

Accordingly, we reject the recommendation of the Acting Regional Director that the election be set aside, and shall order that the challenges to the ballots be handled as recommended by the Acting Regional Director

[The Board directed that the Regional Director for the Twenty-first Region shall, pursuant to the Board's Rules and Regulations, open and count the ballots of James E Perry and Marion B Tuxhorn, and serve upon the parties a supplemental tally of ballots]

CHAIRMAN LEEDOM took no part in the consideration of the above Decision and Direction

Springs, Inc. and Hector Figueroa and Adrian Gomez. *Case No 22-CA-8 September 18, 1958*

DECISION AND ORDER

On March 5, 1958, Trial Examiner Thomas N Kessel issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief¹

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Bean and Fanning]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed The rulings are hereby affirmed The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Springs, Inc, its officers, agents, successors, and assigns, shall

¹ The Respondent also requested oral argument The request is hereby denied as the record, including the exceptions and brief, adequately presents the issues and the positions of the parties

1. Cease and desist from:

(a) Discouraging membership in any labor organization of its employees by discharging or refusing to reinstate its employees.

(b) Interfering with, restraining, or coercing its employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection by discharging or refusing to reinstate its employees.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Hector Figueroa, Adrian Gomez, Ramiro Gomez, Francisco Rivera, Ana Lydia Gomez, Celestino Olmeda, Francisco Garcia, Praxedes C. Gonzalez, Ana Noboa, Gilberto Torres, and Herman Gomez immediate and full reinstatement to their former or substantially equivalent positions without prejudice to seniority or other rights and privileges, and make them whole for any loss of pay suffered, in the manner set forth in section IV of the Intermediate Report.

(b) Post at its plant at Hoboken, New Jersey, copies of the notice attached hereto marked "Appendix."² Copies of said notice, to be furnished by the Regional Director for the Twenty-second Region, shall, after being duly signed by Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of sixty (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.

(c) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of reinstatement under the terms of this Order.

(d) Notify the Regional Director for the Twenty-second Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

²In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT discourage membership in any labor organization of our employees by discharging or refusing to reinstate our employees.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection by discharging or refusing to reinstate our employees.

WE WILL offer to Hector Figueroa, Adrian Gomez, Ramiro Gomez, Francisco Rivera, Ana Lydia Gomez, Celestino Olmeda, Francisco Garcia, Praxedes C. Gonzales, Ana Noboa, Gilberto Torres, and Herman Gomez immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges, and make them whole for any loss of pay suffered as a result of the discrimination against them.

All our employees are free to form, join, or assist any labor organization, and to engage in any self-organization and other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment in conformity with Section 8 (a) (3) of the Act.

SPRINGS, INC.,
Employer.

Dated _____ By _____
(Representative) (Title)

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

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon a charge and amended charge filed by Hector Figueroa and Adrian Gomez, individuals, the General Counsel of the National Labor Relations Board, by the Regional Director for the Second Region, issued his complaint dated August 26, 1957, against Springs, Inc., herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (3) and (1) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act. By an order dated September 3, 1957, the General Counsel of the National Labor Relations Board transferred this case from the Second Region to the Twenty-second Region and assigned to this case the case number set forth in the caption herein. Copies of the complaint, the charge, and a notice of hearing were duly served upon the parties.

With respect to the unfair labor practices, the complaint alleged that on or about February 27, 1957, the Respondent discharged 11 of its employees because they had engaged in protected concerted activities and that the Respondent thereby violated Section 8 (a) (3) and (1) of the Act. The Respondent filed an answer to the complaint which contained a general denial along with certain special defenses referred to hereinafter. Pursuant to notice a hearing was held at Newark, New Jersey, on November 7 and 8, 1957, before Thomas N. Kessel, the Trial Examiner duly

designated to conduct the hearing. The General Counsel and the Respondent were represented by counsel. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence was afforded all parties. After the hearing the parties filed briefs with the Trial Examiner which have been carefully considered. The General Counsel's motion at the hearing, as to which ruling was reserved, that the Trial Examiner notice judicially a hearing and decision by the Appeals Tribunal of the Division of Employment Security, Department of Labor and Industry of New Jersey, is hereby denied.

Upon the entire record in the case, and from observation of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT

I. PERTINENT COMMERCE FACTS

The complaint alleges and the Respondent's answer admits that the Respondent is a New Jersey corporation engaged at its plant in Hoboken, New Jersey, in the manufacture, sale, and distribution of springs and related products, and that during the year ending March 1, 1957, it manufactured, sold, and distributed from its Hoboken plant products valued in excess of \$200,000, said products having been shipped from its plant across States lines in interstate commerce. The Respondent's answer concedes, and it is here found, that it is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

The Pertinent Evidence

The General Counsel contends that the Respondent in violation of Section 8 (a) (1) and (3) of the Act discharged 11 of its employees on February 27, 1957, because they had on that date collectively sought to discuss a grievance with the Respondent's president. The Respondent's answer generally denies commission of the unlawful conduct alleged in the complaint but additionally asserts several special defenses stating in each that the employees were discharged for cause. At the hearing, however, the Respondent defended on the ground that the employees had not been discharged but had quit, and this position is maintained, along with other arguments, in the Respondent's brief filed with the Trial Examiner. The crucial question in this proceeding is factual and involves determination of the events of February 27, 1957.

On that date the Respondent employed approximately 17 employees of whom most were Puerto Ricans with only a slight or no comprehension of the English language. These employees were then represented by a certified union known as Local 21, Industrial Production and Novelty Workers Union of New Jersey, AF of L, which had a contract with the Respondent running from June 20, 1955, to March 1, 1957, with provision for automatic renewal. This contract is not in evidence. It appears, however, that it provides for deduction of dues from earnings by the Respondent on behalf of the Union, for the Respondent presented evidence showing that it had sent a check to the Union on February 27, 1957, transmitting employee dues. Sometime in 1956, Leo Seligman, the president of Local 21, abandoned his connection with the Union and turned over the administration of its contracts to Business Agent Robert Luizzi. Luizzi then concluded that he could not afford to devote himself to servicing the Union's contracts and subsequently decided to relinquish this responsibility. He testified, credibly, that in October or November 1956, he informed Aloysius Quinn, the Respondent's president, as well as some of the Respondent's employees, that when the Respondent's contract with Local 21 expired in March 1957, the Union would surrender its representative status and advise the employees to secure another union to represent them. Local 21 is now defunct.

As to the events of February 27, Hector Figueroa, the Respondent's Puerto Rican employee most capable of understanding and speaking English, testified that early in the morning of that day he had asked Agnes Cross, the Local 21 shop steward, for the Union's address. It should here be noted that prior to February 27 Local 21 had vacated its business office, and that Robert Luizzi had moved from his home on December 1, 1956, without informing the Respondent's employees of his new address. Figueroa related that he asked Cross to accompany him and others to President Quinn's office that day after work to obtain the Union's address and that she told him to go alone. At 10:30 that morning the employees stopped work to take their 10-minute coffee break. At about this time Quinn entered the factory with his foreman, Joe Gauci. Figueroa called to Quinn but the latter did

not stop. At 10:40 a. m. the bell signaled for resumption of work and the employees proceeded to their machines. At this point an employee called to Figueroa that Quinn was returning. Some employees had not yet reached their machines. Others who had started their machines shut off the power. Quinn advanced toward the employees, and they toward him. The latter stopped in the middle of the factory floor and sent his foreman, Gauci, to speak to the employees. As Gauci addressed Figueroa other employees congregated about him. Gauci asked what the employees wanted and Figueroa replied, "we want the address of the Union. We see nobody. Don't know where the money go. We pay for a long time and we don't see nobody. We don't know where the money go." Thereupon Gauci told Figueroa he would speak to Quinn. These two engaged in conversation for a while and then, according to Figueroa, Quinn turned toward the employees, clapped his hands, and remarked "everybody punch out and go home," while at the same time he pulled a switch which turned off the lights over some of the machines. The employees proceeded to the locker room to wash up and change their clothes. Gauci entered and, speaking to Figueroa, told the employees not to leave. Figueroa replied that they did not want to leave, but as Quinn had told them to "go" they could not remain. Gauci told them he would see what he could do with Quinn and left the locker room. The employees waited for his return from 45 minutes to an hour. When he failed to come back they punched out and left the plant.

The foregoing account by Figueroa was supported in its essentials by employees Adrian Gomez, Herman Gomez, and Francisco Rivera. Rivera testified that he understood from Quinn's words that he had been discharged. Herman Gomez formed his belief that he had been discharged from the comments of his fellow employees to the effect that they had been discharged by Quinn.

The Respondent's witnesses presented other versions of the February 27 incidents. Quinn testified that he had left the plant with Gauci between 9:30 and 10 a. m. to go to Jersey City and that they had returned at about 11:30 a. m. Upon entering he heard no machines running and saw a group of employees milling about in a corner. He went directly to Agnes Cross, the shop steward, and asked what had happened. She informed him that the employees had not returned to work after their coffee break. He asked why and she stated she did not know. Figueroa was standing in front of a group of employees and Quinn, in effect, told him to go back to his work, and to take up whatever is wrong through the shop steward. Neither Figueroa nor any other employee said anything, but merely looked around. Quinn directed them again to go back to work. Some time went by with no response from them. Then he remarked, "Look. You are not going to stand around here and not work. You are either going to work, go back to your work as I told you, or punch your card out and go home. Those who want to go back to work, go back to work. Those who don't want to go back to work, punch out and please go home."¹ As he said this he waved his hand and then pulled a switch which extinguished a bank of lights over some machines. Eleven employees punched out. The rest remained at work.

In explanation of his conduct, Quinn testified that he had given the employees an "ultimatum" in which the alternatives were to go back to work or punch out. He did not attempt to find out what the employees wanted to discuss with him, but assumed that they wanted to take up a grievance. He was insistent that their grievance be processed through the shop steward because he felt this was the procedure in the contract with the Union. He also felt that a restriction in the contract prevented him from "bargaining" directly with the employees, and added that in his view it was proper, as a matter of correct discipline, for the employees to process their grievance through the shop steward.

Gauci testified that he and Quinn left the plant on February 27 at about 9:45 a. m. and returned at 11:40 or 11:45 a. m. Before leaving he had informed employee Russell Collins that he would be away from the plant. He denied that before leaving the plant that any employee had indicated anything concerning his

¹ Quinn was called by the General Counsel as an adverse witness under rule 43 B of the Federal Rules of Civil Procedure. Questioned concerning his actual words to the employees, he stated he could not recall exactly what he had said, but that "in essence, it was that they were not doing the right thing. They were to go back to their jobs and process the grievance through Agnes Cross, who is shop steward." At a later point, however, he testified that his exact words were "you can go back to work now, punch your timecard out and if you punch your timecard out, I assume you are quitting." Testifying as a witness for the Respondent at a later point in the proceeding Quinn was again asked to relate what he had said and this time he did not include any reference to an assumption that if the employees punched out he would regard them as having quit.

employment. Upon his return Collins notified him that the employees had stopped working, and he observed that the employees were standing about on the floor without working. He addressed Figueroa and asked what was the trouble and why had the employees stopped working, but received no answer. He walked about making the same inquiry from all the other employees, but none would speak to him. No one told him what was the trouble. Then Gauci asked the employees to go back to work and promised that when it was determined what the matter was all about that it would be straightened out. Still nobody moved. He then went to the washroom where there were 7 or 8 employees. Figueroa was not among them. He told them that what they were doing was wrong and that the matter would be straightened out if they would go back to work. Again the employees remained absolutely silent. From there Gauci went to the machine of an employee named Izzy. He noticed that the power was on and so he asked him whether he would continue to work. Izzy replied that he would. Next he went to an employee named Feliciano who was near his machine and asked him to continue work. All this activity consumed just a little more than 5 minutes. During this time, Gauci related, Quinn had gone to Agnes Cross at her work bench. He did not hear Quinn say anything to the employees. Gauci continued to walk about the plant floor urging employees to go back to work without receiving any answer from them. Finally he went to the time clock where he saw Figueroa and "practically begged" him to go back to work with a promise of straightening everything up, but Figueroa gave no answer. Then he observed employees punching out.

The foregoing account was given by Gauci in his direct testimony. During his cross-examination and upon examination by the Trial Examiner he testified that at some point Figueroa did speak to him. He is not sure what he said to him, but there is some implication in his vague answer that Figueroa complained about working too hard or wanting more money. Gauci further added that he "must have" told Quinn what Figueroa said to him, but that he does not remember. He also modified his direct testimony by recalling that he did hear Quinn tell the employees that if they did not return to work they should punch out and go home. He denied that Quinn had extinguished any lights. Gauci claimed that he spoke to Quinn in the afternoon of February 27 and asked for and received permission to bring the employees who had punched out back to work. Thereafter he met one of the employees named Calesina and also Figueroa but when he asked them to come back they refused.

The aforementioned Russell Collins was employed by the Respondent in the machine shop which was located near the area where the employees involved herein performed their work. It was customary for him to give routine supervision to the work of these employees whenever Gauci left the plant. He testified that while he was in his shop about 10:20 a. m. on February 27 he noticed that it had become quiet in the production area. He went there and was informed by Figueroa that the employees wanted to speak with Quinn. Collins tried to reach Quinn but was unable to contact him. He then advised Figueroa that Quinn was out but would return and asked him what he wanted to see Quinn about. Figueroa replied that the employees wanted a raise and stated they would not go back to work until they spoke to Quinn. Collins did not reply to this. At 11:45 a. m. Quinn returned with Gauci. At this time the employees were still not working. Collins went back to the machine shop and did not hear what Quinn said to the employees. He did, however, hear Gauci tell the employees to go back to work and then heard machines start running. Collins further claimed that some of the employees had punched out before Quinn returned.

Agnes Cross, the aforementioned shop steward, is an English speaking person. Appearing as a witness for the Respondent, she testified that Figueroa approached her at the coffee break and informed her that the employees were stopping work because they worked too hard and did not receive enough money. He asked her whether Quinn was in the plant and she ascertained that he was not. Gauci also was not on the plant floor. Cross suggested that the employees go back to work and await Quinn's return. At Figueroa's request she agreed to contact the Union's agent. Despite her suggestion, the employees did not return to work after the coffee break but stood idly by their machines. Quinn returned at about 11:35 a. m. When he entered the plant she went to him and told him that the employees had stopped work because they claimed to be working too hard and wanted more money. Then Quinn approached the employees and asked Figueroa what it was about. The latter stated that the employees wanted more money. Quinn replied that he could not afford to give a raise. Cross claimed she then heard Quinn say to the employees, "punch your time clocks and go home, but if anybody wants to work, they may

stay on the job," and that he also told them to process any grievance they might have through the shop steward. Thereupon all the employees punched out and did not return to work after the lunch hour with the exception of herself and four others named Izzy Olmeda, Sam Feliciano, Mike Scritta, and Jimmy VanDeemir. Cross also testified that she did not know the address of the Union's agent in the morning of February 27 and did not find it out until the afternoon of that day when she gave it to Figueroa upon his request.

Employee Israel Olmeda, referred to hereinabove as Izzy, testified that no one had spoken to him before the 10:30 a. m. coffee break about stopping work. He related that when the bell announced the end of the coffee break all the employees went back to work and started their machines. At about 11 a. m. Figueroa motioned to everyone to stop working and to assemble in a corner. He claims he is certain of the time because he had looked at his watch. According to Olmeda, the stoppage was induced by the desire of all the employees for a raise and because they were working too hard. He could not recall who had said this to him, but these were his reasons for stopping work. He went back to work at 11:30 a. m. after Gauci told him to continue working. Olmeda recalled that Quinn and Gauci had returned to the plant that morning at about 11:20 a. m. He testified that he did not see Gauci speak to Figueroa, but that he did hear him and Quinn ask the employees what was happening and when nobody answered Quinn said "everybody punch and go home." He saw Quinn turn off the front lights. He has no recollection of Quinn telling the employees to see their shop steward.

Employee Simon Feliciano, also referred to herein as Sam Feliciano, testified that he also had not discussed anything with his fellow employees before the coffee break. He testified that at 11 a. m. all the employees stopped their machines upon an order from Figueroa. Feliciano claims that his machine was turned off by Figueroa. Then all the employees waited for Quinn because they wanted a raise. Feliciano stated that the "strike" was over by 11:20 a. m. which was the time, he said, when Quinn and Gauci returned according to his observation of the clock in the plant. After the "strike" had ended, Gaucia told him to continue working and he accordingly went back to work at 11:30 a. m. Feliciano related that Quinn had asked the employees what was happening and that he told them to "punch out and go home" and said nothing else. At the same time Quinn turned off half the lights in the plant.

Findings and Conclusions

It is clear that at some time during the morning of February 27, 1957, all of the Respondent's Puerto Rican employees stopped work. I find that these employees either ceased work or did not resume work at the end of their coffee break at about 10:30 a. m. because they then saw Quinn in the plant and decided to confer with him. I do not believe that any of the witnesses remembers the exact minute when this occurred notwithstanding Olmeda's claim that he had looked at his watch and recalls that it was then 11 a. m. In any event the stoppage according to the recollection of all the witnesses occurred between 10:30 and 11 a. m. For the purposes of this case, a more precise finding is not necessary. I am satisfied that even if Quinn and Gauci had been in Jersey City that morning as they testified they had returned earlier than they and their supporting witnesses claim, for I credit the testimony of Figueroa and his supporting witnesses that the employees stopped work when they discovered that Quinn was present, and, as I have found, this was between 10:30 and 11 a. m.

It is also not essential that it be determined whether the employees had stopped work to learn from Quinn the address of their Union or to present a demand for a wage increase and a change in working conditions, for, as I shall explain below, their conduct in either circumstance was lawful activity protected by the Act. In any event I credit Figueroa's testimony that when he replied to Gauci's inquiry concerning the reason for the work stoppage he told him it was to obtain the address of the Union. This does not preclude a finding that there existed in the minds of some of the employees the belief that they had stopped work to present a wage demand and to complain about working too hard. I find, however, that Figueroa had not communicated to either Gauci, Collins, or Cross any information to the effect that the employees had stopped work for any reason other than to obtain from Quinn the address of the Union.

The most vital aspect of this case involves the interchange between the employees through their spokesman, Figueroa, and Quinn. If, as the General Counsel contends, Quinn discharged the employees for engaging in protected activity, then the Respondent has violated the Act. A finding that Quinn did not discharge them, but that they had quit, as he testified, would require dismissal of the complaint. Before proceeding to a consideration of the evidence on this point, it is appropriate

here to note the Respondent's defense in the answer that the employees had not engaged in lawful activity, and in its brief that their conduct was in the nature of a "gripe" and hence unprotected. It is difficult to determine whether the Respondent would apply these arguments to the General Counsel's version of the facts, namely, that the employees were seeking information concerning their Union's address, or the version offered by the Respondent that the employees were seeking a wage increase and were complaining about their working conditions. Assuming the latter to have been their objective, it is too well established to require discussion that a work stoppage for such purpose is *prima facie* protected activity. Employees who stop work for this or any other purpose in the face of a provision in a current labor contract containing a no-strike clause or its equivalent do not enjoy the Act's protection and may be discharged for such conduct, but, although there is testimony concerning a subsisting contract at the time of the work stoppage that contract is not in evidence and there is no proof that it contains a no-strike clause or its equivalent. There is, therefore, no merit to the Respondent's arguments that if the employees had stopped work to press for a raise or a change in their working conditions their discharges therefore were justified. If, on the other hand, the Respondent's arguments assume that the objective of the work stoppage was to obtain the address of the Union, I would also find no merit therein. The facts show that the Respondent was forwarding dues from employee earnings as well as welfare contributions for the benefit of the employees to the Union. These are tangible items which affect the terms of employment of the employees. Any inquiry to their employer involving these items may not be characterized as "gripping," but constitutes activity bearing directly on a matter of mutual aid and protection within the scope of conduct protected by Section 7 of the Act. I observe that the employees had no recourse but to turn to the Respondent for the desired information as no one in the plant except the Respondent's agents knew the location of the Union at the time of the events in question.

I have already found that when Gauci asked Figueroa what the employees wanted the latter replied that they were seeking the Union's address and that he further explained why this was necessary. I additionally find, in accord with the testimony of the General Counsel's witnesses, that Gauci then spoke to Quinn who thereupon, with a gesture of the hands, directed the nonworking employees to punch out and go home and simultaneously switched off some of the lights in the plant. I also find that the employees then retired to the washroom and that Gauci subsequently entered and, speaking to Figueroa, urged them not to leave; that when Figueroa responded that they did not want to leave but were constrained to do so in view of Quinn's directive, Gauci advised that he would intercede for them with Quinn; and when Gauci failed to return to the washroom after a delay of approximately 45 minutes the employees punched out and left. I find, contrary to Collins' testimony, that no employees had punched out before then.

In making the foregoing findings I rejected Quinn's testimony that he had directed the employees to return to work with an instruction to channel their grievance through their shop steward, and that he had put them on notice that if they punched out and left he would regard them as having quit. Only Cross supported Quinn's claim that he had directed the employees to process their grievance through her. Neither Gauci, Olmeda, nor Feliciano, all witnesses for the Respondent, heard such comment, and all of them were in a position to have heard it if made. I do not believe it was said by Quinn because I was impressed with the lack of conviction in his testimony as well as in Cross' attempted corroboration. Quinn's account of his alleged ultimatum to the employees to the effect that punching out and leaving would be construed by him as quitting received no corroboration at all from any witness. I believe this too was not said by Quinn, and I am further convinced that this testimony was impulsively offered by Quinn because of his inability satisfactorily to explain his consistent position in his sworn answer that the employees had been discharged with no mention therein that they had quit.

On the basis of the foregoing findings of fact, I conclude that when the Respondent's employees concertedly stopped work to present their Employer with a lawful demand for information pertaining to their terms and conditions of employment, they were peremptorily told to punch out and go home. I am satisfied that Quinn by this action intended to discharge the employees who had not already returned to work and that they thereby reasonably regarded themselves as discharged. Any doubt that this was the effect of Quinn's words and other conduct was dispelled by Gauci's conversation with Figueroa in the washroom and his failure to return to the employees with word that they could go back to their jobs. In the circumstances, the employees had reason to regard Gauci's failure to return as confirmation that they had been discharged by Quinn. Because the Respondent's brief

relies upon the Board's recent decision in the *Prefabricators, Inc.*, case, 119 NLRB 93, to support its contention that a voluntary quitting of employment by employees cannot be the predicate for an unfair labor practice finding against their employer, I emphasize that in the instant proceeding as distinguished from the cited case there is no proof of any kind that the employees had voluntarily quit or that the Respondent by their conduct could reasonably have regarded them as having quit. I am convinced that the Respondent's belated defense of a quitting by its employees is a mere afterthought in this case. Had Quinn deemed the employees to have quit on February 27, it is improbable that the sworn answer signed by him about a half year later would have failed completely to mention such defense, and would instead have listed at least four separate reasons for discharging them.

Quinn's conduct, and hence the Respondent's, was violative of the Act even though the discharge may not have been motivated by union animus. Having discharged its employees because they engaged in protected concerted activity, whether the object thereof was to seek information about their Union or to demand higher wages and improved working conditions, the Respondent thereby coerced, restrained and interfered with rights guaranteed employees in Section 7 of the Act in violation of Section 8 (a) (1) of the Act. In this circumstance the Respondent's motives are not relevant to a finding that the Act has been violated.² Because the effect of the Respondent's conduct discouraged membership by the employees in a labor organization it was also violative of Section 8 (a) (3) of the Act.³

I reject all other defenses raised by the Respondent in its answer and brief, including the defenses that the employees had justifiably been discharged for insubordination,⁴ inefficiency, or for infringing upon their employer's rule not to engage in concerted activities during working hours. None of these defenses was supported by proof. The defense that some of the employees' jobs were eliminated as a result of economic changes in the Respondent's operations is not relevant to the question of whether the discharges were unlawful, but will become a matter for consideration during the compliance phase of this proceeding.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent, set forth in section II, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation 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.

IV. THE REMEDY

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

The Trial Examiner has found that the Respondent discriminated against certain employees whose names appear below in regard to their hire and tenure of employment because of their concerted activities thereby interfering with, restraining, and coercing these employees in the exercise of rights guaranteed them by Section 7 of the Act and further discouraging membership by them in a labor organization. This conduct was found to be a violation of both Section 8 (a) (1) and 8 (a) (3) of the Act. For purposes of effectuating the policies of the Act, however, the remedy for an unlawful discharge is the same, whether it is predicated upon a violation of one section or the other or, as here, upon both.⁵ It will, therefore, be recommended that the Respondent offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to seniority or other rights and privileges. See *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827. It will be further recommended that the Respondent make the employees named below whole for any loss of pay suffered by reason of the discrimination against them. Said loss of pay, based upon earnings which they would normally have earned from February 27, 1957,

² *Ace Handle Corporation*, 100 NLRB 1279, 1292

³ *Rugrofters of Puerto Rico, Inc.*, 107 NLRB 256.

⁴ Had Quinn in good faith promised the employees that if they returned to work he would take up their grievance after working hours, he could, in the view of the Court of Appeals for the Third Circuit, have lawfully discharged them for failing to return to work at his direction. See *N. L. R. B. v. Condenser Corporation of America*, 128 F. 2d 67, 77 (C. A. 3). No such promise was made.

⁵ *Gullett Gin Company, Inc. v. N. L. R. B.*, 179 F. 2d 499 (C. A. 5); *Rugrofters of Puerto Rico, Inc.*, *supra*.

the date of the discrimination against them, to the date of the offer of reinstatement, less net earnings, shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289; *N. L. R. B. v. Seven-Up Bottling Company of Miami, Inc.*, 344 U. S. 344.

Although the Respondent's unlawful conduct tends to thwart the fulfillment by employees of their basic rights guaranteed by the Act to form labor organizations and to engage in protected concerted activity, I am convinced that the Respondent's conduct was spontaneous and unpremeditated and was not the result of hostility towards the general purposes of the Act, particularly as the record is barren of evidence of union animus or any conduct violative of the Act prior to the events in question. I do not anticipate, because of the unlawful conduct committed herein, a danger that the Respondent will in the future commit other similar acts or other conduct proscribed by the Act. I shall, therefore, recommend the issuance only of a narrow order limited to curing the effects of the conduct found unlawful herein.

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

CONCLUSIONS OF LAW

1. By discriminating with respect to the hire and tenure of employment of Hector Figueroa, Adrian Gomez, Ramiro Gomez, Francisco Rivera, Ana Lydia Gomez, Celestino Olmeda, Francisco Garcia, Praxedes C. Gonzalez, Ana Noboa, Gilberto Torres, and Herman Gomez, thereby discouraging membership in a labor organization of its employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

2. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

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

[Recommendations omitted from publication.]

Hershey Chocolate Corporation, Petitioner and Local 464, American Bakery and Confectionery Workers International Union, AFL-CIO¹ and Bakery and Confectionery Workers International Union of America.² Case No. 4-RM-265. September 18, 1958

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Bernard Samoff, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Following the close of the hearing the Board, on March 28, 1958, issued a notice and invitation to submit briefs or comment, advising the parties hereto and all other interested organizations and persons that it was considering possible revisions in certain of its contract bar policies and inviting briefs or comment with respect to certain enumerated policy considerations bearing on or related to the contract bar issues in the instant case.³ Responses to the notice and invitation have

¹ Herein called respectively ABC Local 464, and ABC.

² Herein called BCW.

³ At the same time, similar notices were issued in several other cases inviting briefs and comment with respect to enumerated policy considerations bearing on or related to the contract bar issues in such cases.