

and maintenance employees is both feasible and appropriate for collective bargaining.<sup>3</sup> Accordingly, we find that all production and maintenance employees employed by the Employer, excluding office clerical employees, professional employees, guards, and supervisors<sup>4</sup> as defined in the Act constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.<sup>5</sup>

[Text of Direction of Election omitted from publication.]

<sup>3</sup> Cf. *The Arthur A. Johnson Corporation*, 97 NLRB 1466

<sup>4</sup> The parties have stipulated that Raymond Doran and Clair Rohe are supervisors within the meaning of the Act. We shall therefore exclude them from the unit.

<sup>5</sup> The Employer had a collective-bargaining agreement with the United Construction Workers, an affiliate of the United Mine Workers of America, between 1955 and 1957. However, this agreement was limited to two projects and expired with their completion in 1957.

**Sunshine Biscuits, Inc. and Amalgamated Meat Cutters and Butcher Workmen of North America, Salesmen and Office Workers' Union Local 490, AFL-CIO. Case No. 6-CA-1156.**  
*June 16, 1959*

DECISION AND ORDER

On July 25, 1958, Trial Examiner John H. Eadie 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. On April 6, 1959, Trial Examiner Eadie issued his Supplemental Intermediate Report, a copy of which is also attached hereto, in which he reaffirmed the findings, conclusions, and recommendations of his original Intermediate Report without modification. The Respondent has filed exceptions to the original and the supplemental Intermediate Reports and supporting briefs, and has requested oral argument. The General Counsel has also filed briefs in support of the original and supplemental Intermediate Reports.

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, Bean, and Fanning].

The Board has reviewed the rulings made by the Trial Examiner at the hearings and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Supplemental Intermediate Report, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner. The Respondent's request for oral argument is hereby denied, as the record and the briefs adequately present the positions of the parties.

## 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 Sunshine Biscuits, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Amalgamated Meat Cutters and Butcher Workmen of North America, Salesmen and Office Workers' Union Local 490, AFL-CIO, or in any other labor organization, by discharging any of its employees or otherwise discriminating in regard to their hire or tenure of employment or any other term or condition of employment.

(b) Interrogating employees concerning their membership in, or activities in behalf of, the said Union or any other labor organization, in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1), promising benefits to employees if they should refrain from engaging in such activities in behalf of the said Union or any other labor organization, or threatening reprisals if employees engage in such union activities.

(c) In any other manner interfering with, restraining, or coercing its employees in the right to self-organization, to form, join, or assist the aforementioned Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and 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, as authorized in Section 8(a)(3) of the Act.

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

(a) Offer to William P. Cawley immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

(b) Preserve and make available to the Board and its agents, upon request, for examination and copying, all payroll records, timecards, personnel records and reports, and all other records necessary or appropriate to an analysis of the amounts of back pay due, and the rights of reemployment, under this Order.

(c) Post at its place of business in Pittsburgh, Pennsylvania, copies of the notice attached hereto marked "Appendix."<sup>1</sup> Copies of said

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<sup>1</sup> In 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."

notice, to be furnished by the Regional Director for the Sixth Region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof and maintained by it in conspicuous places, including all places where notices to salesmen 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.

(d) Notify the Regional Director for the Sixth Region in writing, within 10 days from the date of this Order, as to the steps Respondent has taken to comply therewith.

## 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, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in Amalgamated Meat Cutters and Butcher Workmen of North America, Salesmen and Office Workers' Union Local 490, AFL-CIO, or any other labor organization, by discharging any of our employees or by otherwise discriminating in regard to their hire or tenure of employment or any other term or condition of employment.

WE WILL NOT interrogate our employees concerning their membership in, or activities in behalf of, Amalgamated Meat Cutters and Butcher Workmen of North America, Salesmen and Office Workers' Union Local 490, AFL-CIO, or any other labor organization, in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1), promise benefits to employees if they should refrain from engaging in such activities in behalf of the said Union or any other labor organization, or threaten reprisals if employees engage in such union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Amalgamated Meat Cutters and Butcher Workmen of North America, Salesmen and Office Workers' Union Local 490, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in 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, as authorized in Section 8(a)(3) of the Act.

WE WILL offer William P. Cawley immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of his discharge.

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 an agreement in conformity with Section 8(a) (3) of the Act.

SUNSHINE BISCUITS, 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

### STATEMENT OF THE CASE

Upon a charge duly filed by Amalgamated Meat Cutters and Butcher Workmen of North America, Salesmen and Office Workers' Union Local 490, AFL-CIO, herein called Local 490, the General Counsel of the National Labor Relations Board, by the Regional Director for the Sixth Region, issued a complaint dated February 14, 1958, against Sunshine Biscuits, Inc., herein called the Respondent, alleging that the Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act.

The Respondent filed an answer on or about February 25, 1958, in which it admitted the jurisdictional allegations of the complaint, but denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held at Pittsburgh, Pennsylvania, before the duly designated Trial Examiner, on March 17, 18, and 19, 1958. At the close of the whole case, the General Counsel moved to conform the pleadings to the proof as to minor variances and not as to substance. The motion was granted without objection. After the conclusion of the hearing, the General Counsel and the Respondent filed briefs with the Trial Examiner.

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

### FINDINGS OF FACT

#### I. THE ORGANIZATION INVOLVED

Amalgamated Meat Cutters and Butcher Workmen of North America, Salesmen and Office Workers' Union Local 490, AFL-CIO, is a labor organization which admits to membership employees of the Respondent.

#### II. THE BUSINESS OF THE RESPONDENT

The Respondent is a New York corporation, having its principal office in Long Island City, New York. It maintains and operates places of business in various States of the United States, where it is engaged in the manufacture, sale, and distribution of cookies, crackers, biscuits, and other related bakery products. Its establishment located at Pittsburgh, Pennsylvania, alone is involved in this proceeding.

During the calendar year 1957, the Respondent, in the course and conduct of its business operations, caused to be processed and received directly from outside the Commonwealth of Pennsylvania for use at its Pittsburgh place of business goods,

materials, and items valued in excess of \$1,000,000. During the same period the Respondent shipped and sold directly to points in States of the United States other than the Commonwealth of Pennsylvania, goods and items of a combined total value in excess of \$50,000.

### III. THE UNFAIR LABOR PRACTICES

The Respondent has 19 sales territories in the Pittsburgh area. These territories are serviced by 19 salesmen. At the times material herein, Hugh Millsop was the Respondent's district sales manager, and John Faloona was its sales supervisor.

William P. Cawley was one of the Respondent's salesmen for over 5 years until his discharge on March 1, 1957. During January 1956, Cawley became interested in organizing the Respondent's salesmen into a union. After talking to some of them and learning that they also were interested in having a labor organization represent them, Cawley contacted the business agent of Local 485 of the Teamsters, herein called Local 485. At the suggestion of the business agent, Cawley invited the salesmen to a union meeting which was held early in February 1956. Some of the salesmen signed union cards at this meeting. The next meeting of Local 485 was held during the early part of May 1956. Cawley was active between these two meetings, attempting to get the salesmen to join Local 485 and to attend the next union meeting. He called some by telephone and spoke to others after the Respondent's sales meetings.

One day during the last part of May or the early part of June 1956, Millsop went to the territory of salesman William Zabel and accompanied him while he worked. Millsop told Zabel at the time, "If Mr. Cawley put as much enthusiasm into his work as he did into the union, he could be the best salesman we had in the area . . . there is always a fellow like Cawley in most organizations, . . . it was easy to combat, because Mr. Cawley, if he was segregated from the more susceptible men, he wouldn't be as able to work on this type of thing."<sup>1</sup>

After the May meeting of Local 485, Cawley continued to contact salesmen and representatives of Local 485 in an attempt to organize the employees, but it appears that the salesmen showed little or no interest at the time. Interest in the organizing campaign was revived in December 1956. At this time Zabel called Cawley and told him that several salesmen were interested in joining Local 485. Cawley then called on the representatives of Local 485 and asked them if they would solicit the salesmen. Thereafter, and during January and February 1957, Raymond McGill, president of Local 485, contacted a number of Respondent's salesmen.

At the suggestion of some of the salesmen to the effect that "a salesman's union" would be more understanding of their problems, Cawley contacted officials of Local 490 during January 1957. He spoke to its secretary during the early part of January and had a conference with E. B. Hayes, president of Local 490, on January 28. They arranged for a meeting of the salesmen on February 1. Cawley notified the salesmen of the meeting. About four salesmen, including Cawley, signed cards for Local 490 at the meeting. Thereafter, Hayes called on a number of Respondent's salesmen, and reported his progress to Cawley.

Robert Toy, Jr., was employed by the Respondent as a salesman, beginning in March 1956. Cawley spoke to him a number of times concerning organization of a union and invited him to some of the meetings. Toy did not attend any meetings. Shortly after January 1, 1957, Faloona met him on his territory and they had lunch together. Concerning the conversation that he had at the time with Faloona, Toy testified without contradiction that: He (Toy) brought up the union subject by stating, "I hear I've been connected with the union . . . I hear my name's kind of black for that"; Faloona replied that he had "more or less" come out that day to discuss it with Toy, as he had heard reports and wanted "to check" on Toy's "story"; Faloona stated that when he was a younger salesman, he had gone to a union meeting, and that he could see no advantage to salesmen by joining a union; Faloona questioned him as to what benefits he thought he would obtain by joining a union; after they had discussed the subject briefly, he (Toy) stated, "Well, I had told

<sup>1</sup> Millsop initiated the above subject for conversation. At about this time the regular monthly meeting of salesmen was changed. They had been meeting once a month as a group. Starting about May or June 1956, half of the salesmen met on a Thursday night and the other half on a Friday night. The salesmen were notified concerning which meeting they were to attend by letters from Millsop. At some time shortly after Cawley's discharge, the two meetings were discontinued, and the salesmen thereafter met at one meeting.

Mr. Travis that I would join the union when he did, . . . That still goes"; and Faloona replied, "Well, that's good enough for me."<sup>2</sup>

Cawley was called to Millsop's office on January 18, 1957. Millsop and Faloona were present. Concerning the conversation at the time, Cawley testified credibly that Millsop informed him that: His sales were down for the first 10 days of 1957 compared with the same period for 1956; he (Cawley) replied that he was aware of the drop but was not concerned, as his sales "would be up for the month"; Millsop told him that he was being put "on probation";<sup>3</sup> Millsop accused him of not leaving his house for work until 8:45 a.m., and on one occasion until 10 a.m.; Millsop made no reply when he (Cawley) asked, "That ten o'clock, is that the day I called the office and notified them I was having engine trouble?"; Faloona said, "I worked your territory in August of '56 when you were on vacation . . . I found stale merchandise in the Giant Eagle Store on Duss Avenue in Ambridge"; he replied that he had not been notified of it; and Millsop closed the meeting by stating, "Mr. Faloona will ride with you for a two week period to completely cover your territory."

Faloona accompanied Cawley on his work for the last 2 weeks of January 1957. During this period Faloona made suggestions to Cawley, but made no criticism of a severe nature. He did comment that Cawley should use "a few more points of sale material," and agreed with Cawley that "the territory was set up wrong."<sup>4</sup> At the end of the 2 weeks Faloona told Cawley, "Bill, I think everything is going to be all right."<sup>5</sup>

Robert Reese was employed by the Respondent as a salesman from May 1956 until May 1957. He attended the meeting of Local 490 held on February 1, 1957. About 2 weeks after the meeting, on a Friday at about 11:30 a.m., he met Faloona waiting for him at his car when he left a store. The meeting was not prearranged. Faloona suggested that they go to lunch. He told Reese that he was "doing this" on his own time and on Reese's behalf, and that anything that Reese repeated later would be denied. Reese testified that Faloona brought up the subject of unions. Concerning the conversation, Reese testified as follows:

Well first of all, he started out by saying that he knew there was union activity going on and that the company had ways and means of finding out who started it and who had joined, and those who were for the company would be taken care of. And also, he said that the Pittsburgh branch would close down if the union activity started like they did in New York. He didn't mention any dates. . . . He said if the union would start, they would close the Pittsburgh store. It was done in New York which is much bigger an operation than Pittsburgh . . . and I'll add that he said it would affect not only the salesmen, but the people in the office who had been there for many years . . . he said . . . Mr. Millsop received a letter from one of the employees that at first they thought the union was just talk, but this particular salesman was contacted by a union man and he was getting worried about his job. . . . He didn't mention the salesman's name. . . . He wrote the letter to Millsop . . . concerning the Union, and he wanted it stopped for his own protection . . . he [Faloona] said for my own good I should contact someone like Don Travis, to go up and see him and he would straighten me out on the union situation. . . . He's a salesman up in the Butler territory. . . . He [Faloona] said he [Travis] would straighten me up on the union activity. That I should talk to him and see how he's getting along without a union. . . . He said that he reviewed my progress and that I was doing right and my prospects for the future with the company, and he wanted to know whether I was for the union or not, but if I was, to get out for my own good. . . . he told me to think it over and do the right thing. . . . I didn't say too much. I agreed and answered to every-

<sup>2</sup> The record indicates that Travis was one of Respondent's salesmen who was not in favor of a union.

<sup>3</sup> Faloona at first testified when asked if he was at the above meeting, "I believe I was, sir. I'm not sure." Later he testified that he was at the meeting. He further testified that he was the one who at a later date told Cawley that he was on probation.

<sup>4</sup> Cawley testified without contradiction to the effect that they left his house the first morning at about 8 or 8:15 a.m.; that the first four stores they visited, in accordance with his route books, were closed as they did not open until about 9 a.m. or later; and that they changed his normal schedule by going to the other end of his territory and starting there.

<sup>5</sup> Faloona admitted making the above statement. He testified that he told Cawley at this time that he was on probation.

thing he said. . . . I talked to him myself about my own territory . . . driving to the restaurant and eating and then driving back [took] . . . approximately three hours.

Faloona admitted having a conversation at the time and place as testified to by Reese, and that he had told Reese that he would deny anything that Reese repeated. He testified to the effect that he knew that Reese had problems and was worried about his job security; and that that was the reason why he went to see Reese, although not requested to do so by Reese. Concerning the conversation, Faloona was questioned and testified in part as follows:

Q. Will you tell us what was said at that meeting?

A. Mr. Reese was a new man with us at the time. He was quite disturbed about his future with the company. For some reason or other, he felt that he wanted more answers as to the future, and that, I tried to give to him. We discussed certain prospects of business, such as the territory was—the potentials on the territory, the potentials that may be added because of again, stores being built on the outlying sections. For someone that would work it, it would end up as a very productive thing for him.

Generally, our entire line was confined to that. He did bring up the fact that there was someone that said they could get him more security and I made the remark to him that well, I didn't feel that there was any need for any outside help for him to further his future with Sunshine Biscuit Company. Again, we went back into the situations of how he could—well, rather than take my word for it, I suggested that he contact some of our older men, and I don't mean that in terms of age, I mean that in terms of service that had been with the company quite a long time and they could in turn tell them what has happened in their prospective or in their certain locations and how they have advanced with the company over the years. I felt their word would be much better than mine.

\* \* \* \* \*

Q. Mr. Reese testified something about the possibility of the Pittsburgh branch being closed down in the event of it being unionized. What was said about closing any plant?

A. Well, I think the reference to that was something about New York being closed, as I understand, they did have some kind of a flare up up there at sometime or other. I don't know the exact dates, but it was closed. The demands, I guess that were made, after all, they had—the strikers went out, so consequently, the place was closed.

\* \* \* \* \*

Q. (By Mr. Buerger.) Did you tell Mr. Reese that the company closed the plant?

A. I did not.

Q. Or, did you tell Mr. Reese the strikers closed the plant?

A. I told Mr. Reese that they closed the plant.

Q. And, when you used the word they, to whom were you referring?

A. I was referring to the strikers.

Other than the above, Faloona denied all statements attributed to him by Reese. He also denied that he knew of any union activity at the time in question. Faloona testified that: Reese did not mention the closing of the Respondent's New York establishment; he told Reese about it because Reese had said "something about this outside interference"; he told Reese that his job security might be affected if the same thing happened in Pittsburgh; "I said that there would be a good chance [sic] that he wouldn't have any work, because there would be none here to be had. . . . If the Pittsburgh branch closed down"; and with respect to the "outside interference" that he thought was worrying Reese, he did not have "the slightest idea. It might have been family problems, it might have been a lot of things he didn't tell me."

I credit Reese's version of the above conversation, and find that Faloona's interrogation and statements, since they contain threats of reprisal and promises of benefits, are violative of Section 8(a)(1) of the Act.

The conversation between Millsop and Zabel in May or June 1956 has been related and found above. Zabel testified that: After a sales meeting on Thursday night, February 21, 1957, Millsop told him that he wanted to meet him on his territory the next morning; he told Millsop that the only work he performed on

Fridays was to stock shelves with merchandise which he had ordered previously and for that reason the following day would not be a good day for Millsop to observe his sales approach; Millsop replied that he just wanted to talk to him "for a little while"; and Millsop met him on his territory at 10 a.m. on February 22, 1957. Concerning the ensuing conversation, Zabel testified credibly as follows:

Mr. Millsop said, "I understand that five or six men signed cards in the union, and I also understand that you are one who has signed. If you are, I would advise you to get your name off the list immediately. I am only telling you this for the protection of all of us, that the company wouldn't hesitate for a minute to close this plant down if the union, if the salesmen unionize."

He said, "Originally this plant was incorporated—incorporated one hundred salesmen or thereabouts and for this prime purpose it had been broken down into branches in Altoona and Youngstown and at various other points and with only nineteen men here, it wouldn't constitute any great loss in volume of sales if they were forced to close it down." He also stated that a New York bakery, when the salesmen went union there, they closed the bakery for a three year period because of that, and if they would close down metropolitan New York, I could feel quite sure that they would not hesitate to close down a branch with nineteen men it.

\* \* \* \* \*

He also stated that when the election came for the union, the company would see who had signed these cards and after the plant was closed, the men who hadn't signed cards, would be taken care of with jobs in other districts, other branches. Well, I think he said they wouldn't starve is actually—the company would see that the men who were loyal to the company wouldn't starve.

\* \* \* \* \*

I asked him if I was the only salesman that he talked to and he said no, that he had talked to others and he said that a fellow who was one of the top paid salesmen with over twenty years service was quite concerned and had called him in regard to this union activity, said he had gone along with it while it was in the talking stage, but he also felt that he—that his job was in jeopardy, the salesman that he referred to, that his job was in jeopardy due to the place being closed because the men went union and he wanted Millsop to do something about it.

\* \* \* \* \*

He didn't mention Cawley's name. He referred to a fellow, referred to an individual in the conversation as "this fellow."

\* \* \* \* \*

He said, "This fellow thinks he can save his job by organizing a union, but he can't. I've already mailed in bad reports to Philadelphia. I am only awaiting Mr. Inman's approval before firing him."

Millsop did not deny that he met Zabel on the specified date. When questioned in this connection, he testified, "I couldn't say that I wasn't. I probably did, if I was there." He denied the statements attributed to him by Zabel. His denial is not credited. It is found that the above statements of Millsop are violative of Section 8(a)(1) of the Act since they contain threats of reprisal and promise of benefits.

At some time during February 1957, before a sales meeting, Millsop told Cawley that 28 items of stale merchandise had been found in his territory at the Thorofare in Avalon. Cawley answered that he was aware of it as he had made a "pickup slip" on it, but that the number was 18 and not 28.

Cawley was called to Millsop's office on March 1, 1957, and discharged. A Mr. Marsh, Respondent's assistant sales manager for the division with headquarters in Philadelphia, was present. Millsop mentioned a letter from a Mr. Inman and "bad reports over the past eighteen months." He stated, in substance, that the reason for Cawley's discharge was that he had not performed satisfactorily as a salesman.

The Respondent contends that Cawley was discharged because of his poor performance as a salesman. Norman Ort, Thomas Durkin, Millsop, and Faloona testified in support of this contention.

Ort testified credibly, in substance, that: He was employed by the Respondent for "special development, chain store development"; in this job he was not a supervisor; when he visited stores, he noted and reported on the rotation of the Respond-

ent's merchandise; at the Thorofare store at Avalon he found poor rotation on two items, with the codes showing that some of the merchandise was up to 4 months old;<sup>6</sup> at the Sparkle Market in Aliquippa he also found poor rotation on two items, with the codes showing some of the merchandise to be 4 months old;<sup>7</sup> on January 8, 1957, at the Thorofare store in Avalon he had to pull off the shelf "28 graham 1 lb." packages (a different item from the two mentioned above) because their codes showed "April"; the code on the packages did not show the year, but it had to be at least April of 1956;<sup>8</sup> he found poor rotation at the Starr Market in Ambridge but did not make a report on it; on January 8, 1957, he met Cawley at the Thorofare store in Avalon and requested him to make out the pickup slip on the stale merchandise found there; he did not recall Cawley disputing the number of stale items at the time; he had made at times similar reports on other salesmen; and he did not recall ever having found such bad conditions in the territories of other salesmen.

Thomas Durkin, Respondent's warehouse manager, testified credibly that: When salesmen got their orders in late, it caused "a mix up in our delivery schedule"; over a period of 5 years Cawley had sent in orders late about 8 or 10 times; he complained about the late orders to Millsop; he spoke to Cawley about it, at times showing him the envelopes in which the orders were mailed; he had trouble with other salesmen on late orders, but "not as frequently" as with Cawley; on "two or three orders a week" Cawley gave the wrong addresses; Cawley "sometimes" failed to supply the required number of copies of orders; in such cases he had to rewrite the orders; and he also complained to Millsop and Cawley about wrong addresses and copies of orders.

Faloona testified at length concerning the shortcomings of Cawley as a salesman. In addition to the period of 2 weeks in January 1957, it is undisputed that Faloona also accompanied Cawley on his job for 4 days during August 1955. Faloona made reports on both occasions on regular forms provided by the Respondent for the purpose. These reports were received in evidence. The 1955 report shows that: Cawley did not "give close attention to qualifying accounts for discount"; he did not "keep dealer informed on Sunshine advertising"; he did not use any company advertising material and was only rated "fair" in the use of display stands; he did not "properly" service the biscuit department and was "very poor" in the rotation of merchandise; he was rated "fair" in the arrangement of "Sunshine Departments"; he was "poor" in the use of Respondent's selling equipment; and his "attitude toward the Company and his job" was "complacent."<sup>9</sup> Under the space provided for remarks in the report, Faloona noted in part,

Sample case empty of samples except (for three items)—Carried case entire day with no purpose.—Price book outdated.—Attitude toward customer—good—customer reaction favorable but seemed to be at a loss on presentation. . . . Merchandise with codes 7 and 8 months old. . . .

During August 1956, Faloona substituted for Cawley while he was on his vacation. In a written report to Millsop on "old" merchandise, dated August 6, Faloona stated that he found merchandise 1 year old at "Montgomery's—Mt. Nebo," 4 months old at "Repines Mkt.—Ambridge," and three items ranging from 4 months

<sup>6</sup> Ort made a written report of the above to Millsop. The report which was received in evidence is dated January 7, 1957. On the report Ort noted, "one of store personnel stated he would have to give our salesman [Cawley] 'H' on rotation." In his testimony Ort could identify this person only as "an executive in the store." In rebuttal, the General Counsel called as witnesses George Gibson and Leo Sidick, manager and assistant manager, respectively, of the above store. They both testified to the effect that Cawley did a good job in servicing their store; that they received no complaints from customers about stale merchandise; and that they made no complaints concerning Cawley to Ort or to any of Respondent's supervisors.

<sup>7</sup> A report on this store to Millsop also is dated January 7, 1957.

<sup>8</sup> This report of Ort's to Millsop also was received in evidence. It is dated January 8, 1957. Cawley's testimony concerning this stale merchandise has been noted above. Ort's report also notes, "Reset C & L Aliquippa today and found rotation very poor." Ort testified in this connection to the effect that the newer merchandise was in front of the older merchandise. The evidence in the case establishes that it was the duty of Respondent's salesmen to rotate the stock so that the older merchandise was in front.

<sup>9</sup> When questioned on his interpretation of "complacent," Faloona testified, "My definition, I don't know whether it will agree with Mr. Webster's is just a 'I don't care' attitude. In other words, there may be rules and regulations, but I'll do it my way."

to 1 year old at "Sewickly Food." On this same report concerning the Beaver Food Market of Beaver, Faloona notes,

Cawley claims that his territory has been changed, so he cannot get to this store on Monday—consequently if they can't find time to put mdse on shelf our dept remains empty until he shows up on Wed!

In another report to Millsop, dated August 10, 1956, Faloona states,

It seems to me that this territory is being run according to Wm Cawley—no regards as to the policies of Sunshine Biscuit Co.—In most every store once the mdse is delivered, his responsibility ends.—outside of a few chain stores—Biscuit depts are non existent. There is no thought of rotating mdse or grouping of mdse that has been talked of so much. On the entire territory I did *not* find one price card or shelf backer—and very few (and they were run down) displays. In several accounts I mentioned our selling terms—i.e.—discount & advertising allowances in each case they claimed no one had explained anything to them. Last year about this time I was in Giant Eagle at 24th & Duss Ave—Ambridge—That day I had Cawley rearrange the dept—when I was there Wed.—I am sure it has never been dusted or touched since last year.<sup>10</sup> There was no note that we should take care of this acct the wk of July 30th so the orders delivered of 7/30 & 8/6—were in the ware room—the biscuit dept was empty!

Faloona's report on Cawley, dated February 3, 1957, was similar to the one he had submitted in 1955. He again noted "complacent" in answer to the question on Cawley's attitude "toward the Company and his job." He also made the following remarks in this report:

Even though the territory shows an increase in total sales. This I believe is the normal increase in the area—As you will notice the answers on the opposite side of this report are mostly negative. As an illustration when I started with this salesman on the ten day report this territory was showing a \$900.00 decrease—at the end of two weeks we had not only overcome this deficit we had an increase of \$1100.00 (Jan 56 vs Jan 55). This was accomplished by following the prescribed methods as outlined in the Sales Manual. I pointed out to the salesman the necessity of selling the entire line, arranging the departments—the use of our selling terms—use of our advertising and store display material, the allocation of time to the various accounts, sales presentation of each of the items. I also informed the salesman that all operations would be carried out in their entirety. After discussing this salesman with Mr. Millsop I informed him that the many infractions found on the territory. He had placed himself on probation, if he would not or could not conform to the company policies—he then would have to secure employment elsewhere.

In sum, Faloona testified to the effect that Cawley's work as a salesman was "very unsatisfactory," and that he was "the worst" of those employed by the Respondent in the Pittsburgh area.

Millsop testified, in substance, that he made the decision to discharge Cawley; that failure to rotate stock and to improve sales entered into his decision; and that he had reports and complaints from Faloona, Ort, and Durkin. He also testified in this connection,

Well, I felt we would never be able to get Mr. Cawley to produce a day's work on his own. I felt that we were going to have to have somebody go with him very frequently to keep his sales up. . . . I decided if I was going to have to send Mr. Faloona with Mr. Cawley to do his work, we didn't need Mr. Cawley.

Millsop testified without contradiction that he had discharged John Benyak, a salesman on whom Faloona also had made a report as "complacent."<sup>11</sup>

The Respondent's records disclose that Cawley, out of the 19 salesmen, was 14 from the top in gross sales for the first quarter of 1955; 12 for the second quarter; 11 for the third quarter; 13 for the fourth quarter; 13 for the first quarter of 1956; 10 for the second quarter; 13 for the third quarter; 14 for the fourth quarter; and 17 for the first 10 days of 1957.

<sup>10</sup> The undisputed evidence discloses that it was the duty of salesmen to dust and otherwise keep neat their displays of merchandise.

<sup>11</sup> The above report of Faloona was received in evidence.

It was stipulated by the parties that Cawley's earnings were as follows:

1953-----	\$3,999.35
1954-----	4,708.42
1955-----	4,294.80
1956-----	4,850.52
January and February 1957-----	854.93

The record conclusively shows that, except in the matter of sales, Cawley was not a satisfactory salesman, according to the Respondent's standards. He did not follow the rules laid down in the sales manual in a number of respects. For example, he at times failed to rotate merchandise, he did not use the Respondent's samples and advertising material, and he failed to inform customers concerning the Respondent's discount policy. However, insofar as sales were concerned, it appears that he compared favorably with the other salesmen, contrary to the Respondent's contention. As shown above, he ranged from 10th to 14th in sales during 1955 and 1956. It is true that his sales dropped considerably during the first 10 days of 1957; but his earnings for January and February 1957 show that his sales for these months must have been as good, if not better, than for the same 2 months in 1956.

Faloona indulged in generalizations, such as Cawley was the "worst" salesman in the Respondent's employ. This apparently referred to Cawley's shortcomings in following the sales manual, since Faloona admitted that Cawley's sales were increasing, and since the record shows that the sales of other salesmen were not as good as those of Cawley. However, Faloona and other witnesses for the Respondent admitted that other salesmen at times failed to rotate stock or were otherwise remiss in their duties. They testified to the effect that the other salesmen were not nearly so derelict as Cawley in this respect; but the Respondent did not adduce in evidence any records to support this testimony.

As against this defense of discharge for cause, the record clearly establishes the antiunion animus of the Respondent, as disclosed by the statements of Millsop and Faloona, found above. In my opinion, the General Counsel made out a *prima facie* case, and the Respondent's defense has failed to overcome it.

If the Respondent believed that Cawley was such an unsatisfactory salesman, why did it not discharge him when Faloona submitted his adverse reports on him in August 1955 and August 1956? Why did it wait until it appeared that Cawley might be successful in organizing the salesmen? The 1957 report appears to be no worse than the 1955 report. Also, it appears that nothing was remiss, insofar as Cawley's work was concerned, from the date of Faloona's final report until his discharge on March 1. In fact, the undisputed evidence shows that his work improved a great deal, at least insofar as sales were concerned. Under the circumstances, I can only conclude that the Respondent was not too concerned about Cawley's omissions, as long as his sales were up; and that his failure to follow the Respondent's sales manual in all respects, as noted above, was merely a pretext for his discharge. For the above reasons I find that the Respondent discharged Cawley on March 1, 1957, because of his membership in and activities on behalf of Local 490.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent, set forth in section III, above, occurring in connection with the operations of the Respondent set forth 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 of commerce.

#### V. THE REMEDY

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

It has been found that on March 1, 1957, the Respondent discriminated against William P. Cawley. Therefore, it is recommended that the Respondent offer William P. Cawley immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges, and that the Respondent make whole said employee for any loss of pay he may have suffered by reason of Respondent's discrimination by payment of a sum of money

equal to that which he would have earned as wages from the date of the discrimination, March 1, 1957, to the date of reinstatement, less his net earnings during such period, the loss of pay to be computed on a quarterly basis in accordance with the formula adopted by the Board in *F. W. Woolworth*, 90 NLRB 289.

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. Amalgamated Meat Cutters and Butcher Workmen of North America, Salesmen and Office Workers' Union Local 490, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. By discriminating against William P. Cawley the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged 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.]

#### SUPPLEMENTAL INTERMEDIATE REPORT

##### STATEMENT OF THE CASE

On July 25, 1958, the duly designated Trial Examiner issued his Intermediate Report in the above-entitled proceeding. On October 10, 1958, the Board issued an order directing, in part, that the record be reopened and that a further hearing be held before the same Trial Examiner "to permit the further examining of witnesses after the Respondent has been furnished with copies of [pretrial written statements]."

Pursuant to notice, a hearing was held before the Trial Examiner at Pittsburgh, Pennsylvania, on January 26, 1959. The General Counsel and the Respondent filed briefs with the Trial Examiner after the conclusion of the hearing.

Upon the record as a whole, and from his observation of the witnesses, the Trial Examiner makes the following:

##### FINDINGS OF FACT

In accordance with the Board's order and upon request of the Respondent, on October 21, 1958, the General Counsel produced for examination by the Respondent the pretrial statements or affidavits of William Cawley, William Zabel, and Robert Reese. Cawley, Zabel, and Reese testified at the reopened hearing herein.

The further cross-examination of Cawley, Zabel, and Reese did not disclose any material or substantive inconsistencies or contradictions in their testimony as a whole, or as between their testimony and their pretrial statements. Two pretrial statements of Reese were received in evidence. These statements are dated March 11, 1957, and October 23, 1957. In its brief the Respondent contends that Reese's statements conflict with his testimony at the original hearing in that, "*There is not a word about 'closing the plant' in either affidavit!!!*" This is not the fact. In the second paragraph of his pretrial statement dated March 11, 1957, Reese states, "In the restaurant, [Faloona] started the conversation by saying: 'Bob, I'm telling you this on my own time,' and then he began talking about the union, stating that the plant would close if there were any signs of a salesmen's union."<sup>1</sup> This statement does not conflict with Reese's original testimony. In his testimony concerning the conversation Reese used different language and went into more particulars, but the substance is the same.

Accordingly, I find no reason for changing any of the findings of fact, conclusions of law, and recommendations, as set forth in my Intermediate Report dated July 25, 1958.

<sup>1</sup>The conversation referred to in the above statement has been related and found in my Intermediate Report.