

is required to receive authorization from Richmond before he can purchase such rock from outside sources. Though the local managers of CSP and the mining division have autonomy in execution of labor relations policies, overall policy, including specifically negotiating policies, is formulated in Richmond. And though the Employer has discontinued the practice of "rolling," whereby employees in one operation could bump employees with less seniority in another operation in times of layoff, it continues to post job vacancies and to permit bidding in on jobs by employees in either operation. This is true even with respect to the "operator" classifications of CSP which the Employer contends require completely different skills than are required of jobs in the mining division. Such positions are filled either through the bidding in process or by new employees. The Employer has no special requirements for filling such positions, and its witnesses testified that it takes approximately 6 months to train an employee without experience for such position. The percentage of such positions is in any event small, and the great majority of positions in either division require skills which exist among employees of the other division. Moreover, vacation and insurance benefits continue to be computed on the basis of seniority in either or both divisions.

In the light of the foregoing, we conclude that the administrative changes made in the Employer's operations have not so changed working relationships or functions of employees so as to preclude finding the unit requested by the competing labor organizations to be appropriate.

Accordingly, we find that a unit of the following employees is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees of the Employer at its concentrated superphosphate plant and mining division in Nichols, Homeland, and Clear Springs, Florida, excluding office clerical employees, professional and administrative employees, chemists, engineers, department heads, guards, and supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.]

Rickel Bros., Inc. and Retail Clerks Union, Local 34, Retail Clerks' International Association, AFL-CIO. *Case No. 22-CA-485. August 5, 1960*

DECISION AND ORDER

On April 4, 1960, Trial Examiner Paul Bisgyer issued his Intermediate Report in the above-entitled proceeding, finding that the 128 NLRB No. 58.

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.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations 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 made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations² of the Trial Examiner.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Rickel Bros., Inc., Union, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Retail Clerks Union, Local 34, Retail Clerks' International Association, AFL-CIO, or in any other labor organization, by discharging, refusing to reinstate, or in any like or related manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and 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, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

¹The Respondent's request for oral argument is hereby denied as, in our opinion, the record, exceptions, and brief adequately present the positions of the parties

²The Trial Examiner recommended that a broad cease-and-desist order run against Respondent, and that Respondent post copies of the notice herein at Respondent's stores located in Succasunna, Union, and Paramus, New Jersey. The Respondent has excepted thereto. In view of the fact that Respondent's discriminatory activity was directed solely toward employee Strafford Nicolas and occurred solely at the Succasunna store, we find merit in Respondent's exceptions in this regard and shall accordingly limit the scope of the Order herein.

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

(a) Offer Strafford Nicolas immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earning 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 amounts of backpay due and the right to reinstatement under the terms of this Order.

(c) Post at its store in Succasunna, New Jersey, copies of the notice attached hereto marked "Appendix."³ Copies of said notice, to be furnished by the Regional Director for the Twenty-second Region, shall, after being signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notice is not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges that the Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge or other reprisals because of their union membership or activities.

³In 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, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in Retail Clerks Union, Local 34, Retail Clerks' International Association, AFL-CIO, or any other labor organization, by discharging or refusing to reinstate any of our employees, or in any like or related manner discriminating in regard to their hire or tenure of employment, or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in 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, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer Strafford Nicolas immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered as a result of the discrimination against him.

All our employees are free to become, remain, or refrain from becoming or remaining members of Retail Clerks Union, Local 34, Retail Clerks' International Association, AFL-CIO, or any other labor organization, 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, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

RICKEL BROS., 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 the above parties represented, was heard before the duly designated Trial Examiner in Newark, New Jersey, on February 8 and 9, 1960, on complaint of the General Counsel and answer of Rickel Bros., Inc., herein called the Respondent. The issues litigated were whether the Respondent, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, discriminatorily discharged an employee, Strafford Nicolas, because of his union activity and whether the Respondent engaged in other conduct in violation of Section 8(a)(1) of the Act.¹ At the close of the hearing, the Respondent moved to dismiss the complaint. Ruling

¹ In its answer, the Respondent also alleged as an affirmative defense that Retail Clerks Union, Local 34, filed the charges herein only "unfairly to influence" the employees to support it in the representation proceeding then pending before the Board. The Respondent's brief to the Trial Examiner is silent with respect to this defense. Obviously, the Union's alleged reason for filing the charges cannot affect the merits of the alleged discriminatory discharge.

on this motion was reserved and is now disposed of in accordance with the findings and conclusions made below. Briefs were received from the General Counsel and the Respondent which have been carefully considered.

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a New Jersey corporation, is engaged in the business of selling at retail plumbing, electrical, painting, carpentry, and other related supplies and tools for "do-it-yourself" home maintenance repairs and construction. It operates a retail store in each of three cities in New Jersey—Union, Paramus, and Succasunna. The events herein involved occurred at the Succasunna store. During the past year, the Respondent purchased goods for its three stores which were shipped directly from outside the State of New Jersey valued in excess of \$800,000. During the same period, its gross volume of business at these stores exceeded \$2,000,000.

Accordingly, I find that the Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and I find, that Retail Clerks Union, Local 34, Retail Clerks' International Association, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Discrimination

This case presents the familiar factual question of whether an employer discharged a union adherent because of his union activities, as the General Counsel alleges, or for cause, as the employer contends. Since it is a rare case—which this is not—where direct evidence of discriminatory motivation is available, determination of this question must rest upon the facts leading to and the circumstances surrounding the discharge.²

1. The events

In July 1959, the Union began to organize the Respondent's employees at its three stores.³ At the Succasunna store, the Union succeeded in enlisting the active support and assistance of employee Strafford Nicolas⁴ in soliciting membership from the employees there employed.

On August 21, the day before Nicolas' discharge, Nicolas discussed the Union with Frieda Moeck, a cashier in the Succasunna store, and asked her to join, as he had been doing with respect to other employees. Receiving a negative reply, Nicolas told her that he supposed that she just wanted "to get in on the gravy end of it," apparently meaning thereby that she probably desired the benefits of unionization without joining. Moeck testified that, after thinking the matter over for a short while, she informed Assistant Store Manager Joseph Fleischman, concededly a supervisor, that Nicolas had solicited her membership in the Union and requested Fleischman's advice as to whether or not to join. Moeck further testified that Fleischman told her that she had to make her own decision. Thereafter, Moeck joined the Union.

Fleischman's testimony varied from Moeck's in that he testified that Moeck had told him that Nicolas and Edward Randolph, another store salesman who was not discharged, had solicited her. However, in two pretrial affidavits given to a Board agent, dated September 16 and October 8, 1959, Fleischman stated that Moeck had informed him that an employee who was not named had solicited her to join the Union and in the latter affidavit, Fleischman, in addition, specifically stated that Moeck did not mention Nicolas' name. In view of the inconsistency between Fleischman's testimony and his statements in the pretrial affidavits, I do not credit his testimony, and find, as Moeck, who impressed me as a thoroughly credible witness, testified, that she did not tell Fleischman that Randolph had also solicited her.

² *NLRB v Southern Desk Company*, 246 F. 2d 53, 54 (CA 4).

³ There is also evidence that a local of the Teamsters Union was similarly engaged in organizational activity at the same time.

⁴ At different times during the hearing, Strafford Nicolas was erroneously referred to as Mr. Strafford.

Fleischman further testified that, prompted by his conversation with Moeck, he immediately summoned to his office "each and every employee in the store, or most of all of them,"⁵ individually and "told them that under no consideration [sic] can anyone direct another to join any organization under coercion or under threat that they will be penalized in any respect. As far as each and every one of you is concerned . . . you will have to use your own free will." In these conversations, Fleischman also testified that he told the employees that anyone who threatened another employee or caused him to join a union against his will would be brought up on charges by the National Labor Relations Board. He, however, denied threatening employees that they would be discharged for such conduct. Employees Edward Randolph and Bruno Bolognini testified concerning Fleischman's remarks about coercive solicitation. However, contrary to Fleischman's testimony, Randolph also testified that Fleischman warned him that the offending employee would be discharged, and Bolognini testified that Fleischman told him that if the main office learned about the coercion, there would be "serious complications or repercussions."⁶

No evidence was adduced at the hearing that any employee had actually engaged in coercive conduct. The only testimony relating to complaints about such coercion was that given by Assistant Manager Fleischman to the effect that Moeck informed him when she sought his advice about joining the Union that Nicolas and Randolph told her that if she did not join then and the Union came in she would be required to pay an exorbitant initiation fee later. Moeck, however, not only denied, as indicated above, that Randolph had solicited her, but also expressly denied that Nicolas had made such a statement to her. Although on cross-examination Moeck also testified that she could not recall telling Fleischman that Nicolas had warned her about a higher initiation fee, I am persuaded from her entire testimony and the fact that she apparently had no reason falsely to accuse Nicolas that Moeck did not inform Fleischman that Nicolas had threatened her with payment of an exorbitant initiation fee. I therefore do not credit Fleischman's contrary testimony. Moreover, in view of Fleischman's prior inconsistent statements and unreliable testimony, I find, as employees Randolph and Bolognini testified, that Fleischman threatened to discharge employees or subject them to other discipline for coercive solicitation.

On August 22, the day following Fleischman's conversations with Moeck and other employees, Store Manager Paul Syby discharged Nicolas under the circumstances related below. The Respondent contends that it did so because of an accumulation of errors and other shortcomings on Nicolas' part which came to a head when he made a serious error in connection with the sale of a water pump to a Mr. Genaro on August 21.

2. Nicolas' employment and discharge

The Respondent hired Nicolas as a salesman about December 1958 at its Union store with the intention of transferring him to its Succasunna store which was scheduled to be opened shortly thereafter. Nicolas had some 30 years' experience in the plumbing, heating, pump, sheet metal, and related lines, during which time he had been in business for himself. In fact, Manager Paul Syby acknowledged that he himself hired Nicolas because of this background which he regarded as being extremely valuable in Respondent's operation which catered to a "do-it-yourself" clientele. As contemplated, Nicolas was transferred to the Succasunna store when it opened and, until his discharge, worked in the plumbing and heating department where he waited on customers, laid out and estimated jobs for them, and made suggestions. In addition, as the only experienced employee in the department, he assisted and gave advice to other salesmen in connection with their transactions with customers.

Nicolas worked on his job until August 22 when he was discharged. He testified that about 3 o'clock in the afternoon of that day Manager Syby approached him in the plumbing department, told him that Mr. Rickel and he were disappointed in his work, and, without giving him any details or the immediate cause for his (Syby's) action, discharged him, stating that he could finish out his shift or leave immediately. Nicolas further testified that he then smiled and remarked that he did not think that he was being terminated because of his inefficiency and nothing more was said. Syby, on the other hand, testified, in substance, that he had long

⁵ At that time, there were about 15 full-time and 6 part-time employees employed in the Succasunna store.

⁶ Employee Albert J. Fuge credibly testified, without contradiction, that after Fleischman summoned him to his office, Fleischman told him that union literature was being distributed in the store and that such distribution was not allowed on company property and would not be tolerated.

been dissatisfied with Nicolas' errors and shortcomings so that when he learned that Nicolas had sold wrong pumping equipment to a customer named Genaro, it brought matters to a head, and that he alone then decided to discharge Nicolas. Accordingly, Syby testified, he told Nicolas about 7 o'clock that evening that, in view of the Genaro incident and considering Nicolas' past "work habits," he could no longer continue him in the Respondent's employ. Stressing the importance of the Genaro incident in his decision, Syby further testified, "How could I help but mention" the incident to Nicolas at the time of his dismissal. However, when confronted on cross-examination with his pretrial affidavit he had given to a Board agent on October 8, 1959, in which he stated that at the time of Nicolas' discharge, he did *not* discuss the Genaro incident with him, Syby testified, "Under the circumstances, . . . [he could not] contradict what's on that statement"; it would be correct. In view of Syby's inconsistent statements and his later retraction, I do not credit Syby's conflicting testimony⁷ but accept Nicolas' version of the circumstances of his discharge.

With respect to the Genaro incident, Nicolas testified without contradiction that on August 21, 1959, one of the salesmen referred a customer named Genaro to him; that he thereupon waited on Genaro who told him that he wanted a well pump to be used at a depth of 60 feet in a 90-foot well; that based on this information he sold Genaro a one-half horsepower pump, model CJS 4 (also known as CJX 4), and wrote out a sales slip in which the unit was described as "C-J-S-4."⁸ It is also undisputed that, after paying for the merchandise thus purchased, Genaro received delivery from the warehouseman of a carton containing the CJS 4 pump and a jet assembly No. 55433. It appears that the manufacturer packaged these items together in one carton. According to the uncontradicted testimony of Donald F. Jaeger, formerly employed by the Respondent as a warehouseman who filled Genaro's order, the notation CJS 4 was written on the outside of this carton. When Genaro unpacked the pumping equipment at his home, he discovered that he had been given the wrong jet assembly for his purposes. He thereupon complained to the Respondent and on the following day, August 22, he returned the equipment. Since the correct jet assembly had to be ordered, Genaro refused to wait and his money was refunded.

Although the manufacturer packaged the CJS 4 pump with a No. 55433 jet assembly, its catalog, which Nicolas and other salesmen customarily consulted in their work, specifies that the No. 55433 jet assembly is used with CJX 3 pumps, which have one-third horsepower.⁹ For the 60-foot depth installation required by Genaro, the manufacturer's catalog concededly calls for jet assembly No. 55465. It thus appears that, whatever might have been Nicolas' error, the inclusion of No. 55433 jet assembly in one package with a CJS 4 pump was not indicated by the manufacturer's catalog.

⁷ Manager Syby also demonstrated that he was not a credible witness when he testified on voir dire and cross-examination that Company Exhibit No. 5, a certain compilation of records, was prepared at his request by the Respondent's bookkeeper a week before the hearing herein, although it was actually prepared months before, in September 1959, and not at his instance. However, on redirect, he corrected himself and stated that he assumed it was a week ago when the compilation was made because it was then that he had first seen it but did not know when it had actually been made. Syby's unreliability as a witness was further shown by his testimony that he overheard Nicolas' telephone conversation with Genaro when Nicolas told Genaro that he could get him a certain jet assembly for his pump, which was not in stock, the following Monday. Syby also testified that he then told Nicolas, "whether he heard me or not," that it would normally take 10 days to 2 weeks. However, in his pretrial affidavit, Syby did not mention the above telephone conversation but stated that Assistant Manager Fleischman complained to him that Nicolas had made promises to Genaro to get the jet assembly in a few days. Nicolas denied any recollection of having had the telephone conversation to which Syby testified. Under the circumstances, and in view of Nicolas' entire testimony on the subject, I find that the telephone conversation in question never took place.

⁸ Other supplies were also purchased and described in the sales slip, which are not involved in this case.

It appears that after the sale and delivery of the merchandise were completed, Assistant Manager Fleischman inserted on the sales slip jet assembly number 55433 for bookkeeping purposes.

⁹ Respondent General Manager Bryan testified that the 55433 jet assembly could be used with CJS 3 or CJS 4 pumps. However, only the latter pump could be used in a 60-foot installation, which Genaro required.

The Respondent presented testimony to the effect that Nicolas did not follow instructions by failing to designate separately on the sales slip the appropriate jet assembly number, i.e., No. 55465, and that this jet assembly was not carried in stock in any of its stores and had to be specially ordered. Nicolas, on the other hand, testified that the CJS 4 description of the unit was sufficient to include the appropriate jet assembly and that it had always been his practice at the store to write the order in that fashion. However, the manufacturer's catalog shows that a CJS 4 pump may be used with differently numbered jet assemblies depending on the type of installation required. It thus appears that Nicolas probably mishandled the Genaro transaction in failing to specify in the sales slip the particular jet assembly.¹⁰

Nicolas credibly testified that no one had ever complained to him about the Genaro incident and that, in fact, he had first learned about the substance of Genaro's complaint about a month before the hearing in this case from the attorney for the General Counsel.¹¹ Indeed, Manager Syby admitted on the witness stand that he did not give Nicolas an opportunity to explain the Genaro sale, although he would normally give an employee an opportunity to explain an incident on which he (Syby) would base a discharge.

As indicated previously, the Respondent also asserts that it had been dissatisfied with Nicolas' work performance for some time and that when the Genaro incident occurred it was the proverbial straw that broke the camel's back and caused Nicolas' discharge.¹² In support of its contention, the Respondent refers to a number of errors made by Nicolas in undercharging customers. However, it is clear that the Respondent did not sustain a financial loss as a result of these errors since the Respondent customarily deducted the amount of these undercharges from Nicolas' earnings and the customers reaped the benefits of such errors. Moreover, although Nicolas did not protest the deductions, the record is not entirely clear that all the undercharges were due to Nicolas' inefficiency.¹³ Finally, according to Nicolas' uncontradicted testimony, which I credit, no Respondent official or supervisor ever threatened him with discharge if his pricing errors continued. Indeed, Manager Syby himself admitted that he never warned Nicolas that he was subject to dismissal unless he improved.

As additional proof of Nicolas' alleged inefficiency, the Respondent presented evidence that it was required to make refunds on sales made by Nicolas. However, Manager Syby admitted that refunds are common in its business; that every salesman has refunds and returns on merchandise they sell; and that customers return purchases for a variety of reasons unrelated to a salesman's errors, such as, personal dissatisfaction, defective merchandise, overpurchases, or lack of need. In the case of Nicolas, Syby could point to only one instance of a refund due to an alleged error on Nicolas' part other than the Genaro incident, and that was made on July 12, 1959, for a 60-cent overcharge to a customer. It is obvious that the Respondent is grasping at weak reeds in its reliance on refunds as evidence of Nicolas' shortcomings.

The Respondent also gave testimony regarding Nicolas' alleged mishandling of a sale of base kitchen cabinets and a formica counter top to a customer named Frey

¹⁰ It appears that No. 55465 jet assembly would have had to be ordered specially for future delivery if Genaro were willing to wait that long.

¹¹ Nicolas testified that on August 22 when he reported for work, the warehouseman simply told him that Genaro had complained to the Company.

¹² Although Manager Syby testified on direct examination, as the Respondent contends, that it was the Genaro incident that precipitated the discharge, he nevertheless inconsistently stated on cross-examination that had the Genaro incident not occurred he would have discharged Nicolas for another incident which came to his attention earlier that day involving Nicolas' alleged mishandling of a customer's order for a copper drainage fitting. Syby did not recollect discussing this matter with Nicolas. It also appears that this matter was not mentioned in Syby's direct testimony or in his pretrial affidavit or at the time of Nicolas' termination. I, accordingly, do not credit Syby's testimony.

¹³ See, for example, Nicolas testimony concerning the sale of a toilet closet combination wherein Nicolas was charged with the price of the toilet seat. Nicolas explained that from the way the item was displayed and the price marked he reasonably assumed that the price included the toilet seat and no one at that time told him otherwise.

Although there is evidence that Nicolas made more pricing errors than other salesmen, he credibly testified, without contradiction, that he wrote at least 7 out of every 10 sales tickets in his department for the 3 months preceding his discharge. Moreover, sales tickets are not necessarily written by salesmen in other departments, as, for example, the paint department, so that the occasion for pricing errors are not the same throughout the store or for all salesmen.

on July 8, 1959, more than 6 weeks before Nicolas' discharge. Respondent General Manager Bryan testified that Nicolas erred in not giving Frey an allowance for the counter top which normally was sold as part of the unit with the cabinets, since the customer ordered a custom-made top, and that Nicolas violated the Respondent's instructions in making measurements for the customer for the custom-made top. Nicolas, on the other hand, denied, in effect, knowledge that the cabinets could be sold without the top or that he was so informed by management. He also denied that there was any prohibition against making measurements for customers and testified, without contradiction, that, in fact, Manager Syby and Assistant Manager Fleischman had on many occasions sent him out to make measurements for customers. He further testified that Frey complained that the counter top the Respondent delivered to him was warped. Whether or not Nicolas acted improperly in connection with the Frey sale, it is significant that he was not reprimanded for his conduct, much less threatened with discharge.

3. Concluding findings concerning discrimination

It is axiomatic that an employer may discharge an employee for cause or even no cause at all provided it is not for union membership or activity. It is equally settled law that the existence of—"A justifiable ground for dismissal is no defense if it is a pretext and not the moving cause."¹⁴

In the present case, it is admitted that immediately upon learning from employee Moeck that Nicolas had solicited her to join the Union, Assistant Manager Fleischman was prompted to, and did individually, summon to the privacy of his office practically all the employees of the Succasunna store and warned them that no employee may coerce another employee into joining the Union. In these circumstances, and in view of the fact that there is no credible evidence that any employee had been actually coerced or that Fleischman was informed of such coercion, Fleischman's remarks plainly have more meaning than a simple explanation of employees' statutory rights. In my opinion, they reveal a subtle concern and dissatisfaction with union activity of the Respondent's employees, although the remarks themselves do not constitute unfair labor practices. That the Respondent, and particularly Manager Syby, who shared his office with Fleischman, was aware of Nicolas' solicitation of Moeck, is not denied.¹⁵

I am not impressed with the Respondent's contention that it was not motivated by Nicolas' union activity in discharging him, and that it was the Genaro incident that precipitated the discharge. Although Manager Syby originally stated on the witness stand that he mentioned this incident to Nicolas at the time of the dismissal because, as he testified, "How could I help but mention it," and normally he would give an employee an opportunity to explain the basis of the contemplated discharge, he retracted this testimony when confronted with his contradictory pretrial affidavit and, in effect, admitted the truth of the affidavit. It appears to me that Syby did not give Nicolas this opportunity to explain, but instead summarily discharged him without prior warning, because the Genaro incident was not the true cause that triggered the discharge. Although Nicolas probably mishandled the Genaro sale, I am persuaded that it was the recently acquired knowledge of Nicolas' union solicitation that precipitated his dismissal and that the Genaro incident was only a pretext to rid itself of an active union adherent. The fact that the Respondent retained other union supporters in its employ does not exculpate it for the discrimination against Nicolas.¹⁶

As for Nicolas' alleged history of inefficiency, it is clear from the Respondent's admissions and contention that it did not regard this asserted inefficiency to be so serious as to warrant terminating Nicolas who was the only employee in the Respondent's plumbing department with the background and experience so valuable in its business. Significantly, the record shows that at no time was he warned or threatened with dismissal unless he improved his work.

In view of the foregoing, and upon the entire record in the case, I find that the Respondent discriminatorily discharged Nicolas because of his union activity and thereby violated Section 8(a)(3) of the Act. I further find that, by this conduct,

¹⁴ *N.L.R.B. v. Solo Cup Company*, 237 F. 2d 521, 525 (C.A. 8); *Wells, Incorporated v. N.L.R.B.*, 162 F. 2d 457, 460 (C.A. 9).

¹⁵ Assistant Manager Fleischman testified that he informed Manager Syby about his conversations with the employees the same day he held them.

¹⁶ *N.L.R.B. v. W. C. Nabors d/b/a W. C. Nabors Company*, 196 F. 2d 272, 276 (C.A. 5).

the Respondent interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act.

B. Independent interference, restraint, and coercion

The complaint also alleges that the Respondent, through its agent, Assistant Store Manager Fleischman, threatened its employees with discharge or other reprisals if they became and remained members of the Union, or gave assistance or support to it. As there is no evidence to sustain this allegation, I shall recommend dismissal of such allegation.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, which occurred in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

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

I have found that the Respondent discriminated in regard to the hire and tenure of employment of Strafford Nicolas. I will therefore recommend that the Respondent offer him immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the Respondent's discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned from the date of his discharge to the date of the Respondent's offer of reinstatement, less his net earnings during said period. Backpay shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company* 90 NLRB 289, 291-294.

In view of the nature of unfair labor practice herein found which, as the Fourth Circuit Court of Appeals observed, "goes to the very heart of the Act,"¹⁷ there exists the danger of the commission of other unfair labor practices proscribed by the Act. I will accordingly recommend that the Respondent cease and desist from in any other manner infringing upon the rights guaranteed employees by Section 7 of the Act.

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. Retail Clerks Union, Local 34, Retail Clerk's International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. Rickel Bros., Inc., is an employer within the meaning of Section 2(2) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Strafford Nicolas, thereby discouraging membership in the above-named Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By the foregoing conduct, the Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act, and has thereby committed unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

6. The Respondent did not violate Section 8(a)(1) of the Act by threatening employees with discharge or other reprisals because of their union membership or activities.

[Recommendations omitted from publication.]

¹⁷ *N L R. B. v. Entwistle Mfg. Co*, 120 F. 2d 532, 536 (C.A. 4).