

and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is

All employees including garage employees and truckdrivers, at our bakery at Dover, New Hampshire, excluding office clerical employees, driver-salesmen (wholesale and retail), guards, and supervisors as defined in the Act

WE WILL reinstate and make whole the following employees for any loss of pay suffered by them as a result of our discrimination against them

Octave Aubert
 Martin McManus
 Rene Gagnon
 John Harward
 Donald Robitaille
 Leo Spencer
 Edward Cullen
 Philip Otis

Salvatore Fanfera
 Armand Ovellette
 Raymond McDonald
 Maynard Welch
 Richard Cole
 Joseph Amagnon
 Lloyd Orser

All our employees are free to become or remain members of Local 41 or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the amended Act

M & M BAKERIES, 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

General Industries, Inc and Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local #40, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO. Case No 9-CA-1216 October 29, 1958

DECISION AND ORDER

On June 2, 1958, Trial Examiner A Norman Somers 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 brief. The Charging Party filed a reply brief.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Jenkins, 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 briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of

the Trial Examiner, except insofar as they are inconsistent with this decision.

1. We find that the entire conversation between the Respondent's vice president, Pferrer, and employee Thompson, containing threats of reprisal for union activities and culminating in Thompson's discharge, violated Section 8 (a) (1) of the Act. Consequently, we do not find it necessary to decide whether Pferrer's conversation with Thompson constituted unlawful interrogation as such, and therefore do not adopt the Trial Examiner's finding of interrogation and his analysis of the law on this point.

2. We agree with the Trial Examiner that the Respondent violated Section 8 (a) (1) and (3) of the Act by its discharge of employee Thompson for reasons relating to his union activity.

ORDER

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

1. Cease and desist from:

(a) Discouraging membership in Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local #40, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, or any other labor organization, by discharging or otherwise discriminating against any employee because of membership in, activity on behalf of, or sympathy with, the above or any other labor organization.

(b) Threatening economic reprisals against its employees because of their union sympathies and activities.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist said Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of mutual aid or protection as guaranteed in Section 7 of the Act, and to refrain from any and all such activities, except to the extent that such rights may be affected by any agreement, if validly made pursuant to the proviso of Section 8 (a) (3) of the Act, which might require membership in a labor organization as a condition of employment.

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

(a) Offer James M. Thompson immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole

for any loss of pay he may have suffered by reason of the discrimination against him, in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

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

(c) Post at its plant in Louisville, Kentucky, copies of the notice attached hereto marked "Appendix."¹ Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

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

¹In 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 our employees that:

WE WILL NOT discharge or otherwise discriminate against any employee because of membership in or activity on behalf of, or sympathy with Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local #40, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, or any other labor organization.

WE WILL NOT threaten economic reprisals against our employees because of their union sympathies and activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to join or assist, or to engage in collective bargaining through, the above or any other union, or to engage in concerted activities for the purpose of mutual aid or protection, or to refrain from any such activities, except to the extent that such

rights may be affected by any agreement, if validly made under Section 8 (a) (3) of the Act, which might require membership in a labor organization as a condition of employment.

WE WILL offer James M. Thompson immediate and full reinstatement to his former or substantially equivalent position without prejudice to seniority or other rights and privileges.

WE WILL make him whole for any losses in pay sustained in consequence of the discrimination against him.

All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named Union or any other labor organization, except to the extent that this right may be affected by any agreement in conformity with Section 8 (a) (3) of the Act, as above indicated.

GENERAL INDUSTRIES, 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

This proceeding, with all parties represented, was heard before the duly designated Trial Examiner in Louisville, Kentucky, on March 25, 1958, on complaint of the General Counsel and answer of Respondent. The issues litigated were whether the discharge of James M. Thompson was discriminatory and whether the interrogation and threats which immediately preceded it were coercive, in violation, respectively, of Section 8 (a) (3) and (1) of the Act. Oral argument was waived, and the General Counsel has filed a brief, which has been duly considered.

Upon the entire record and my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Kentucky corporation engaged, at its plant in Louisville, in fabricating and manufacturing conveyor parts. It provides materials and services in excess of \$100,000 annually to Carrier Corporation, also of Kentucky, which does an annual out-of-State business exceeding \$50,000. Jurisdiction is undisputed.¹

II. THE UNFAIR LABOR PRACTICES

A. Discharge of James M. Thompson

James M. Thompson, at the time of his discharge on September 5, 1957, had been employed for over 2 years as a welder and fitter in the tank and stack fabricating department.

In the summer of 1957, he and a fellow employee procured authorization cards from the Union and passed them out among employees at their homes and other places away from the plant. Among the employees given a card was William Parker, to whom Thompson handed one in the car on the way to work. Two days later, on September 5, Mike Katzman, general foreman of the plant, turned the card over to Emil H. Pferrer, vice president of Respondent and manager of the plant, saying,

¹ So, too, is the Charging Party's status as a labor organization within the meaning of the Act.

"Here's a card that Mr. Thompson gave to Mr. Parker, and he told him he better join the Union."²

On receiving the card from Katzman, Pferrer called Thompson aside, and, in the ensuing conversation, discharged him. Thompson and Pferrer gave their respective versions of what was said. Thompson testified:

Sò Mr. Pferrer asked me, said, "Don't you like to work for us?" And I told him, I said, "Well, I have worked at better places, and I have worked at worse places." He said, "Well, then, why are you agitating?" I told him, I said, "What do you mean by agitating?" He said, "By trying to get a union in here." I said, "Because I think a union could improve conditions in the plant." He said, "Well, me and Bob Carrier has decided before we will let a union come in here that we would close the doors." And he says, "I am going to have to ask you to quit." I said, "Well, I can't quit because I need a job." He said, "Well, I will have to let you go, then." So he said, "Come on over to the office," and he took me to the office and told the man to make out my time.

Q. Who was the man?

A. That, I don't know. It is a man in the office that makes out the checks. His name I don't know.

Q. And who was Mr. Carrier, if you know?

A. Mr. Carrier is the man that owned the company.

Q. Did you get your check?

A. I got my check, yes, sir. I had two checks coming, one for the—one full week check, or it was four days' pay, and then another one for a couple of days on the week when I got fired

Q. And you were discharged September 5, 1957?

A. That's right.

Pferrer's version:

Following that, when he [Katzman] gave me the card, I went down and asked Mr. Thompson to come outside, I would like to talk to him. I asked him why he was unhappy with us, and he said he was not particularly unhappy with us. And he said why—Then I asked him, "Why are you agitating here, then?" And he said, "I am agitating because I want the Union in here." I said, "I don't intend to have the Union in here, and I don't believe that Mr. Carrier does, either. And if we have the Union in here I expect to go back home and go fishing."

Mr. Thompson said, "You may well have to do that." When he said that, I told him, "If you are that unhappy here, why don't you quit?" He said, "I won't quit, you will have to fire me." And I told him, "I can do that for you. Come on over to the office." And he said, "Well, you will hear from me about this."

Q. Had you any intention of discharging Mr. Thompson at the time that you called him out?

A. None whatever.

Q. What was Mr. Thompson's attitude at the time that he told you you would have to fire him, and he wouldn't quit?

A. His attitude was arguing. He dared me, to make me fire him, is the way I felt about it.

The conversation under either version would thus appear to be the same in substance, unless it makes a difference whether Thompson met Pferrer's suggestion that he quit with the protestation that he "can't quit because I need a job," or with the assertion, "I won't quit, you will have to fire me." I can hardly see that it does. Thompson would seem already to have come acropper when he accepted

² Pferrer thus quoted Katzman on cross-examination. On direct, Pferrer answered affirmatively to a leading question suggesting that Thompson had given Parker the card "during working hours." Whether Pferrer was representing that this was the fact or merely indicating that Katzman so told him when he handed him the card is not clear, for he never again mentioned it. Nor does it matter. When testifying to the incident on his own, as appears from the quoted extract in the text, he did not indicate that Katzman said the card had been passed out during working hours. And in the immediately ensuing conversation with Thompson, under Pferrer's version no less than Thompson's, there is no indication that where or when the card was passed out played any part in Pferrer's inquiry or action. The undisputed evidence is that there was no plant rule concerning the matter. Accordingly, this portion of Pferrer's testimony cannot be credited.

Pferrer's two previous offers, first to state whether he was "unhappy with us" and second why he was "agitating." Pferrer's final invitation that Thompson "quit" was in effect asking Thompson to help dress up in the clothes of a resignation what was in fact an accomplished discharge. Pferrer's request might have been in the highest traditions of statecraft, as when the chief executive "invites" a cabinet member to resign, but it rather impaled Thompson on the horns of a dilemma: if he accepted Pferrer's invitation to quit, he would be losing a job he needed; on the other hand, if he did not accept it, then he was guilty of an affront to Pferrer, of which the latter, indeed, now accuses him.

The above is not to say that Pferrer's version is to be credited as against Thompson's. To do so would be inverting the scales of credibility unfairly to Thompson, who, it must be observed, acquitted himself with greater credit than his rival witness. His manner was forthright, and his testimony, as it sounded on the stand and as it reads in cold print, is consistent within itself and the external circumstances. On the other hand, as already appears (footnote 2), Pferrer betrayed a susceptibility to suggestion somewhat on the other side of strictest candor. Also, when, on cross-examination, counsel picked up his blunt avowal (attributed to himself in his own version of the conversation with Thompson) that he and the company president "don't intend to have the Union here," and that if a union came in he would "go back home and go fishing," he began to back water. First, he said the feeling of Mr. Carrier, which he identified with his own, was "about the Union or a union shop, or a closed shop," and then, as to himself, what he opposed, as he now claimed he put it to Thompson, was not a union but only a "closed shop." On the basis of relative performance of the witnesses, the scales of credibility tip in favor of Thompson, and such conflict as there is in the two versions must be resolved in favor of the one given by him.

On the basis of either version, however, it is manifest that Pferrer discharged Thompson either for "agitating," his term for passing out union cards, or for Thompson's frank statement of why he was doing so, which was to invoke the aid of the Union in effectuating certain "improvements" in working conditions. The interesting aspect of this last is that Pferrer admitted the existence, at the time of this talk with Thompson, of a valid grievance concerning the very item which, in response to company counsel's question, Thompson cited as his main subject of complaint—inadequate toilet facilities. Pferrer acknowledge the "toilet was in terrible condition," and indicated that after Thompson's discharge, this was rectified. Yet significantly, it was Thompson's avowal that it was through the Union that he hoped to have conditions improved, which precipitated Pferrer's suggestion that Thompson "quit" if he was "that unhappy here."³ However unwittingly, Pferrer could hardly have more eloquently betrayed his intolerance of collective or concerted activity as a means of ameliorating conditions, even those concededly needing improvement. The discharge thus invaded employees' guaranteed rights under Section 7, in violation of Section 8 (a) (1) of the Act.⁴ Additionally, it was calculated to discourage membership or activity in the Union, in violation of Section 8 (a) (3) of the Act.⁵

B. *Interference with guaranteed rights apart from the discharge*

Apart from the manifest invasion of protected rights which inheres in the act of discrimination, there are also the threats and interrogation in the conversation culminating in the discharge.

1. Threats

a. *"Don't intend to have the Union in here"*

Pferrer's statement that he was also voicing President Carrier's sentiment in saying, as he testified, that he did not "intend to have the Union in here" hardly falls in the category of an innocuous expression of "intention," such as, for example, where the speaker indicates that come the fall, he does not intend to wear an Ivy

³ Pferrer testified that before Katzman brought him the card, he "knew that there was agitation in the shop for a union, but . . . didn't know who, particularly was agitating"; and when he found out it was Thompson, he "wanted to know why the man was unhappy, what was wrong with him."

⁴ See *Bronx Survey Corporation*, 119 NLRB 1240; *Rugcrofters of Puerto Rico, Inc.*, 107 NLRB 256, 262, enfd. 213 F. 2d 537 (C. A. 1); *Smith Victory Corporation*, 90 NLRB 2089, 2090, enfd. 190 F. 2d 56 (C. A. 2); *Kennametal, Inc.*, 80 NLRB 1481, 1482, enfd. 182 F. 2d 817, 818 (C. A. 3).

⁵ *Ibid.*

League suit or don a crew haircut. A statement by top management that it does not "intend to have the Union here" conveys by implication that it will use its managerial control over jobs to put that intention into effect.

b. "If we have the Union in here, I expect to go back home and go fishing"

The same must be said of Pferrer's statement, which he likewise attributed to himself, that "if we have the Union in here, I expect to go back home and go fishing." It would require an inordinate appetite for the unreal to interpret this as but a "personal prediction," comparable, for example, to a father's statement that when he finally marries off his youngest, he will dust off the old fishing rod and, with a keg of beer, take things easy in the shade of a hickory tree.⁶ For that kind of confidence a Pferrer does not need the likes of a Thompson to unburden himself. When the plant manager and vice president tells a lowly employee that if the Union comes in he will retire and "go fishing," he is fairly conveying that if he is ever to heed the call of Isaak Walton, it will be when *he* is ready, not when the Union drives him to it by getting into the plant, and that meanwhile he is prepared to exert the full force of his managerial power to prevent his enforced dedication to rod and reel. This would serve to explain why, as would appear from Thompson's testimony, Pferrer's remarks registered with Thompson as a threat that Carrier and Pferrer "would close the doors" before having a union in the plant, for that is the plain implication of the "go fishing" alternative to a union sometimes heard by employees from management. The statement attributed by Pferrer to himself was thus threatening in its connotation and, as such, was coercive in violation of Section 8 (a) (1) of the Act.⁶

2. Interrogation

The threatening and punitive sequels to Pferrer's opening up the subject of Thompson's reasons for "agitating" are, of course, sufficient to outlaw it. However, to make the question of its legality hinge upon what finally came out of it would seem to me to be avoiding the vital issue of the standard of conduct appropriate to the situation at the time Pferrer first approached Thompson, and before the damage was done. Pferrer testified that at that time he had not yet determined to discharge Thompson. If that is true, the ensuing threats and discharge would not have occurred had Pferrer refrained altogether from opening up the subject with Thompson. If what happened was a reasonably foreseeable result of Pferrer's undertaking to interrogate Thompson, then it would be fair to say that this bears crucially on whether such conduct should not be avoided at the threshold. More important, if such an outcome is reasonably foreseeable, it would follow that it provides an understandable basis for employees' being apprehensive when interrogated concerning union or organizational matters, and, by that token, being restrained in the free exercise of their statutory rights.

I have no intention of reviving the old bugbear about whether interrogation is "unlawful *per se*,"—at least not in the sense in which that term would seem to have been understood preceding the Board's decision in *Blue Flash Express, Inc.*, 109 NLRB 591. As was pointed out in *Cone Brothers Contracting Company*, 114 NLRB 303, the decisions of the Board preceding *Blue Flash*, specifically those which met with reversal on court review, came up in a posture barren of a showing, to the courts' satisfaction at least, that the Board was making due allowance for special business or operating exigencies which might necessitate the employer's innocently eliciting the information sought to be derived by the interrogation of polling. *Id.* at p. 316, *et seq.* On proper analysis, what was called the doctrine that interrogation and polling are "unlawful *per se*" was really not such at all; accurately described, it was a doctrine declaring such conduct to be "unlawful no matter what." As such, it failed to make due allowance for competing employer interests of equal legitimacy.

More important, the Board appeared to the courts to be giving effect in that field to one interest "so single-mindedly [as to] ignore other and equally important"⁷ interests. Lacking from it was the proper balance between the right of employees under Section 7 to be spared the discomfiture inherent in interrogation or polling on the one hand, and the right of an employer to meet legitimate business exigencies on the other, with a charting of the line at which the one must yield to the other.

⁶ Pferrer's belated explanation, at the hearing, that he had indeed retired from a previous job when a union acquired a "closed shop," was hardly calculated to soften the sting of what he said to Thompson, for Pferrer was manifestly venting the full spleen of his aversion to the closed shop upon the mere act of passing out a union card.

⁷ Cf. *Southern Steamship Company v. N. L. R. B.*, 316 U. S. 31, 47.

This is the approach which governs decisions under the Act in other fields—as, for example, where the right of employees to engage in concerted activities under Section 7, if carried to its absolute, conflicts with the right of an employer against seizure of his property,⁸ or with the laws against mutiny,⁹ or with the right of an employer to dedicate his plant premises to efficient production,¹⁰ or where freedom of choice of representatives, guaranteed to employees under Section 7, if carried to its ultimate, collides with the interest of stability of labor relations, thereby necessitating that the former be suspended during the “certification year,”¹¹ or during the contract term.¹²

The failure of the Board, as the reviewing courts saw it, to balance competing interests in its formulation of policy or standards relating to interrogation and polling, led them to try to strike a fair balance themselves. Indeed, law review comment during the period the courts were overturning Board decisions on the question was to the effect that, in essence, that was what the courts on review were groping to accomplish.¹³ The comment on the Sixth Circuit's decision *N. L. R. B. v. Russell Kingston*, 172 F. 2d 771, is an instance in point. There, the employer conducted a poll to determine whether his employees wanted a union, because he needed the information in order to gauge his future labor costs as an incident of bidding on a contract. Before taking the poll, he told the employees of his purpose and assured them that the result of the poll would have no official significance. To further minimize their apprehensions about expressing their preferences in a privately conducted poll, he told them they could vote or not as they wished, and if they did it would be in complete privacy, and if perchance their individual choice should unintentionally be discovered, it would make no difference in their conditions or tenure. The Board nevertheless found the poll to be in violation of the Act,¹⁴ and the court reversed. *Supra*. In commenting favorably upon the decision of the court, the law review note stated in part:

There is an element of coercion in a poll itself but provided there is complete anonymity and the employees understand that the poll is purely informational, it would seem proper to allow the consequently small element of coercion to be weighed against the employer's business justification. The instant case seems to achieve a balance between these considerations, thereby indicating a standard to be used in judging future employer-conducted polls.¹⁵ [Emphasis supplied.]

Unfortunately, as the later Board cases came up to the courts, it would not appear that the Board adopted the standard thus indicated. The one exception was *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732 (C. A., D. C.). There the Board applied the special privilege, evolved some years earlier, under which an employer was permitted to interrogate employees where the information was needed as evidence for use in litigation.¹⁶ The limitation placed upon that privilege was that the interrogation be confined to matters relevant to the issues in the litigation.¹⁷ In that one case which came up for court review in the context of a showing that the Board was willing to balance a legitimate competing employer interest against that of the employees, the court sustained the Board, even though the result reached was against the employer because he had overstepped the limitation attached to the privilege. Judge Washington, writing for the court, plainly rested the court's affirmation of the result on its view that the Board in that instance was striking a fair balance between these competing interests. He said:

Such a standard assumes that interrogation of employees concerning their union activities is, of itself, coercive (citing cases), but that fairness to the employer requires that a limited amount of such questioning be permitted despite the possible restraint which may result.¹⁸ [Emphasis supplied.]

⁸ *N. L. R. B. v. Fansteel Metallurgical Corporation*, 306 U. S. 240.

⁹ *Southern Steamship Company v. N. L. R. B.*, 316 U. S. 31.

¹⁰ *Republic Aviation Corporation v. N. L. R. B.*, 324 U. S. 793.

¹¹ *Ray Brooks v. N. L. R. B.*, 348 U. S. 96.

¹² For numerous instances of the harmonizing of opposing interests under the Act, see address of former Board Chairman Guy Farmer before the Cleveland Bar Association on March 16, 1955.

¹³ See Comment, 63 Harv. L. Rev. 900 (1950); note: Interrogation of Employees Concerning Union Matters as an Unfair Labor Practice, 3 Duke Bar J. 113, 126 (1953).

¹⁴ *Russell Kingston*, 74 NLRB 1484 (1947).

¹⁵ 63 Harvard L. Rev. 900, *supra*, footnote 13.

¹⁶ *May Department Stores Company*, 70 NLRB 94.

¹⁷ *Joy Silk Mills, Inc.*, 85 NLRB 1263, 1288-1292 (1949).

¹⁸ *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732 at 743.

From the tenor of later court decisions, it would reasonably appear that had the Board continued to show a disposition to balance the employer's interest in meeting a special exigency against that of the employees' interest in being shielded from interrogation, its factual assumption, as Judge Washington put it, "that interrogation of employees concerning their union activities is, of itself, coercive" would likely have been spared the road of appellate misadventure. The courts seemingly would not have resisted that premise any more than did the court in *Joy Silk Mills*, as long as the Board provided a guarantee against inequitable results by demonstrating a willingness, in "fairness to the employer," to permit "a limited amount of such questioning . . . despite the possible restraint which may result." [Emphasis supplied.] The Board, after *Joy Silk Mills*, would not appear to have made such allowance. Indeed, a later case, *Katz Drug Company*, 98 NLRB 867 (1952), reflected a serious curtailment of even the narrow privilege accorded to employers under *Joy Silk Mills* to conduct a limited interrogation of employees in order to prepare for the trial of a lawsuit. In reversing the Board on review, the Eighth Circuit issued a rather pointed reminder that the Board must strike a proper balance between competing interests. *N. L. R. B. v. Katz Drug Co.*, 207 F. 2d 168. The employer there interviewed the employees concerning their union affiliations because he needed the information for evidence in the trial of a suit in the State court, and though the subject matter of the questioning was directly relevant to the issue in litigation, the Board held the interrogation to have been unlawful because, in its view, the employer could have established its point in the court action some other way. In overturning the Board, Judge Johnsen, writing for the court, did not take issue with the Board's factual assumption that the interrogation had certain "incidental consequences" of coercion, but reminded the Board that it must "recognize the fundamental right and duty of the courts to perform their judicial function." He added (p. 171):

And so the Board necessarily *must make a reasonable and practicable reconciliation* between the purpose of the Labor Management Relations Act and its lack of interest to interfere with the administration of justice in other rights. [Emphasis supplied.]

This was in 1953. The Board being thus reminded that it must "make a reasonable and practicable reconciliation between" competing interests involved, what did it do? Less than a year later, it asked the same court to enforce its order in *Protein Blenders, Inc.*, 105 NLRB 890. There the Board found an employer had violated the Act in conducting a poll of its employees for the same purpose and with the same safeguards as in the *Kingston* case. The Eighth Circuit reversed again. *N. L. R. B. v. Protein Blenders, Inc.*, 215 F. 2d 749. Judge Johnsen, who wrote the opinion there too, reminded the Board of the court's admonition in *Katz*, but this time with a note of impatience. He observed that the result of the Board declaring a poll to be illegal under the circumstances in *Protein Blenders* "is to forbid the employer to take any more [employee] polls of any kind, at any time, in any manner, under any circumstances, for any purpose" (p. 751). Since all other methods for getting the Board to make the "reasonable and practicable reconciliation" proved to no avail, it was then that the court attacked the premise that the polling was "unlawful *per se*," and indicated that whether it was illegal depended upon all the circumstances. A more recent decision of the Ninth Circuit, which follows *Protein Blenders*, and involved a poll similar in all its essential aspects to those in *Protein Blenders* and *Kingston*, is to the same effect. *N. L. R. B. v. Roberts Brothers*, 225 F. 2d 58 (C. A. 9).

The Board, in the *Blue Flash Express* case, used language similar to that of the Eighth Circuit in *Protein Blenders*, but it would seem rather clear that it was actually disposing of the issue on the basis of a balancing of interests; thus, the Board noted the special exigency which called for the interrogation (the union was asking for recognition without an election and the employer wanted to verify the union's claim to a majority before waiving his right to an election); and it also noted the "safeguards" provided by the employer, for he gave appropriate assurance to the employees that they would suffer no reprisals on the basis of how they answered. See 109 NLRB 591 at 592. Not long later, the Board, in *A. L. Gilbert Company*, 110 NLRB 2067, held successive polls of employees illegal because "no need or occasion" was shown for them. *Id.* at 2072. And in the *Cone Brothers* case, previously referred to, the Board adopted the approach of this Trial Examiner in pass-

ing upon the legality of an employer poll on the basis of the "balancing of interests" standard. 114 NLRB 303 at 316.¹⁹

The desirable aspect of applying the "balancing of interests" standard to interrogation and polling is that by doing so we can serenely face up to the rather obvious consequences of such conduct upon the minds and fears of employees, without thereby being forced to the conclusion that resort to such conduct by an employer is inexorably illegal regardless of circumstances which make eliciting the information legitimately necessary. In other words, the fact that such conduct, again to quote Judge Washington, "is, of itself, coercive" does not mean that it is invariably in violation of law, regardless of exigencies which in "fairness to the employer" should make "a limited amount of such questioning [permissible] despite the possible restraint which may result."

Applying the same "balancing of interests" approach here, one need hardly speculate concerning what interrogation about union affiliation or sympathy means to employees in an unorganized plant during the formative stages of union organization. It is no secret that owners of an unorganized plant see in unions increased labor costs and unaccustomed restrictions upon their freedom of action through such avowed union objectives as grievance procedures, seniority systems, and, indeed, union-security clauses. It would seem idle to deny that employees are aware of this attitude on the part of employers in unorganized plants at least, and that they would normally relate any questions concerning their union ties or sympathies to such attitude. And so the inquiry, when put by an employer, is to the employee, in effect, a probing into whether he is allied, by membership, card designation, or sympathetic point of view, with what he knows is regarded by the employer as hostile to its own economic interests and managerial freedom. The employee thus faces the dilemma of either admitting a bond with the group which the employer deems a threat to its interests, or falsely denying it, as many employees in such situations have been known to do. Understandably, an employee would find foregoing any union tie a more comfortable alternative to being subjected to the dilemma presented by such interrogation. Therefore, insofar as the mere probing into an employee's union affiliation or sympathy places the employee in the kind of dilemma, to escape which he is reasonably motivated to forego joining or supporting a labor organization, it is "of itself coercive," regardless of whether it is followed, as it happened to be here, by threats and discharge. That being so, Pferrer must be deemed to have already overstepped the limits of the Act when he engaged in the interrogation, unless it can be said to have been dictated by circumstances of business necessity, exemplified by such cases as *Kingston*, *Protein Blenders*, *Katz Drug*, and *Blue Flash*. For though "fairness to the employer" requires tolerating such conduct where the "need or occasion" therefor exists, fairness to the rights guaranteed under the Act requires that an employer who engages in such conduct in the absence of a business "need or occasion" for it not be given a free immunity ride on the back of a premise that it is but a harmless indoor sport, something which, in the formative stage of union organization in an unorganized plant at least, it plainly is not. In the case at bar, no business exigency is pleaded or claimed, but even if it had been present, the interrogation was not surrounded with the safeguards calculated to reduce to a minimum "the possible restraint which may result." The interrogation, therefore, in advance of the threats and discharge, and apart from them, tended to place an undue stricture upon the exercise of the rights guaranteed under Section 7, and, as such, interfered with, restrained, and coerced employees in their exercise in violation of Section 8 (a) (1) of the Act.

III. THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action calculated to remedy or redress the injury done.

¹⁹ That case went up on review, but the Fifth Circuit, in enforcing the Board's bargaining order in the case, set aside all the independent findings of interference in violation of Section 8 (a) (1), including the poll, without passing upon the merits as such. The reason was that court found that all of the employer's conduct was simply an aspect of its challenging the certification on which the Board's bargaining order was based; and since the certification was being upheld, a bargaining order was deemed by the court sufficient to remedy the entire situation. See *Cone Brothers Contracting Company v. N. L. R. B.*, 235 F. 2d 37.

It has been found that Respondent, to discourage membership in and activity on behalf of the Union, discriminated in respect to the hire and tenure of James M. Thompson by discharging him. It will accordingly be recommended that Respondent offer Thompson immediate and full reinstatement to his former or substantially equivalent position, without prejudice to seniority and other rights and privileges.²⁰ It will also be recommended that Respondent make Thompson whole for any loss of pay he may have suffered in consequence of the discrimination by payment to him of a sum of money equal to what he normally would have earned from September 5, 1957, the date of his discharge, to the date of offer of reinstatement as above provided, less his net earnings during said period, the same to be computed on a quarterly basis, in a manner consistent with the Board's policy as enunciated in *F. W. Woolworth Co.*, 90 NLRB 289.

Since the conduct found manifests a pervasive hostility on Respondent's part to the exercise by the employees of the rights as guaranteed by the Act, the preventive purposes of the statute will be best served by a provision requiring that Respondent cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed by Section 7 of the Act.²¹

Something should here be said about the scope of the injunction against interrogation. As indicated in the body of the discussion, interrogation concerning union matters during the formative stages of union organization in an unorganized plant is normally regarded by an employee as a probing into his alliance or sympathy with a group which he knows is regarded by the employer as inimical to its economic and managerial interests. So viewed, an employee who might favor a union would understandably feel his freedom to express his true sentiments a bit circumscribed, somewhat in the manner of the familiar little figure in the spot commercial on television, who, with a toy howitzer trained on him, is asked by the other mite, "Okay, buddy, what do you think of Wilkins Coffee?" Hence, absent specially exonerating circumstances of business necessity, accompanied by adequate safeguards, the employer here should refrain from probing, by interrogation, into the union affiliations, sympathies, or reasons therefor, on the part of its employees. This will serve to insure "the benefits of prevention or prophylaxis":²² it will spare the employees a sense of undue stricture in the exercise of their guaranteed freedoms, and additionally, safeguard against a recurrence of the kind of eruption which came in the wake of the interrogation engaged in here.

It will also be recommended that the notice to be posted be signed by Carrier, the president, and by Pferrer, vice president and plant manager, whose specific conduct gave rise to this proceeding.

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

CONCLUSIONS OF LAW

1. Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local #40, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discharging James M. Thompson in order to discourage membership or activity in the above-named labor organization, the Respondent has engaged in and is engaging in an unfair labor practice within the meaning of Section 8 (a) (3) of the Act.

3. By the above and by interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act in the other respects specifically found herein, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

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

[Recommendations omitted from publication.]

²⁰ See *Chase National Bank*, 65 NLRB 827, 829.

²¹ *N. L. R. B. v. Cheney California Lumber Company*, 327 U. S. 385.

²² *Hutcheson, Judging as Administration, Administration as Judging*, 21 Texas Law Rev. 1, 6 (1942).