

union, and was not going to have a union," did not violate the Act because it contained no threat of reprisal or force or promise of benefit.⁸

Upon a consideration of all the authorities, and the undisputed circumstances surrounding the utterance of the statement here in question, I feel constrained to find that the statement is the expression of a view, argument, or opinion, and is protected by Section 8(c) of the Act. That section defines the criterion by which such statements are to be measured—the statement is to be protected unless it contains a threat of reprisal or force or a promise of benefit. Measured by that test the statement falls short of becoming an unfair labor practice in violation of Section 8(a)(1). Accordingly, I will recommend that the complaint be dismissed.

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. The Union is a labor organization within the meaning of the Act.
2. The Company is engaged in commerce within the meaning of the Act.
3. The Company has not engaged in the unfair labor practice alleged in the complaint.

[Recommendations omitted from publication.]

⁸In similar vein, see *R. & J. Underwear Co., Inc.*, 101 NLRB 299; *Senorta Hosiery Mills, Inc.*, 115 NLRB 1304, 1315; *Sunset Lumber Products*, 113 NLRB 1172.

Memphis Can Company and Local 250, American Federation of Grain Millers, AFL-CIO. Case No. 4-CA-1972. April 29, 1960

DECISION AND ORDER

On January 5, 1960, Trial Examiner Thomas A. Ricci issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the charging party filed exceptions to the Intermediate Report and a supporting 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 [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 and the entire record in this case, including the exceptions and the brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

[The Board dismissed the complaint.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before the duly designated Trial Examiner in Allentown, Pennsylvania, on November 23 and 24, 1959, on 127 NLRB No. 64.

complaint of the General Counsel and answer of Memphis Can Company, herein called the Company and the Respondent. The main issue litigated was whether the Respondent had violated Section 8(a)(3) and (1) of the Act. The General Counsel and the Respondent filed briefs after the close of the hearing.

Upon the entire record, and from my observations of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

Memphis Can Company is a corporation duly organized under the laws of the State of Tennessee, and is engaged in the manufacture and sale of containers. Its main office and plant are located in Memphis, Tennessee. The Respondent also operates a plant at East Greenville, Pennsylvania, which is the only plant involved in this proceeding. Annually, the Respondent purchases more than \$50,000 worth of materials which are shipped from points outside the State of Pennsylvania to its East Greenville plant; annually it ships across State lines products valued in excess of \$50,000. I find that the Respondent is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to exercise jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local 250, American Federation of Grain Millers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The principal question in this case is whether the Respondent discharged Lester Yoder because of his activities on behalf of Local 250, the Charging Union, and in order to discourage the adherence of its employees generally to that labor organization. He was the union president, and was released during collective-bargaining negotiations. The complaint also alleges that a management representative made unlawfully coercive statements to the employees intended to bring about their disaffiliation from Local 250. The Respondent denies the unlawful statements and asserts Yoder was discharged for just cause.

There is no significant disagreement concerning the facts immediately giving rise to Yoder's discharge. He was the president of Local 250, and at 2 p.m. on July 8, 1959, attended a bargaining conference in the office of the general manager, John Erdie. With him were Albert Gerring, the Union's recording secretary, and Norman Crane, International vice president of the Grain Millers. Erdie, on behalf of the Company, was assisted by Kenneth Weiland, the plant superintendent or general foreman. From 2 to 3:30 p.m. proposals and counterproposals were discussed. At 3:30 the end-of-shift buzzer rang, and Erdie told Gerring and Yoder, who had left their work to participate in the meeting, to punch their timecards. A minor variance in the testimony of the witnesses—whether Yoder had already started to leave when Erdie asked the employees to punch out, or whether they arose to leave after he told them to do so—is immaterial; Yoder stated directly he heard Erdie's order.

Yoder and Gerring left the room and returned in a few minutes; Gerring did punch out at 3:31; Yoder did not go to the timeclock. The meeting continued only a minute or two longer. Crane said he had to leave to attend to other matters and a new conference was scheduled for the next day.

In the hall, as they were leaving, Crane asked Yoder and Gerring to accompany him into town because he needed their signatures, as officers of Local 250, to complete certain documents necessary to place the Union in compliance with the then filing requirements of the statute. Yoder protested to Crane that his seniority rights among the employees entitled him, instead of another operator then assigned to his machine, to do the overtime work that was scheduled for that very moment and was just starting. Crane talked him out of the idea, and assured Yoder the Union would compensate him for the worktime lost. The three then left for town.

At 5 o'clock Crane drove Yoder back to the plant, where his car was parked. Yoder entered the plant, punched his timecard "out 5:31," and, with his rider, a Mr. Peterson, went home. Shortly thereafter one of the foremen noticed that the card, as punched, credited Yoder with time not worked, and made a pencil correction back to 3:30 p.m.

Yoder saw the change on his card the next morning and called it to Foreman Weiland's attention. The latter told him to see Erdie "if you want to do something about it." Yoder did nothing. During the day Weiland brought the matter to Erdie's attention, who asked the office girl to prepare Yoder's final paycheck and

separation papers. The scheduled bargaining conference started at 3:30, with the same persons present. Forthwith Erdie payed off Yoder and said he was discharged for "stealing" from the Company. Crane asked Erdie to forget about it, that "the boy made a mistake." Yoder raised no protest whatever, and the conference ended abruptly. Although Yoder participated in a later contract negotiation session, he never returned to work.

The basic theory of the General Counsel is that Yoder was not discharged for having punched 2 extra hours on his timecard, but rather that the Respondent seized upon Yoder's misconduct as a pretext to achieve a longstanding objective to get rid of him as a blow to Local 250's prestige in the plant. In support of this contention, the General Counsel introduced evidence intended to prove that the Company regularly paid employees for time spent handling union matters with company representatives, and that it was opposed to Local 250 as the bargaining agent in its plant.

On the first point, it does appear that plant practice was for employees representing the Union to be paid for regular working time devoted instead to grievance meetings with management and bargaining negotiations when new contract matters were at hand. Whether the Company also, in the past, has paid such employees for periods when they might have done overtime work had they not been involved in such union-management conferences, is not affirmatively shown on the record. In any event, whatever the practice had been in these two situations, there is no indication the Respondent ever paid any employee for time spent away from the plant on straight union business—such as its compliance with the Taft-Hartley Act—in which the Respondent had no part. Yoder having been so occupied during the 2 hours in question on July 8, I consider the evidence on this point totally irrelevant to the issue of this case.

As to the Respondent's dealings with Local 250 itself during these events, again, there is no factual issue. On June 17, 1959, company representatives met with union officials because the then current contract was due to expire on June 30. It was orally agreed to extend that contract to July 15. More comprehensive negotiations started at the July 8 meeting, when offers and counteroffers were discussed. The meeting scheduled for July 9 to continue negotiations was short-lived because of Yoder's discharge there. At that point the Respondent questioned Yoder's right to be present because he was no longer an employee of the Company, and Crane, for the Union, insisted that as an officer of Local 250, Yoder was entitled to participate. The parties met again the next day, July 10, and Yoder did, as before, form part of the union negotiating team. Apparently negotiations continued thereafter, and, on August 20, the parties concluded a new contract, by its terms retroactive to August 1.

As proof that, despite its unassailed and seeming proper dealings with Local 250, the Respondent in reality was motivated by a strong animus against the Union, the General Counsel relies primarily upon testimony of Yoder and two other employees—Jones and La Rocca—that in a speech to the assembled employees on July 2, 1959, Plant Manager Erdie said he would not deal with Local 250 and attempted to persuade the employees to abandon it and either choose another labor organization or forgo any union. Erdie, corroborated by employee Getz, denied such statements attributed to him.

On July 2, Erdie called a meeting of all employees for 3:30 p.m. and he spoke for over an hour. Certain facts related to this incident, and some of the things he said, are clear on the record, either because the testimony was uncontradicted, or because the opposing witnesses agreed. For a number of years the Respondent's plant was located in a town called Downington, a distance away from East Greenville; it was moved to East Greenville in about September 1958. In June there were about 60 employees, of whom 20 had transferred from Downington; the rest were local residents who had not previously worked for the Company. Local 250 had been certified by the Board as bargaining agent in 1956 when the plant was at Downington.

Sometime late in June about a dozen employees discussed ways of changing their union, complaining that the old employees "had all the say-so in the Union," and enjoyed seniority privileges. They asked Getz, an employee, to speak to the plant manager about it. Getz asked Erdie about the possibility of changing unions, and Erdie replied that if the employees really wished to make a change he would help in any way he could. Erdie then testified he telephoned to the nearest Regional Office of the National Labor Relations Board and spoke to a Mr. Chester Montgomery, an attorney or field examiner. Montgomery told him that if a majority of the employees so desired, they could "decertify" Local 250, and explained some of the mechanics of decertification proceedings. A few days later, on July

2, Erdie assembled the employees in order, as he testified, to explain to them what he had learned. He said a number of things to them. It is undisputed that his statements included the following: the employees had a constitutional right to have a union of their choice, or no union at all; he regretted having brought Local 250 from Downington and imposing it upon the new employees; the employees had a right to change unions or decertify Local 250; if those who so desired would place their names on paper, he would take it from them and help them achieve their desire. He also said they could choose the "Steelworkers Union," or the "Paper-makers Union," or a "shop union."

Concededly Erdie also berated the employees generally for having engaged in a short strike a week or 10 days earlier; he singled out several employees—including Yoder and La Rocca—as the ringleaders who had instigated it. Further, on Erdie's own admission at the hearing, he expressed his dislike of Yoder. Election of officers in Local 250 was about to take place. Erdie said he would "hate to negotiate with him [Yoder] further . . . because of his tendencies," and voiced the hope the employees would choose another president.¹

A final subject in Erdie's talk on which there is no disagreement is that he discussed certain production problems, which provoked a few questions and answers.

Beyond all the foregoing, Jones, an employee, testified Erdie also said, "That he refused to have any more dealings with The American Federation of Grain Millers" and "Just because you as an officer of the Union you can think you're damn smart because you as an officer of the Union can take \$3 a month union dues that didn't make your job safe." Yoder quoted Erdie as having said, "He didn't want to go along with the Grain Millers." According to La Rocca, Erdie said, "He definitely would not go along with the Grain Millers." Erdie denied having said he would not deal with the Grain Millers, and Getz, an employee, expressly corroborated him. As to the testimony about union officers being insecure in their jobs, Erdie's testimony was that after calling down the ringleaders of the strike, some of them officers of Local 250, he said that if there should ever be another wildcat strike he would not take back the offenders.

¹ Erdie explained that by "tendencies" he had in mind Yoder's activities in "creating" and "soliciting" grievances, and his "greed of trying to make as much money as he could." Asked to give examples of Yoder's poor behavior, Erdie testified as follows:

A. Well, his tendencies were always creating grievances, for one thing, soliciting it. Secondly, his greed of trying to make as much money as he could, whether he'd done it legally or honestly, or whatever way.

A few incidents that I might mention of his very—the financial secretary has asked for a leave of absence because her daughter was dying, and I had given it to her, in fact, she called in and wanted an extension of time, and I even accepted the phone charge. Then she came back and cried to me that Mr. Yoder even tried to get the \$5 that she receives from the union in a month for doing whatever clerical work she was to do. And that is one of them.

The other, he went and solicited . . . and revived and solicited a year-old, and sort of got the people to make out a grievance that worked in Downington that they wanted to collect a certain bonus money. And the man later didn't accept it, although I was going to grant it because he realized and he didn't want to do it in the first place, but he was told by Yoder that, "You've got nothing to lose, leave it to me and just sign this, and we'll get it. So, if we don't get it, why, you've got nothing to lose." Now, what other propositions that he made, I don't know.

And another grievance, he's always caused hardship in the operation because on a 10-minute break that I give them he sort of got the people not to work. Sometime we have to have them work on the 10-minute break. Because he was two-tenths of a cent short, that was his way of seeking pay, that if he worked he'd only get paid, he'd be cheated two-tenths of a cent.

Lucky enough that I had been—that my attention was drawn to that because I found out instead of cheating him I was paying him two times and a half.

But it was his—always his intentions of causing some sort of trouble, of creating some sort of disturbance in the plant. And that is the reason I had called Mr. Crane's attention to his behavior many, many times, but he seemed to uphold him, no matter what he did, and never done anything about it.

And I certainly made the remark that I'd hate to negotiate a new contract, for them to elect a new president, because I heard they were going to, anyway. In fact, Mr. Crane himself said that he was for it, a new president in Yoder's place. . . .

. . . I was just—I couldn't see where I could put up with a lot of that unreasonable grievances that I have had to entertain from time to time.

Whatever Erdie may have said about his preference for another union or no union at all, his personal dislike of Yoder, and his hope he would not have to deal with him in the future, I credit his denial that he announced he would not honor his statutory obligation to recognize and bargain with Local 250 so long as the employees so desired. The testimony of Jones, Yoder, and La Rocca on this point was not convincing. On July 20, shortly after the event, Jones signed an affidavit devoted entirely to Erdie's statements of July 2. It details Erdie's reference to employee complaints about a union having been brought from another location, his apologies for the fact, his criticism of individual employees and the union officers for misconduct, and for presuming superior intelligence. The affidavit contains no mention of any intentions not to deal with the Grain Millers. And it was given at a meeting in his house attended by Bernice Cole and Yoder, officers of Local 250, Lewis, a Labor Board investigator, and Crane, the Grain Miller International representative. The conference was held for the express purpose of nailing down Erdie's speech. The original charge in this proceeding, filed 7 days before July 20, included a refusal-to-bargain allegation, and Lewis presumably was an experienced investigator. Crane has been a professional union agent for 25 years. I cannot believe that if Jones had heard Erdie voice anything like the statements in issue, these men would not have learned the fact from him. And the fact that on November 17, 6 days before the hearing in this proceeding, Jones gave a much broader affidavit, hardly serves to make his testimony credible now.

On direct examination Yoder was definite that Erdie said he did not want "to go along" with Local 250. On cross-examination, however, he was very evasive and vague, and at times, when asked to recall Erdie's exact words, sat mute for extended periods. Here he qualified his testimony with such phrases as "I don't know," "he [Erdie] implied," "he suggested that we get rid of the Grain Millers," and "I guess so." La Rocca testified he became much disturbed during the July 2 meeting and after being accused personally of wrongdoing, that he became so upset "that I remember that one thing. I just didn't pay attention to anything much more than that," and that "I don't remember too much because my mind going blank." When I add to this type of testimony the fact that no officer of the Union spoke a word in defense of Local 250, or in protest against the alleged rejection of their union by Erdie, and the further fact that the Respondent's dealings with the Union, both before and after the July 2 meeting, show nothing but proper recognition at any time and complete negotiation and execution of a new contract nowhere criticized in the charge or complaint, I cannot credit these witnesses.

There are other small items of testimony on which the General Counsel also rests for his argument that the discharge of Yoder ought not be viewed as what on the face of things it clearly appears to be. Thus, Crane said that Erdie told him, before the bargaining session of July 8, that "he [Erdie] did not believe that he could meet . . . because the employees didn't want The American Federation of Grain Millers to represent them," and that he would do so "subject to his right to discontinue at any point that a question of representation was raised." Of course Erdie did meet with Local 250 that very day, and later. After discharging Yoder, Erdie thought he should not sit in bargaining; again, however, he did not refuse to negotiate with Yoder present.

Erdie did not like Yoder; he called him a troublemaker and an agitator. At the July 2 meeting he told all the union officers that their status was no guarantee of permanent employment. He was talking about a strike a week before; he called it a "wildcat" strike and a form of misbehavior. The employees did not protest his characterization of their conduct then, and they did not contend at the hearing that Erdie had misjudged them. On this record, therefore, it is of little significance to the issue of this case that in the bargaining negotiations the Respondent proposed a contract provision that union officers should "not be accorded special privileges over the rest of the union members," and that officers or members "with radical or troublemaking tendencies, or unduly enticing unrest among the employees," could be discharged.

As I view the case as a whole, there are two facts which, in a measure, would lend support to an inference of antiunion motivation in the discharge of Yoder. Erdie disliked him and, among his reasons, was the persistent and perhaps "radical" manner in which Yoder presented and fought for grievances in his capacity as a union officer. A discharge for such reasons, if such it was, is an unlawful discrimination under the statute.²

Further, it is quite clear that Erdie was not only agreeable to the incipient move toward unseating Local 250 in the plant, but even offered to assist the employees to

² *Chemical Construction Corporation*, 125 NLRB 593.

decertify it if they so desired. This encouraging remark to them on this subject at the July 2 meeting may very well have been in itself an act of illegal coercion within the meaning of Section 8(a)(1). Where questions of motivation are raised, however, the total record must be appraised, and not only selected portions. Yoder deserved to be discharged. In the teeth of the superintendent's reminder that he should punch his timecard, he tried to slip through 2 hours' extra pay. Erdie told him he was being released for that reason, and Yoder made no protest then. Of equal significance: whatever its opinion of Local 250, the Respondent always dealt with it, and does not now stand accused of ever attempting to avoid its legal obligation to recognize and bargain with it. As always, the burden to prove illegal purpose in the discharge rests upon the General Counsel. Upon consideration of all the foregoing, and the entire record, I conclude that the evidence does not support the essential allegation that Yoder was discharged because he was an officer of Local 250, or because of his union activities.

The only conduct by the superintendent which may have overstepped the proscription of the statute, and trenched upon the employees' freedom to engage in concerted activity without interference by the employer, was his offer to assist them in carrying out any desire they might have had to decertify Local 250 or to select another union, and his virtual invitation at the July 2 meeting that they place in his custody any documents on which those who so desired might place their names. As the General Counsel correctly points out in his brief, at best it was 8 or 10 employees who turned to Erdie, through their spokesman Getz, for assistance in changing union or for information as to how to proceed. It was not necessary for Erdie to gather all the employees to explain decertification proceedings if his only though was to reply to the few employees who had evinced an interest. However, unlike those cases cited by the General Counsel in support of his request for a specific finding that Erdie committed an unfair labor practice in so offering to assist the employees to get rid of the Union, this would be the total extent of the improper conduct shown in the entire record.³ At least partial justification for Erdie's remarks to the employees is found in the fact that it was the employees, and not he, who initiated the entire subject, that Erdie was passing on the information given him by an employee of the Labor Board, and that the procedure he outlined to the employees in fact comported with their procedural rights in such matters. Moreover, I deemed it significant here that this Respondent at all time did bargain with Local 250, that their subsequent negotiations led to a signed agreement between them, and that peaceful industrial relations appear to prevail in the plant at the present time. Nothing ever came of Erdie's suggestion that the employees put any names on paper or take any steps to change unions. Accordingly, even assuming that Erdie exceeded his statutory privilege to express an opinion, or even to voice a preference among unions, I believe no useful purpose would be served by making an unfair labor practice finding upon this limited and isolated ground. Accordingly, I will instead recommend dismissal of the complaint in its entirety.

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. Memphis Can Company, Allentown, Pennsylvania, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 250, American Federation of Grain Millers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The allegations of the complaint that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act have not been sustained.

[Recommendations omitted from publication.]

³ Compare, *Watson Bros. Transportation Company, Inc.*, 120 NLRB 146, where the company also threatened employees with economic reprisals if they did not disaffiliate from the union it was attempting to keep out of the plant; *Automotive Supply Co., Inc.*, 119 NLRB 1074, where, in addition to advising employees to form an inside or "company" union, the company also unlawfully discharged a prouion employee, unlawfully refused to bargain with the union which the employees desired, and committed other unfair labor practices; and *Poultry Enterprises, Inc.*, 106 NLRB 100, where widespread solicitation of signatures to an antiunion petition was found unlawful shortly after the same company had been found guilty, in an earlier proceeding (102 NLRB 211), of refusing to bargain with that union, threatening to close the plant, and otherwise interfering with its employees' rights to self-organization.