supra*, I have discounted Cioffi's card.

<sup>12</sup> Case 2-RC-16023.

<sup>13</sup> O'Brien told General Manager Martin and Perretti on this same day of his telephone call to Oliveri.

<sup>14</sup> The foregoing findings are based upon the composite credited testimony of O'Brien, Rose, Cioffi, and Moggio.

<sup>15</sup> Oliveri also testified rates of pay, based on straight salary and incentive, were discussed at the Union meeting.

- A. I believe so.
- Q. Wasn't that the context in which he was talking about incentive pay, if they were bargaining for one thing it might mean the loss of another?
- A. Right.

General Counsel's witness, employee Moggio, testified that Perretti spoke of incentive pay at either the December 7 or 8 meeting. According to Moggio, Perretti commented as follows: "He asked us, you know, what the Union said they could do for us, and we had mentioned what they said they were going to get us per hour, and he said, 'You could never get that much money on piece work, incentive pay, that you would have to be on hourly rate.' "

Service Manager Rothenberg, without being able to pinpoint the meeting at which incentive pay was discussed, testified that at one of the meetings one of the employees brought out that with the Union, employees would be getting \$5.37 an hour. Rothenberg related that Perretti explained that \$5.37 more likely was a figure in a salary shop, not one with an incentive system and if that was the figure ultimately agreed upon, it would be as a salaried shop.

Perretti testified as to these meetings but he too could not pinpoint the specific subjects covered at any given meeting. With respect to incentive pay, he testified he told the men that in order for the men to get more pay, he would have to approve it—"there was no guarantee that they would get—would be on incentive pay or not incentive pay."

Considering the total testimony of the witnesses regarding Perretti's comments about incentive pay, I find Rothenberg's explanation, as substantially corroborated by General Counsel's witnesses, Cioffi and Moggio, to be more reliable and credible. In reaching this finding, I have been mindful that an increased wage rate was discussed at the December 6 union meeting and that at the December 8 meeting, employees first mentioned that with the union employees would be getting a higher wage rate. In response to the employee predictions, Perretti said such higher rates could not be effected under an incentive pay system.

At one of the later December meetings with Perretti, O'Brien insisted on reading a list of demands prepared by the employees.<sup>16</sup> Perretti told O'Brien he could not comment about the demands until the Union was out of the picture. Perretti also said Rothenberg was recently made service manager and he needed an opportunity to observe how the men performed. He asked the men to wait until after the first of the year. The General Counsel contends that at one of these meetings Perretti threatened to bring back Diaz as service manager if the Union came in. It was common knowledge that the employees had been thoroughly dissatisfied with Diaz and this was one of their main gripes. The credible testimony discloses that at one of the meetings prior to December 19, the employees mentioned to Perretti that Diaz had been a disagreeable

person to work for. Perretti responded by saying that if the Union came in, Diaz would be brought back. This finding is based upon the credited testimony of Cioffi, O'Brien, and Rothenberg.<sup>17</sup> Rothenberg testified as follows: "Well, Mr. Perretti said if the shop, if it is bargained and it does become a union shop that he would transfer me back to Totowa and bring Hank Diaz up. And he said that Hank Diaz is well seasoned how to run a union shop because he's worked in one for four or five years at Atlas Bronx."

The General Counsel contends that employee Moggio was offered and granted a wage increase, the purpose of which was to defeat the Union. The credited evidence disclosed that at one of the Perretti meetings with the employees, probably the one held on December 8, Moggio complained that his wage rate was too low. Moggio said he was earning no more than the less-skilled mechanics under the incentive pay system and yet he was classified as a foreman. Strange as it may seem, at this meeting Perretti, Martin, and Rothenberg all disclaimed knowledge that Moggio was considered a "foreman".<sup>18</sup> Several days later, Rothenberg came up to Moggio and told him the Company did not realize he was a foreman—they had wondered why he had been helping other mechanics as much as he did and they wanted to give him a raise. Although no definite date could be established, the record does disclose his rate was thereafter increased from \$4.50 to \$4.75 an hour between January 11 and 31.<sup>19</sup>

The General Counsel alleges that Respondent promised additional paid holidays and, on December 22 and 29, did grant such holidays to induce its employees to abandon their support of the Union. It is undisputed that prior to 1972, Respondent's employees worked only one-half day on the last working day before Christmas and before New Year's and were paid for only the half days. The same practice existed at the Totowa agency. At Bayside and Atlas, where the employees are represented by the Union, the employees for a number of years have received full days off as paid holidays. Some time before Christmas Respondent's employees were told that the employees at Totowa would receive the additional half day off with pay before each of the two holidays (December 22 and 29) and they likewise would receive this additional benefit. The announcement of the additional holiday benefit was made before the Union withdrew its petition before the Board.<sup>20</sup> A significant date would be December 19—when O'Brien notified Martin and Perretti he had told the Union to withdraw the petition. Considerable testimony was adduced regarding the announcement of the benefit but the testimony is vague and contradictory. None of the witnesses appeared to have a clear recollection as to the date when the announcement was made. O'Brien first testified it was after he had told Perretti of his call to the Union on December 19; he then placed the event as having occurred before the meeting at Rose's house and thereafter suggested it may have been announced some time between the meeting at Rose's house and December 19. Other

manager, Mancini, told him he was a foreman and that he was to help other mechanics who had problems

<sup>16</sup> O'Brien fixed this meeting as having occurred prior to his call to the Union on December 19

<sup>17</sup> Perretti did not specifically deny saying he would bring back Diaz as service manager.

<sup>18</sup> Moggio had been employed by Respondent about 4 years at the time of the hearing. He testified that about 3-1/2 years ago the then service

<sup>19</sup> The General Counsel's brief mistakenly shows this period as January 11 to January 13

<sup>20</sup> Withdrawn on December 26

witnesses were equally uncertain in their testimony. However I was more impressed with Rothenberg's testimony on this point. According to Rothenberg, at one of the Perretti meetings with the employees, O'Brien mentioned that he learned the employees at Atlas were receiving full days off before the holidays. Perretti replied that if he gave it to Totowa employees he would give it to them. Thereafter, according to Rothenberg, on either December 18 or 19, Perretti told him to give the employees the full days off before the holidays and the same benefit was being given at Totowa. Rothenberg then relayed this information to the employees. In determining on which of the two dates the announcement was made, I am mindful of O'Brien's undisputed testimony that after he told Martin on December 19 of his call to the Union, he then imparted the same information to Perretti on the telephone. More than likely, it may be assumed that Perretti was not at the store on December 19. Under the circumstances, I believe and find that the announcement of the additional half-day holidays was made on December 18. However, in announcing this benefit, it should be noted that no mention was made of the Union or of the organizing campaign. Moreover, the employees were told the benefit was being given to the Totowa employees as well.

## 2. Analysis and conclusions

As found above, the incentive pay system had been instituted when the store was moved to Nanuet in early November 1972. The employees were dissatisfied with the manner in which it operated and a higher wage rate had been discussed at the union meeting the employees had with the union representatives on December 6. At one of the later meetings with Perretti, the employees first mentioned that with a Union they would be looking for a substantially higher wage rate. It was in response to this statement by the employees that Perretti remarked that such higher wage rate would more realistically be under a flat rate than under an incentive system. Under these circumstances, I do not find Perretti's statement to constitute an unlawful threat to discontinue the incentive pay system if the employees continued their support of the Union.

With respect to any offers or promises of benefit, the undisputed evidence shows that Perretti constantly cautioned the employees he could not make any promises while the Union was in the picture. Even when O'Brien insisted upon reading the employee demands, Perretti again reiterated he would listen but would make no comments nor could he negotiate with them. The only actual promises of benefit disclosed were the additional paid holidays and the promise to Moggio to increase his rate of pay. Strange as it may seem, the uncontradicted testimony shows that some 3 years earlier Moggio had been granted additional responsibilities by the individual who was then service manager—assisting less skilled mechanics. When this was brought to the attention of Respondent's hierarchy, Moggio was told he would receive an increase of 25 cents per hour. No mention was made of

the Union. The increase itself was not put into effect until several weeks after the petition was withdrawn. In my opinion, I do not view the promise to increase Moggio's wage rate as being an unlawful promise in violation of the Act or as an attempt to influence the employees in their selection of a bargaining representative. When Moggio voiced his complaint about the inequity of his wage rate, the Respondent, being made aware of such inequity for the first time, took steps to correct his wage rate.

As found above, the announcement of additional paid holidays was made on December 18—before the Respondent was made aware that the petition would be withdrawn. At the two organized stores owned by Perretti, the employees were receiving the last full working day before Christmas and New Year's as paid holidays. At Totowa and at Respondent, employees had been receiving only one-half days. At one of the meetings, employees voiced their dissatisfaction that they were not receiving the full days as holidays and Perretti had told them if he granted such benefit to Totowa they would also receive it. I view the subsequent announcement of the additional half-day benefits as an equalization of the benefits at all four stores rather than as an attempt to influence the employees in their selection of a bargaining representative. Accordingly, I find the General Counsel's allegation concerning the holiday benefit to be without merit.

At one of the December meetings, Perretti told the employees that if the Union became the bargaining representative, he would bring back Diaz as service manager. It cannot be said that Perretti was not free to make his selections to supervisory positions but in the context in which he mentioned the return of Diaz, I find it to be an unlawful threat. As stated earlier, it was common knowledge that the employees had found Diaz to be intolerant and his presence was one of the gripes made known to Perretti. When the employees voiced their displeasure about Diaz to Perretti and indicated this was one of the reasons they sought out the Union, it was at that point Perretti said he would return Diaz to his role as service manager if the Union became the bargaining representative. Clearly, this message to the employees conveyed the threat that if the employees selected the Union, they would once again undergo an unpleasant working relationship—they would have foisted upon them a supervisor whom they had found to be insufferable. As such, I find Perretti's threat to return Diaz as service manager if the Union came in as violative of Section 8(a)(1) of the Act.

## 3. Alleged threats of discharge

On January 31, Rose called Oliveri and requested that the Union once again file a petition with the Board for an election. Thereafter, the instant petition was filed on February 7.<sup>21</sup> A hearing was originally to be held on February 16 but was rescheduled to February 20. The General Counsel alleges that Perretti threatened Theodore Cioffi with discharge because he intended going to the aborted February 16 hearing. Cioffi testified he told

<sup>21</sup> O'Brien had already been discharged on January 23. His termination is discussed *infra*.

Martin on February 15 he was taking off the next day to go to the union hall and to the Board. Cioffi planned to attend the Board hearing. Martin told him to tell Rothenberg. This he did and Rothenberg gave him permission. However Cioffi reported for work the next morning, having learned the evening before that the hearing had been called off. According to Cioffi's credited testimony, Perretti, accompanied by Rothenberg, came up to him at work. With profanity and personal invectives injected into his conversation, Perretti told Cioffi he had no right to go to the union hall or the Board, that Perretti was paying his salary, and that he would be fired if he went to the Board. Employee Lawler testified he was walking by as Perretti was yelling at Cioffi. He admittedly did not hear the entire conversation but did hear Perretti say he was paying Cioffi's wages and he had no right to go to the Board. To the extent that the testimony of Rothenberg differs from that of Cioffi's, I credit Cioffi's account. Rothenberg said Perretti used no obscenities. Perretti testified, "I may have. — It's possible. I mean its not something I wouldn't do. I would do something like that. I admit it. If I thought he was, I would call it to him." Rothenberg also testified Cioffi had not said anything about going to the Board—only to the union hall. Yet Perretti was aware that Cioffi had intended going to the Board. Both Rothenberg and Perretti in their testimony attempted to make it appear that Perretti was objecting to any attitude Cioffi may have had that he could take time off as a matter of right to go to the Board without permission of management. I find this unconvincing particularly because Cioffi had already received permission from both Martin and Rothenberg. Rothenberg admitted on the stand that there was no indication Cioffi intended taking off without permission.

Respondent argues that Perretti was privileged to require employees to ask for permission before they go to the Board. He states that Cioffi was not disciplined in any way and the incident added up to nothing more than a misunderstanding between Perretti and Cioffi.<sup>22</sup> I do not agree this was a mere misunderstanding. Cioffi had already received permission from both Martin and Rothenberg to attend the hearing. There is no evidence that employees are refused time off for personal reasons. Perretti must have been aware that Cioffi had already received permission to go to the hearing and there was no indication he intended to go without first receiving permission from supervision. Under these circumstances, I view Perretti's tirade against Cioffi as an obvious attempt to intimidate Cioffi from engaging in activity on behalf of the Union in violation of Section 8(a)(1) of the Act.

As stated above, the hearing on the representation petition was rescheduled from February 16 to February 20 at the Board's Regional Office. Business Representative Olverli passed the word to the employees to come to the Board office that morning. Approximately 12 employees left work in mid-morning to go to the Board office and

were gone for several hours. The General Counsel alleges that Stephen Velten, Respondent's parts department manager, threatened John LaFazia with discharge if he went to the Labor Board.<sup>23</sup>

LaFazia was employed in the parts department under Velten's supervision. On February 20, employee Craven told him the Union had called and the men had to go to the Board to "witness the signatures so we could have an election." Velten asked him if he was going with the rest of the employees. According to LaFazia, when he replied in the affirmative, Velten responded, "Well, he told me that I'd better make up my mind good, because if I did go down, he could guarantee that within a month's time that I wouldn't have a job." LaFazia did go to the Board's office. When he returned, nothing was said about his absence. None of the employees were disciplined for absenting themselves during working hours to go to the Board nor was anything said to them upon their return.

Velten testified when he observed LaFazia leaving with the rest of the men he told LaFazia he did not have to go if he did not want to but LaFazia still went. He denied the threat of discharge attributed to him by LaFazia. I credit Velten and shall recommend dismissal of this allegation.

#### 4. The promise of promotion to Gerald Lawler

The General Counsel alleges that on about February 19, Rothenberg promised and then promoted Lawler to used car manager to induce him to refrain from becoming or remaining a member of the Union, and to refrain from giving any assistance or support to it, and to induce him to abandon his membership in and activity on its behalf.

Lawler was hired by Rothenberg on February 5, 1973, as a used car mechanic.<sup>24</sup> According to Lawler, Rothenberg told him on February 19 he was making him used car manager. Rothenberg wanted him to assume responsibility for New York State inspections and deliveries of used cars and to assign work to the other remaining employee in the department, Botwick. Since Lawler was senior to Botwick and was already performing this work he asked what the title meant. Rothenberg replied it did not mean any more money but as used car manager he would be a member of management, would not be able to vote in a Board election, and if the Union got in and later called a strike, the Company would still be able to get out the used cars.

Rothenberg testified the conversation took place in early February and he decided to make Lawler used car manager because there was no person in the department charged with the responsibility of inspections and deliveries of used cars. According to Rothenberg, Lawler said he would let him know if he wanted the position and it was not until a month later that Lawler accepted the position. Rothenberg denied making any reference to the Union, to Lawler's eligibility to vote, or to the possibility of a union strike.

discriminatees had been discharged prior to February 20. At the hearing the General Counsel stated he was not contending the Respondent committed an unfair labor practice per se by objecting to the employees leaving on February 20. This of course is apart from the specific allegation concerning Velten's alleged threat to LaFazia.

<sup>24</sup> He was subsequently discharged on April 3. An unfair labor practice charge filed on his behalf was dismissed for insufficient evidence.

<sup>22</sup> Respondent's counsel cites *N.L.R.B. v Superior Company, Inc.*, 199 F.2d 39 (C.A. 6), denying enforcement 94 NLRB 586, which I believe to be inapposite.

<sup>23</sup> As I understand General Counsel's position, he contends that the employees who went to the Board on February 20 were engaging in a protected activity and that this action by the employees was a reason for the discharges of LaFazia, Craven, and Cioffi. The other three alleged

I find Lawler's version more plausible and credible. I cannot conceive that if Rothenberg earnestly desired to promote Lawler to used car manager and give him added responsibility to improve the operation of the department he would have waited an entire month for Lawler to decide if he wanted the position. At the time of the conversation between Lawler and Rothenberg on February 19, Lawler had not engaged in any union activity and was himself undecided whether or not to support the Union. Obviously therefore, Respondent had no idea how Lawler might ultimately vote in the election. I agree with Respondent's counsel that by making Lawler the used car manager it was not seeking to nullify a potential affirmative vote for the Union. However, I believe the Respondent's concern was to keep the used car department in operation in the event the Union was successful. Keeping in mind that the representation hearing was scheduled for the very next day, February 20, Respondent, under the guise of giving Lawler a meaningless title without any change in job function, engaged in a vain attempt to remove him from the bargaining unit thus insuring itself an uninterrupted operation of the used car department in the event of a strike by the Union. Lawler voted a challenged ballot at the election held on March 14. His name had not been included on the *Excelsior* list of eligible voters furnished by Respondent to the Board's Regional Office on February 22. At the conclusion of the election, but before any ballots were counted, Respondent argued that Lawler was an ineligible voter because he was a managerial employee. It then agreed to his eligibility after some discussion. His vote was then counted.

Under the circumstances, I believe that conferring the title of used car manager upon Lawler in the manner described above was an attempt to disenfranchise Lawler from his participation in Section 7 activities and constituted an unlawful infringement upon the Section 7 rights of the employees in violation of Section 8(a)(1) of the Act.

#### D. *The Discharge of Richard O'Brien*

O'Brien was employed by Respondent as a mechanic for about 2 years prior to his discharge on January 23, 1973. O'Brien was a principal spear-head in the organizational activities among Respondent's employees. He made the initial contact with the Union, was a member of the employee committee that met with Perretti on December 7 seeking recognition. He appeared to be a principal spokesman for the employees at their December meetings with Perretti and presented the employee demands to Perretti at one of their later meetings. It should be noted too that O'Brien was the one who, on December 19, told Martin and Perretti the employees had decided to drop the Union. Respondent, while admitting that O'Brien was a very good mechanic, contends he was discharged for cursing General Manager Martin.

On Thursday evening, January 18, Martin told Rothen-

<sup>25</sup> A radio was to be installed but the work had been delayed because of the unavailability of a part

<sup>26</sup> O'Brien admitted the profanity but testified he was laughing as he said it. He further testified he did not recall being asked if he was kidding. I credit Rothenberg's version.

<sup>27</sup> The above is substantially in accord with O'Brien's testimony. O'Brien

berg a customer had complained because his car was not ready and wanted the work completed the following day.<sup>25</sup> According to Rothenberg, on Friday morning he gave O'Brien the repair order and told O'Brien that Martin wanted the car ready by noon and to work on that car the first thing. O'Brien told Rothenberg to tell Martin to go f-k himself. Rothenberg, thinking that O'Brien may have been joking, asked O'Brien if he was kidding and O'Brien said he was not.<sup>26</sup> The work was completed that afternoon. Martin had been away from the store most of the day and that evening upon his return and after the mechanics had gone, Rothenberg informed Martin of O'Brien's remarks that morning. Martin said he would handle it. On Tuesday morning, January 23, Martin called O'Brien into his office. According to Martin's credited testimony, O'Brien admitted the profanity and Martin told O'Brien that he hated to fire him because he was a good worker but he was discharged. O'Brien responded that he knew he would be fired but it did not make any difference to him because he wanted to go into business for himself.<sup>27</sup>

The General Counsel contends that the reason given by Martin for the discharge was a pretext and refers to a situation where Moggio used similar language to Perretti but was absolved. On December 8, Perretti engaged in a conversation with several employees and was exhorting his authority. He turned to Moggio and said that because he was the boss he could tell an employee to go f-k himself but that an employee could not say it to him. After a bit of baiting by Perretti, Moggio said the same thing to Perretti. Perretti thereupon told Moggio he was fired. But a few minutes later, after mutual apologies, Moggio was told to go back to work.<sup>28</sup> This incident appears to be no more than a childish happening, comparable to one juvenile daring another to knock a stick off his shoulder. I do not view this as analagous to the O'Brien-Martin occurrence. Noteworthy too is that at the time of O'Brien's discharge, there was no union activity, the petition having been withdrawn about a month earlier. I am not persuaded that Martin's reaction to O'Brien's cursing him was motivated by any antiunion sentiments rather than concern that an employee would believe he could with impunity engage in such conduct towards his supervisor. Accordingly, I shall recommend dismissal of the allegation that O'Brien was discharged because of his union activities.

#### E. *The Discharge of John Comparetto*

Comparetto started his employment on a part-time basis in 1969 and became a full-time warranty writer in June 1972. He signed a union card on December 7 but otherwise was not prominent in any union activity. On February 9, 1973, Rothenberg discharged him. Rothenberg told Comparetto he would have to let him go; that they were bringing in the warranty writer from the Totowa agency (Stan Mreposki) to replace him. Rothenberg explained that the Totowa agency was being audited by Chrysler and

testified Martin also said he had been pressured "from above" to discharge O'Brien. I am not convinced this statement was made nor that O'Brien told Martin he had been joking.

<sup>28</sup> Perretti is an extremely flamboyant and colorful character. He is referred to by his employees as Wild Bill and has a tendency to yell and use colorful and profane language.

there was no need there for Mreposki who had been the warranty writer at Totowa, performing similar work as Comparetto at Respondent. Rothenberg went on to say that since Comparetto did not intend to remain with Respondent, the decision was made to replace him with Mreposki.<sup>29</sup> Mreposki remained at Respondent's facility for about 2 months and then returned to Totowa as a dispatcher. Nobody was thereafter hired as warranty writer at Respondent—the work was absorbed by the existing complement.

The General Counsel refers to Comparetto's testimony that in early December—before the Union's request for recognition, Perretti asked him if he had heard any union talk among the employees. Comparetto disclaimed any knowledge of this activity. This conversation was denied by Perretti. The complaint does not allege this conduct by Perretti as an unfair labor practice and I therefore do not make any such finding. In view of Comparetto's denial of any knowledge of union activity, no inference may be drawn that such interrogation established any knowledge by Respondent of any union interest by Comparetto. It may be that in a small shop as we have here, an inference may be drawn that Respondent may have believed Comparetto supported the Union. The fact that a second representation petition was filed by the Union only 2 days before his discharge gives rise to a suspicion that his termination was unlawfully motivated. However suspicion itself is hardly enough and an unlawful motive is not lightly to be inferred. In the choice between lawful and unlawful motive, the General Counsel must prove by a preponderance of the evidence that Respondent's motive was an unlawful one. Comparetto's tenure with Respondent was an indefinite one—he intended to embark on another career when he completed his schooling. Mreposki's services at Totowa were no longer required and Perretti wanted to retain him. Even after Mreposki was sent back to Totowa as a dispatcher, the warranty writer work was absorbed by the existing personnel. In light of all these circumstances, I am not persuaded that the General Counsel has met his burden of proving that Respondent was motivated by antiunion considerations when it discharged Comparetto and, accordingly, I shall recommend dismissal of this allegation of the complaint.

#### F. *The Discharge of James Rose*

Rose had been employed by Respondent from June 1970 until his discharge on February 14, 1973.<sup>30</sup> He initially was a lube man, then a new car get ready mechanic and from November 1972 until his discharge was a line mechanic. The initial union meeting on December 6 was at his home at which time he signed a union card. Another meeting at his home was held later in December when the employees decided to drop the Union. On January 31, Rose called Oliveri to file another petition for an election with the Board.

<sup>29</sup> During the time Comparetto worked for Respondent he was also a full-time student at night. It was common knowledge that he intended to seek a law enforcement career.

<sup>30</sup> He had been discharged in 1971 for a brief period.

<sup>31</sup> The car was a 1973 Valiant purchased from Respondent the previous month and had a mileage reading of 1,310 miles.

On February 13, Rose worked on a customer's car which had been brought in to correct a water leak in the windshield. Rose resealed the windshield and put the chrome molding back on. The following day he was discharged by Martin for poor workmanship. Rothenberg credibly testified that when the customer came to pick up his car the evening of February 13, he complained bitterly to Rothenberg about the work.<sup>31</sup> Rothenberg then examined the car and noticed that the chrome was all dented and a piece of chrome was sticking out on the side. It appeared like the chrome had not been put back properly and had popped out. Rothenberg attempted to pacify the customer and said the Company would order new chrome. The customer was not satisfied because later that evening he called General Manager Martin. Martin testified the customer threatened to take a picture of the car and send it to Chrysler. The customer asked Martin to look at the car personally which he did the next morning. He ascertained from Rothenberg that the car had not been previously serviced and that Rose had performed the work. Martin then discharged Rose. Rose claimed that the windshield had been resealed previously and Martin said this was not so. According to Martin, he told Rose, "You've been screwing me for three years and you can't do quality work. You're fired." He denied saying anything about being stabbed in the back.<sup>32</sup>

I am convinced that Rose did a poor job in resealing the windshield and that the customer complained bitterly to both Rothenberg and Martin about the poor workmanship. I do not credit Rose's testimony that it appeared to him the windshield had been resealed previously. His testimony that he did not think the work he performed on the car was bad lends credence to Rothenberg's testimony that Rose was indifferent to the work he performed and was a sloppy worker. Although Martin found fault with Rose's work in the past he candidly stated, "Let me say this to you. I am not going to stay here and say that the man's work was that atrocious but it wasn't the best to my expectations."

The issue as to Respondent's motivation in discharging Rose is not free from some doubt. The discharge occurred 1 week following the filing of the second representation petition.<sup>33</sup> However, the evidence does not justify drawing the inference that Respondent had any knowledge Rose was the individual who had contacted the Union to file the petition. Moreover, it is clear that Martin was extremely upset by the customer's complaint and the poor workmanship performed by Rose. Accordingly, I find in consideration of all the pertinent facts, the General Counsel has not sustained the ultimate burden of proof by substantial evidence in the record as a whole that Rose was discharged because of his union activity. I shall therefore recommend dismissal of this allegation of the complaint.

#### G. *The Discharge of John LaFazia*

LaFazia was hired by Rothenberg and began his

<sup>32</sup> Rose admitted that Martin told him about the customer's complaint. He further testified that Martin also accused him of stabbing Martin in the back and said, "One day I was telling him the complaints of the men in the shop and the next day he gets this thing in the mail from the Labor Board, that the Union is seeking an election." I credit Martin's version.

<sup>33</sup> The petition was filed on February 7.

employment on January 31, 1973. He was discharged by Parts Manager Stephen Velten on March 5. The General Counsel alleges LaFazia was discharged because he ignored Velten's threat of discharge on February 20 and went to the Board that day. Respondent, on the other hand, contends that LaFazia was discharged because of too many absences during his short tenure of employment.

During the approximate month of his employment, LaFazia was absent on four occasions. On February 7, he was absent for one-half day to drive his wife to the doctor. On February 9 he was out an entire day to attend a funeral. On both occasions he notified Velten he would be off. After his second absence, Rothenberg cautioned him about being absent too often. The next time he took time off was for several hours to go to the Board on February 20. On February 28, LaFazia mentioned to Rothenberg that he was not feeling well and may be out the next day to see the doctor if he did not feel any better. Rothenberg told him he had better be in the next day. However LaFazia was out ill the next 2 days, Thursday and Friday, March 1 and 2. When he returned to the store on Monday, March 5, he saw another man working in the parts department and he was told by Velten he had been discharged—that he needed a man who was there every day. LaFazia testified he had telephoned Velten and said he would be out sick and Velten said okay. LaFazia's wife testified she called on Friday and thought she spoke to Panas, the second employee in the parts department and notified Panas her husband was still ill. Velten denied getting the call on Thursday from LaFazia and denied being told by Panas that LaFazia's wife had called on Friday.<sup>34</sup> However the Respondent has contended LaFazia was discharged because of too frequent absences and has not advanced as a reason that LaFazia had not called in to report his absences. In this connection, it is well to note that in the termination interview between Velten and LaFazia on March 5 nothing was said regarding calling in to report the absence. Velten who himself first began his employment with Respondent on January 15 credibly testified he had interviewed an individual who had come to the store looking for a job on either February 28 or March 1. On Friday, March 2, after LaFazia had not appeared for a second straight day, Velten contacted the applicant (Pfeiffer) and had him report for work on Monday, March 5.

I find that LaFazia was discharged because of his absences which Respondent regarded as too many in such short period of employment. I have previously found that LaFazia was not threatened with discharge on February 20. I have also taken into account the fact that the employees who went to the Board on February 20 were not chastised on their return nor were they disciplined for their absence of several hours. Accordingly, I find that LaFazia was not discharged for going to the Labor Board on February 20. I shall therefore recommend this allegation of the complaint be dismissed.

<sup>34</sup> Panas was not called as a witness by either party.

<sup>35</sup> Craven's involuntary quitting is alleged to have also been caused by

#### H. *The Alleged Discriminatory Treatment of Francis Craven and Theodore Cioffi and Their Alleged Constructive Discharges*

The General Counsel alleges that during March and April 1973 Respondent made less favorable and less lucrative job assignments to Craven and Cioffi cheated them on time for work performed and constructively discharged them on April 27 and May 4, 1973, respectively.<sup>35</sup>

Craven was a class A skilled mechanic who had worked for the Respondent for a little over 2 years when he quit on April 27. He signed a union card at the December 6 union meeting and was one of the three employees who attended the meeting with Perretti on December 7, when the Union requested recognition. In the latter part of January he volunteered to Martin that he was no longer on the employee committee and did not want to be bothered with the Union. At no time thereafter did he tell Respondent he again favored the Union. However, he appeared as the union observer at the Board-conducted election on March 14, 1973.

Normally the employees take their annual vacations during the summer months. In the latter part of April, Craven told Rothenberg he wanted to take his vacation the first 2 weeks of May. After clearing with Martin, Rothenberg told Craven he could take the desired time off. Craven received his vacation pay on Friday, April 27, and left. He never reported back to the Respondent but, instead, went to work the following Monday as service manager at another automobile agency.

Cioffi was also a class A skilled mechanic. He had previously worked for Respondent and had quit shortly after Thanksgiving 1972. He resumed his employment with Respondent on December 7 and signed a union card the same day. On February 16, he was berated by Perretti because he had planned on attending the Board hearing. On May 4, 1973, without giving any reasons, he told Rothenberg he was quitting. He had been offered a job by Craven and on May 5, he went to work as a mechanic for the same automobile agency as Craven who had left just the week before.

The General Counsel contends that Respondent, for discriminatory reasons, cheated Craven and Cioffi by not giving them the proper credit for work performed and assigned them less lucrative work than the other employees. The General Counsel takes the position that because of the manner in which they were thus treated, the two employees quit and such termination of their employment should be construed to be unlawful constructive discharges. The General Counsel further contends that with respect to Craven, he was harassed by Rothenberg because of his union interest and this was an additional element which adds up to a constructive discharge.

Both Craven and Cioffi testified a principal reason for their quitting was because Rothenberg was cheating them on their time, more specifically, that he was not crediting them for sufficient time for the work they performed. Further discussion of this subject first requires an explana-

harassment by Rothenberg

tion of the incentive system, as operated by the Respondent, and obviously not clearly understood by the employees. Such explanation of the system was best described by Rothenberg at the hearing. He testified that the system is a form of initiative pay. In an 8-hour day, an employee could produce and be paid for more than 8 hours based upon his flat hourly rate. For about 65–70 percent of the work performed by the mechanics, the time to be credited to the mechanic for the particular operation performed could be ascertained from the operations manual. Thus, for example, if the manual calls for 2 hours for a particular operation and the employee completed the job in less time, he nevertheless would be credited for 2 hours. For the remaining operations, no time allowance is given in the manual. This is termed nonoperational work. Normally the employee is paid for the actual time he puts in on such operation. The disagreements which usually arose between the mechanics and the service manager were in those instances where the mechanics performed mixed operations, that is both book and nonoperations. Rothenberg gave as a hypothetical example a situation where there may be three items to be performed, two shown in the book and one a nonoperational item. The book called for 4 hours for the two book operations and the mechanic was able to complete them in 2 hours but the third operation, the nonoperational, may have taken the mechanic 3 hours. He would be credited for only 4 hours total even though he actually worked 5 hours on the three items. On the other hand, if he had only a single operation to perform on a car—a nonoperational—he would receive credit for the full time it took him to complete the work.

Both Craven and Cioffi testified that on a number of occasions they were credited with different times for identical operations. Some company records of work orders were introduced by the General Counsel to support his theory that they were being cheated. To contradict their claims, Rothenberg, in his testimony, offered explanations of the alleged discrepancies. Both Craven and Cioffi constantly complained to Rothenberg regarding the time he credited to them. Occasionally, he agreed with their claims and made the necessary adjustments. I have not attempted or found it necessary to resolve the issue whether or not in each of the examples offered by Craven and Cioffi of the alleged “cheating,” Rothenberg did in fact knowingly not credit them with the proper time under Respondent’s incentive system. Craven testified that when Diaz was still service manager, all the mechanics went to see Martin and registered their complaints about being cheated. Comparetto testified that employees were complaining about cheating since the system was instituted in November 1972. Cioffi said somebody was always complaining. Even Oliveri testified that at the December 6 meeting the employees complained about being “short-changed.” I find it unnecessary to decide whether Rothenberg cheated employees in the time to be credited for work performed. For the record clearly discloses that from the moment the incentive system was first instituted,

there were constant complaints from all the mechanics about the time credited to them for particular operations. This was evident even before any union interest arose. I therefore find the evidence is insufficient to support a finding that Rothenberg selectively cheated Craven and Cioffi in the time to be credited for work they performed.

We now turn to the General Counsel’s contention that in March and April 1973, Rothenberg made less favorable and less lucrative job assignments to Craven and Cioffi because of their union interest.

Craven testified that about the last 2 months of his employment his earnings were substantially less than before and attributes this to receiving less favorable job assignments. He testified that transmission work was a choice assignment and whereas in the past he had averaged one transmission job a week, he received only two such assignments in the last 2 months of his employment. Although this was advanced as a reason for his quitting, there is no testimony from Craven he ever complained to Rothenberg or Martin about the so-called lack of choice jobs. Rothenberg testified credibly that he never intentionally gave Craven less lucrative work.

Cioffi also testified that during the last 2 months of his employment (March-April 1973) his earnings diminished and attributes this also to the job assignments. The record discloses that in March he was told by Rothenberg that he would have to take more of the less lucrative work and the favorable work would have to be distributed more evenly among the other mechanics.<sup>36</sup> He testified that another mechanic, Rolik, was also getting less lucrative work. He had no knowledge who was getting a greater share of the choice assignments.

In an apparent attempt to support Craven and Cioffi, Comparetto testified he noticed that Craven and Cioffi got less favorable assignments during the last 2 months that he worked there. Since Comparetto was terminated on February 9, such assignments would necessarily have been made during December 1972 and January 1973. I find his testimony unconvincing.

Earnings statements of Craven and Cioffi were introduced in evidence. The General Counsel contends that their earnings declined during March and April compared to the earnings of the two other class A mechanics. I do not agree. The earnings of Moggio and Beebe, the other class A mechanics, were also introduced into evidence by the General Counsel. An examination of the weekly earnings by Craven and Cioffi does reveal that during the March-April period their average earnings were less than for the period from the first of the year through February. But it is equally true that the average earnings of Moggio also decreased during the same period in approximately the same proportion.<sup>37</sup> No meaningful comparison can be made with that of Beebe since the record of his earnings first began in mid-February.

I am not convinced that the evidence is sufficient to support a finding that Respondent began giving less lucrative assignments to Craven in March and April. It will

<sup>36</sup> Rothenberg admitted telling Cioffi he intended to spread the choice assignments more equally. He testified Cioffi had in the past been getting the greater share of choice assignments because he was a good mechanic and a high producer with very few comebacks.

<sup>37</sup> During January-February, Craven, Cioffi, and Moggio earned \$261, \$261, and \$294, respectively; during March-April, \$243, \$238, and \$271, respectively.

be remembered that Craven had told Martin and Perretti the latter part of January that he no longer was interested in the Union. That he once again evidenced an interest in the Union was shown when he appeared at the election on March 14 as the union observer. But the alleged discriminatory assignments were supposed to have been already going on. The evidence does not support the contention that his earnings diminished any more than the other class A mechanics during March and April 1973. I am convinced that Rothenberg did not, during that period, knowingly, if at all, reduce the lucrative assignments to Craven, let alone for discriminatory reasons.

As for Cioffi, admittedly Rothenberg told him in March that the choice assignments would be divided more equally among the other mechanics. But the evidence does not support General Counsel's contention that this was done for discriminatory reasons. Cioffi himself stated another mechanic, Rolik, also began getting what he called "lousy assignments." There is no contention that Rolik's assignments were made for discriminatory reasons. I credit Rothenberg's testimony that in the past Cioffi had been getting more than his equitable share of lucrative assignments because he was a very good mechanic and producer and that the change in assignments was made to distribute the work more equitably among the other mechanics. I therefore find that General Counsel has failed to establish Rothenberg made less favorable and less lucrative job assignments to Craven and Cioffi because of their union interest and shall recommend dismissal of this allegation in the complaint.

There remains for consideration the alleged harassment of Craven by Rothenberg which General Counsel has advanced as an element in his theory of a constructive discharge.

In early April, Craven and Cioffi went to Sales Manager Bishop's office and voiced their displeasure with the manner in which Rothenberg had been crediting their time for work they had been performing.<sup>38</sup> In the midst of the discussion, Rothenberg walked in and expressed his resentment because they were complaining to Bishop rather than taking the matter up with him. When Craven said he was tired of being cheated, Rothenberg offered to meet Craven outside after work, an obvious challenge to settle their dispute by physical means. I fail to see that even if this be called harassment, it would be the type of harassment unlawful under the Act. That all the employees were dissatisfied with Rothenberg's method of computing time under the incentive system is clearly established in the record. The incident in Bishop's office was just another chapter in the constant dispute with Rothenberg and Diaz before him. Moreover, I am not convinced that Rothenberg's challenge to fight was a motivating reason in Craven's decision to quit. As he said the principal reason he quit was because he felt he was constantly being cheated. The incident in Bishop's office was no more than another unsuccessful challenge to Rothenberg's method of computing time and Rothenberg's resentment towards Craven was not motivated by any antiunion considerations.

I have concluded that neither Craven nor Cioffi were unlawfully cheated on the time for work performed and were not unlawfully given less lucrative assignments, nor was Craven unlawfully harassed by Rothenberg. Under the circumstances, I am compelled to further find and conclude that Craven and Cioffi voluntarily quit their employment rather than having been constructively discharged under the Act. Accordingly, I shall recommend this allegation of the complaint be dismissed.

### I. *The Alleged Refusal to Bargain*

The General Counsel in his complaint alleges that Respondent since December 7, 1972, unlawfully refused to recognize the Union in violation of Section 8(a)(5), relying upon the Section 8(a)(1) and (3) violations also alleged in the complaint.

Based upon my findings above, I have found that the Union represented a majority of the employees in the appropriate unit on December 7 when it demanded and was refused recognition. Before any bargaining order may be considered, it becomes necessary to determine whether the election of March 14 should be set aside pursuant to the objections filed by the Union. Only if the objections are sustained and the election set aside may the remedy of a bargaining order be considered and resolved.<sup>39</sup> As more fully described below I shall recommend to the Regional Director that the objections to the election be sustained and that the election be set aside.

I have found that in December 1972, during the pendency of the earlier petition, Perretti threatened to bring in Diaz as service manager, on February 16 Perretti coercively threatened Cioffi with discharge, and on February 19 Rothenberg interfered with Lawler's right to engage in union activity by attempting to remove him from the bargaining unit. I have found that by each of these acts, Respondent has interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 of the Act and thereby violated Section 8(a)(1) of the Act.

Relying on *Gissel*,<sup>40</sup> the General Counsel urges that the bargaining order is warranted in view of Respondent's alleged unlawful campaign to dissipate the Union's majority status. This requires consideration of the extensiveness of Respondent's unfair labor practices in order to determine the possibility of erasing the effects of the unfair labor practices and of ensuring a fair election by the use of traditional remedies. The bulk of the allegations of the complaint have not been sustained. I am not satisfied that upon examining the totality of Respondent's unlawful conduct described above, a bargaining order is warranted. Those violations found are not so coercive as to require a bargaining order to repair the unlawful effects or of such an extent the application of traditional remedies would not be able to ensure a fair election. Accordingly, I do not sustain the Section 8(a)(5) allegation and I reject the request for a bargaining order.

<sup>38</sup> General Manager Martin was not at the store that day.

<sup>39</sup> *Irving Air Chute Company, Inc.*, 149 NLRB 627

<sup>40</sup> *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969)

IV. THE CHALLENGES AND OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

The tally of ballots showed eight votes cast for and eight votes cast against the Union with three unresolved challenged ballots. The Regional Director determined that the challenges could best be determined in this proceeding. The individuals whose ballots were challenged were Richard O'Brien, James Rose, and Joseph Perrini.

Perrini was included in the charge in Case 2-CA-12887. The complaint that issued in this case did not include any allegation relating to his discharge nor at the time of the hearing had any other disposition been made relating his discharge. During the course of the hearing, on July 24, the Regional Director dismissed that portion of the charge in Case 2-CA-12887 relating to his discharge because of insufficient evidence. (G.C. Exh. 1-ZZ.) Thereafter the Union appealed to the General Counsel from the Regional Director's dismissal. The General Counsel subsequently, on August 16, denied the appeal and upheld the Regional Director's refusal to issue complaint thereon. In accordance with well-established precedent, I find that Perrini was discharged for nondiscriminatory reasons and was not an employee on the date of the election eligible to vote. Although the record does not show the actual date of the termination, he clearly had already been discharged before the election.

I have elsewhere in this decision found that O'Brien and Rose were discharged before the election, albeit not for discriminatory reasons. Thus they were no longer employees on the date of the election and ineligible to vote.

I shall therefore recommend to the Regional Director that the three challenged ballots be sustained.

Although not before me I feel compelled to make this additional observation. I have elsewhere in this decision found that LaFazia was discharged on March 5 but not for discriminatory reasons. Nonetheless, an examination of a copy of the *Excelsior* list apparently used at the election and the initial list of challenged voters received in evidence seems to indicate that LaFazia, although not an eligible voter, cast a ballot which was not challenged.

The Petitioner-Charging Party stated he was relying only on the related allegations in the complaint in support of his objections. He introduced no additional evidence. As set forth above, I have found during the critical period<sup>41</sup> Perretti unlawfully threatened Cioffi with discharge and Lawler's change in job title constituted an unlawful attempt to disenfranchise Lawler from his participation in Section 7 activities. The effects of such conduct cannot be evaluated on a computer. It is sufficient to conclude that this conduct was reasonably calculated to inhibit the employees in expressing what should have been their free and untrammled choice at the election. Such conduct is sufficient to affect the results of the election which I recommend should be set aside.

In accordance with applicable Board Rules and Regulations, Case 2-RC-16053 is hereby severed and remanded

<sup>41</sup> February 7, when the petition was filed to March 14 when the election was held.

<sup>42</sup> 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,

to the Regional Director for Region 2 for such action as he deems appropriate.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

CONCLUSIONS OF LAW

1. Rockland Chrysler Plymouth, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to bring in a supervisor who would be tough with the employees if the Union was selected as the bargaining representative, by threatening an employee with discharge to discourage him from engaging in union activity, and by changing the job title of an employee to disenfranchise him from exercising his Section 7 rights, Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, and has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The General Counsel has failed to establish by a preponderance of the evidence the remaining allegations of the complaint herein, and it will be recommended that said complaint be, to that extent, dismissed.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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

ORDER <sup>42</sup>

Respondent, Rockland Chrysler Plymouth, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees, by threatening to impose more onerous working conditions upon the employees if they select a union as the

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.

bargaining representative, by threatening employees with discharge for engaging in activities on behalf of the Union, or by changing the job titles of employees for the purpose of disenfranchising them from exercising their Section 7 rights.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Post at its place of business located at Nanuet, Rockland County, New York, copies of the attached notice marked "Appendix."<sup>43</sup> Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges unfair labor practices not specifically found herein.

<sup>43</sup> In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

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

WE WILL NOT threaten to impose more onerous working conditions on our employees if they select a union as their bargaining representative.

WE WILL NOT threaten to discharge our employees who exercise their rights under the National Labor Relations Act.

WE WILL NOT in any like manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective bargaining or other mutual aid or protection, or to refrain from engaging in any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the National Labor Relations Act, as amended.

ROCKLAND CHRYSLER  
PLYMOUTH, INC.  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

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

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 36th Floor, Federal Building, 26 Federal Plaza, New York, New York 10007, Telephone 212-264-0330.