

therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the promulgation and announcement of Respondent's plant rule interferes with, restrains, and coerces employees, I recommend that Respondent be ordered to discontinue maintaining a rule broadly forbidding its employees from engaging in solicitation and other union activities on company premises during their nonworking time.¹⁴

Respondent having discharged Christine Arterburn because of her union activity, I recommend that the Respondent offer her immediate and full reinstatement to her former or substantially equivalent position without prejudice to her seniority and other rights and privileges, and make her whole for any loss of pay she may have suffered by reason of Respondent's discrimination against her by a payment to her of a sum of money equal to that which she normally would have earned as wages from the date of her discharge, July 30, 1959, to the date when, pursuant to the recommendations herein contained, Respondent shall offer her reinstatement, less her net earnings during said period. Said backpay shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289.

It is also recommended that the Respondent be ordered to make available to the Board, upon request, payroll and other records to facilitate the checking of the amount of earnings due.

In view of the nature of the unfair labor practices committed, the commission of similar and other unfair labor practices reasonably may be anticipated. I shall therefore recommend that the Respondent be ordered to cease and desist from in any manner infringing upon rights guaranteed to its employees by Section 7 of the Act.

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

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail, Wholesale and Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By promulgating and announcing its rule prohibiting solicitation and other union activities on company premises during nonworking time, under penalty of dismissal, Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminating with respect to the hire and tenure of employment of Christine Arterburn, thereby discouraging the free exercise of the rights guaranteed by Section 7 of the Act and discouraging membership in and activities for the above-named labor organization, 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.

5. By its discharge of Opal Kays on July 27, 1959, and Dave Kays on September 16, 1959, Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

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

[Recommendations omitted from publication.]

¹⁴ *National Steel & Shipbuilding Corporation*, 126 NLRB 900.

Gibbs Automatic Division, Pierce Industries, Inc. and International Union United Automobile, Aircraft & Agricultural Implement Workers of America, UAW-AFL-CIO. *Case No. 25-CA-1083 (formerly Case No. 35-CA-1083).* September 30, 1960

DECISION AND ORDER

On February 29, 1960, Trial Examiner Phil Saunders 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 a copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and the Respondent filed a supporting brief.

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 entire record in this case, the Intermediate Report, and the exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, only insofar as consistent with our decision herein.

1. The Trial Examiner found that the Respondent violated Section 8(a) (3) and (1) of the Act by discharging Preston Higgs on March 18, 1959, for engaging in protected activity. As more fully described in the Intermediate Report, Higgs' activity consisted in actively organizing on behalf of the Union, e.g., passing out literature, soliciting cards, and contacting people in the plant. However, the Trial Examiner deemed it unnecessary to determine whether or not Higgs was a supervisor when he was engaged in such activity. We disagree, as we believe such a determination is crucial to the issue involved.

The record shows that from the time of his hire in August 1956, until March 11, 1959, Higgs exercised authority in respect to maintenance department employees by advertising for help in the local newspaper, interviewing prospective employees, screening employment applications, hiring, assigning work, approving timecards for overtime work, making out rate cards used as a basis for granting pay raises, and setting rates of pay. On March 11, 1959, written notice was posted on the plant bulletin board to the effect that one James Vanover would thereafter be foreman of the maintenance department. Accordingly, we find that until March 11, 1959, Higgs was a supervisor within the meaning of the Act.

The organizational campaign in which Higgs was an active participant culminated in a Board election on February 27, 1959, which the Union lost. Higgs, whose name did not appear on the eligibility list because he was considered a supervisor by the parties, appeared at the polling place and cast a challenged ballot. There is no evidence or indication that Higgs or anyone else engaged in any organizational activity after the date of the election. It is undisputed that when Higgs was discharged on March 18, 1959, following Vanover's appointment as foreman, he was not a supervisor.

The Trial Examiner found that Respondent's alleged reasons for the discharge of Higgs were pretexts, and that the actual reason was his union activity. These findings are supported in the record and we accept them. However, it is clear that all union activity ceased with the holding of the election. Thus, it appears that Higgs was discharged while in the status of employee for union activity he engaged in when he was a supervisor. It is well settled that an employer may discharge a supervisor for engaging in active conduct on behalf of an employee union. We cannot find on this record that Higgs was discharged because of his known union sympathies as an employee. Nor can we agree with the Trial Examiner that Higgs' unprotected conduct became protected because he was an employee (for 9 days) when discharged.

As we find that Higgs was in fact discharged for his union activity carried on while he was a supervisor, and that the Respondent would have been justified in discharging him for this reason before he was demoted to an employee, we conclude, in the absence of contrary evidence, that Higgs was lawfully discharged for prior acts of unprotected conduct.¹ We shall therefore dismiss the alleged violation of Section 8(a)(3) and (1) of the Act.

2. Under all the circumstances in the case, we shall also dismiss the alleged independent violations of Section 8(a)(1). Thus we find that the single instance of interrogation of employee Simon Clayton did not interfere with, restrain, or coerce employees in a manner which infringed on guaranteed rights in Section 7 of the Act.² Concerning the sole remaining issue involving Plant Manager Gibbs' remark to Supervisor Higgs on February 22, which was overheard by employee Williams, we find that even if the statement was coercive as to Williams, it was, at best, an isolated incident not warranting the issuance of a remedial order.

[The Board dismissed the complaint.]

MEMBER KIMBALL took no part in the consideration of the above Decision and Order.

¹ *N L R.B. v. Columbus Iron Works Company*, 217 F. 2d 208 (C.A. 5).

² *Blue Flash Express, Inc.*, 109 NLRB 591.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before the duly designated Trial Examiner in Henderson, Kentucky, on November 23 to 25 and December 2, 1959, on complaint of the General Counsel and answer of Gibbs Automatic Division, Pierce Industries, Inc., herein called the Respondent or the Company. The issues litigated were whether or not the Respondent violated Section 8(a)(1) and (3) of the Act. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. At the close of the hearing both parties presented oral arguments, and the Respondent also filed a very helpful brief which has been duly considered. Reserved

rulings are disposed of in accordance with the following findings of fact and conclusions of law.

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

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

The Respondent is engaged in the moulding and diecasting of plastics and in the manufacture of nonferrous metal products at plants in Missouri and in Henderson, Kentucky, which latter is the only plant involved in this proceeding. During the past 12 months, which is a representative period, the Respondent shipped products of a value in excess of \$1,000,000, from its Henderson plant to points outside the State of Kentucky. I find that the Respondent is engaged in commerce within the meaning of the Act.¹

II. THE LABOR ORGANIZATION INVOLVED

International Union United Automobile, Aircraft & Agricultural Implement Workers of America, UAW-AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The issues and events*

The main issues to be resolved are whether or not: (1) certain of the Respondent's supervisory force engaged in specific conduct constituting interference, restraint, and coercion of employees; and (2) the Respondent discriminatorily discharged Preston F. Higgs.

The Union started its organizational efforts at the Respondent's plant during the summer of 1958, and Union Representative Kavanaugh testified that Preston Higgs was his right-hand man from the beginning and the person most active in organizing the plant. A representation election (Case No. 35-RC-1620, not published in NLRB volumes) was conducted by the Board on February 27, 1959.

B. *Interference, restraint, and coercion*

1. The testimony

To support the independent 8(a)(1) allegations of the complaint and, moreover, to show the Respondent's opposition and hostility to union organization, a matter relevant to the issue of unlawful motivation and pattern in the alleged discriminatory discharge of Higgs, the General Counsel called several witnesses in support of these allegations, and I will first consider their testimony.²

Former employee Maurice Williams testified that on or about February 22,³ a week prior to the representation election, he and Preston Higgs were working at the plant, and that he had overheard General Manager Gibbs tell Higgs that "If I catch some of them working for the union I am going to let them go." In addition, Williams testified that on February 27, he was called into the plant office, and was then asked by Gibbs if Higgs had been talking to him before coming in and also that Gibbs told him that he himself had belonged to an electrical union, and further that Gibbs, "said something about the unions was putting some of these companies out of business."

Higgs testified that about a week before the representation election, he and Williams were working in the plant when General Manager Gibbs came up to him and brought up the question of the Union, and that after inquiring as to who was

¹ Gibbs Automatic Division started its initial production in 1956 at Henderson. In 1958 the facilities, plant, and equipment were leased to Rupert Diecasting Company, a Missouri corporation, and a subsidiary of Pierce Industries, Inc.

² The complaint alleges that General Manager Gibbs (1) inquired of an employee as to his conversation with another employee about the Union; (2) told an employee that he would discharge those caught working for the Union; (3) told employees that if the Union had won the representation election the dies would have been pulled out; (4) told the employees that if the Union set up a picket line he would go home and oil his shotgun; and (5) interrogated an employee as to why he voted for the Union.

³ All dates are 1959 unless specified otherwise.

the instigator, Gibbs stated, "Anybody that I catch having anything to do with, or trying to bring a union in here, I will fire them."

Robert Nunn testified that on March 4 he attended a meeting called by the Company for the diecast and plastic employees. General Manager Gibbs talked to the group about a union contract at Rupert Diecasting Company and what it would cost had the Union won the February 27 election. Gibbs also stated that Rupert had leased the Henderson plant, and "if they so aimed to could pull out and leave Gibbs Automatic Moulding where they was before they took over."

Julius Nunn testified that he also attended the March 4 meeting called by the Company, and that Gibbs had told them on this occasion "that Rupert could pull out when they got ready."

Paul Drury testified that at the March 4 meeting Gibbs told the employees that he could not understand how the Union got as many votes as it did at the February election, what a union contract would cost in money, and that Rupert might pull out of the leasing contract if the Union came in.

Kenneth Carter testified that prior to the representation election he was asked into the plant office where Gibbs inquired as to what he and Higgs had been discussing at the tool crib, and then asked Carter, "Were you discussing the union?" Carter testified that Gibbs then went on to tell him "that Preston was a nice guy, and he liked him, but they could not use a union." Carter also attended the March 4 meeting called by the Company, and stated that Gibbs talked about the financial troubles of the Respondent, and stated that several companies who had dies with them had initially inquired if the Respondent was unionized. In response to a question of whether Gibbs at the meeting made any reference to a picket line, Carter testified, "Yes, he was talking, and he laughed and he says something about if there's a picket line that he would have to oil his gun, or something like that." In addition Carter testified that Gibbs also inquired of employee Clayton as to why he voted for the Union.

Simon Clayton testified that at the March 4 meeting Gibbs talked about financial difficulties, then Gibbs asked him why he voted for the Union, and wanted to know if his vote for the Union was because of his argument with Supervisor Herb Hyatt.

Clarence Becker testified that he was active for the Union and that he was discharged on March 21 for negligence in handling equipment, but subsequently rehired when it was satisfactorily established that he was not at fault. As to the meeting on March 4, Becker testified that Gibbs told the employees that he could not understand why they wanted the Union as the Company was having serious financial trouble, and that "If the union came in there that Rupert would pull out."

Employee Ivo Linton testified that he attended the March 4 meeting, at which time Gibbs more or less congratulated them in that the Company had won the representation election, and that Gibbs could not understand why the Company had not won by more votes.

By way of general defense to the complaint's 8(a)(1) allegations, the Respondent adduced testimony through General Manager Gibbs to the effect that his conversation with Higgs, a week prior to the representation election, concerned the financial condition of the Company and the lease agreement with Rupert. Gibbs testified that he and Higgs also talked about union activities, but Gibbs testified, "I was talking to him as one stockholder to another." Gibbs denied any statement of his to the effect that he would fire anyone caught working for the Union, but testified that on this occasion he may have told Higgs, "It probably will be harmful to us, to the Gibbs Corporation, and to us if they get a union in to organize this plant, because if we did have any union trouble it could lead to Rupert canceling their lease, or a lot of other trouble. We could have a lot of trouble." As to his conversation with employee Carter in his office, Gibbs testified that he called Carter to discuss scrap alloys and to get acquainted with him since he was a new employee. Gibbs testified that he also mentioned to Carter that the Company had union activity in the shop, and expressed the hope that the plant would not vote union. He denied that he inquired as to what Higgs and Carter were talking about early in the day.

As to the meetings called by the Company on March 4, Gibbs testified that he held five such meetings for the purpose of thanking the employees for their confidence in the Company, and for the further reason that the Union had received so many votes he was astounded and that he was shocked as to what might have happened to the Company if the Union had won. Gibbs testified that at these meetings he related to the employees the financial facts of life, how he had to negotiate a lease with the Rupert Company, and that the Respondent was a service company making parts for other manufacturers and would not be able to retain the dies of the companies if there was a strike or any other interference. As to any remark of using a shotgun as attributed to him by employee Carter, Gibbs testified

that he did relate an incident of a St. Louis firm who had labor trouble and employed a "group of goons" which refused to let other employees in the plant, and stated that in connection with this story, he told his employees, "If anybody gets in the doorway here that doesn't work here and is keeping my employees out, I'm going to go oil my shotgun," and that by this statement he had reference to blackmail picketing by outsiders rather than his own employees. In addition to the above, Gibbs testified that at the March 4 meetings he also made references to various employees in connection with their voting at the prior representation election, and in regard to employee Clayton he might have said to him, "I wouldn't be surprised if you voted for the union because of your fight with Herb." Gibbs testified that this was the extent of his remarks and that he actually did not know how anybody voted.

C. The alleged discriminatory discharge of Preston Higgs

1. The testimony

The record reveals that Preston Higgs was hired by General Manager Gibbs in August 1956, and was discharged by the Respondent on March 18, 1959. Higgs was the first person hired in the maintenance department of the company plant, and Gibbs testified that he hired Higgs as the foreman to head up the maintenance department but at no time actually told Higgs that he was foreman. In the words of Gibbs, "he was always a foreman with the formality of being baptized." The record contains a good deal of testimony bearing on the exact duties and status of Higgs at various intervals during his employment, and I will consider these aspects and testimony later in the report.

The record establishes that Higgs was paid weekly on an hourly basis, that he was subject to call to call on a 24-hour basis, and that he worked overtime on many occasions. Higgs credibly testified that the Union started its activity in the Respondent's plant in the summer of 1958, and that he delivered literature, contacted employees, and solicited cards for the employees to sign. Union Representative Kavanaugh testified as aforesaid, that Higgs was his right-hand man in organizing the Company and the person most active for the Union. The record also establishes that James Vanover was hired by Gibbs as the foreman of the maintenance department on March 9, that thereafter no one considered Higgs as the head of this department, and that on March 11 the Company posted a written notice to this effect. As to the representation election conducted by the Board on February 27, it was established that at a preelection conference, the voting eligibility of Higgs was fully discussed, with Gibbs contending that Higgs was a foreman and therefore could not vote. As a result Higgs' name was stricken from the voting list. The record reveals, however, that Higgs nevertheless voted at the election, but that his ballot was challenged and was not counted in the final tabulations since the Company had won the election by a considerable majority.

Higgs testified that in December 1958 he was asked by Respondent Superintendent Herbert Hyatt, "What's the idea of your being the instigator of the union?"; that Hyatt also told Higgs that he was going to get in serious trouble if he did not stop. Higgs testified that on the following day he inquired of General Manager Gibbs as to who told Hyatt that he was the union instigator, and that Gibbs replied, "Jim Greenwell did," but that he did not know where Greenwell got his information. Higgs also testified as to another conversation with Gibbs in January to the effect that Gibbs was going to fire Pete Becker because he was the union instigator.

There is a great deal of testimony in the record bearing on the relationships between Higgs and the various foremen of the plant. Higgs testified that the foremen would interfere with his duties when they themselves attempted repairs after a breakdown of a machine, and that he had asked the foremen many times to leave the machines alone as it was his job to do the repairing and maintenance work. Higgs stated that he had several arguments with different foremen about this matter, and that considerable friction and tension resulted. Higgs related several incidents with great detail as to his difficulties in fixing specific machines, especially after the foremen had first "messed" with them. The testimony also shows that Higgs initially supplied the Company with his own personal tools, and that on occasions they would be used and he would encounter some difficulty in getting them properly returned to the tool crib of the maintenance department.

On the day of his discharge, March 18, Higgs testified that when he reported for work, Foreman Vanover told him, "Mr. Gibbs and Mrs. Whalen decided to let you go. Mr. Gibbs pulled your time card last night," and that he then received his checks from Vanover. That afternoon Higgs called on General Manager Gibbs and inquired about his leaving, and according to Higgs' testimony, Gibbs then informed him, "Well you're hard to get along with, and all the people out there on that floor is your

enemy." Higgs testified that on the next morning he returned to the plant and asked for his release, and that Gibbs' secretary then instructed the telephone operator to type it out and told the operator to "put on there, laid off due to reduction in force." Higgs stated that he then argued that this was not the reason Gibbs had given him, be to no avail, and "laid off due to reduction in force" was the reason typed on his release. The same day Higgs also spoke to Foreman Vanover about his release and he was told by Vanover that one reason for his layoff was that Higgs had his home telephone number changed and he had not been able to reach him.⁴ Higgs testified that never before had he been reprimanded for not being available.

Former employee Maurice Williams testified that he had seen Higgs' timecard in the company card rack on the night of March 17, and that Foreman Vanover had told him that the Company had to let Higgs go because his phone number was changed or had been discontinued. Williams testified that in doing maintenance work it was often necessary that an employee be called at home.

General Counsel's witnesses, Paul Drury, Benny Williams, Ivo Linton, and Clarence Becker, testified that General Manager Gibbs had also used Higgs' name at the company meetings with the employees on March 4, and Williams testified, "Mr. Gibbs said that the maintenance men and Preston Higgs made more money than any employees there, and they made better—around \$200 that week, and still the sons-of-bitches voted for the union." Clinton Parker testified that he got along with Higgs better than the other supervisors, and that Higgs told him that he had his phone number changed as he did not want to get calls from the plant. Robert Perry testified that Higgs never refused to do repair jobs, that he did satisfactory work, and that he got along very well with Higgs.

As to the alleged discharge of Higgs, the Respondent's defense adduced testimony through Foreman Vanover to the effect that Higgs did not like to take orders, and that when he would tell him to do something, there was "rebellion." Vanover testified that he instructed Higgs to wire a new switch on a diecast machine that he had previously taken off, and that after 20 minutes or so Higgs informed him that he could not put the switch on. Vanover testified that on March 17 he had asked Higgs to work on the No. 7 Lester machine, but that Higgs did not report back to him, and he then informed General Manager Gibbs that he was going to discharge Higgs and was told by Gibbs, "you're the boss." Vanover stated that it was his own decision to fire Higgs and that Gibbs did not advise him, and that he had given the reason of reduction in force on the release, because Higgs was a good mechanic when he wanted to be and he did not wish to hinder him in obtaining another job. Vanover testified that in a subsequent conversation with Manager Gibbs he was asked to give additional reasons for the discharge and accordingly entered several other reasons on the Company's records.⁵

General Manager Gibbs testified that he did not exercise hiring or firing duties except as to supervisors, that he had no idea Higgs would be for the Union, and further that Higgs had even denied to him any union efforts on his behalf. Gibbs testified that he opposed Higgs from voting at the representation election because he considered him a foreman, and that he did not want any irregularities to invalidate the election. Gibbs stated that when Higgs persisted that he did not have the status of a foreman he then hired Vanover on March 9, and that the arrangement appeared to satisfy all concerned including Higgs. As to the repairing of machines by the foremen, Gibbs testified, "I have issued instructions to them if they can fix anything, don't bother the maintenance department, fix it." Gibbs stated that he knew Higgs was having his troubles with the foremen over this matter, but that Higgs was not always available to do the repair jobs.

Supervisor Hyatt testified that the foremen complained to him about Higgs on several occasions, and that they would have to wait for him when their machines broke down. Hyatt stated that he had also attempted to call Higgs at his home after his regular shift, but that usually a lady would answer the phone and that most of the time they would be unable to locate him. According to Hyatt, the heart of the trouble was the controversy between Higgs and the foremen on the repairing of machines after breakdowns, and that he had instructed the foremen to do minor jobs but that they were not to attempt major repairs. Hyatt denied any conversation with

⁴ General Counsel's Exhibit No. 4, and testimony adduced relative thereto, established that Higgs' home telephone number was changed on March 17, and that Higgs became aware of the same upon his return to his residence after completing his regular work shift at the plant on the 17th.

⁵ The additional reasons for discharge entered on the company records were: to reduce expenses in maintenance department, insubordination, and complaints against Higgs from foremen and other employees throughout the plant.

Higgs relative to the Union, but stated that prior to the representation election, employee Greenwell had told him that he thought Higgs was a union man.

Supervisor Nelson testified that at the start of company operations Higgs did splendid work, but that "eventually" he would always be talking with someone else and that his delays in making repairs would hold up plant production. Nelson stated that he had an argument with Higgs over a press, and that during the latter part of his employment he was disgusted and had to push himself "to go and tell him that something was wrong."

Foreman Bush testified that Higgs was a good man at the first, but that during the last 15 months tension had built up, and that he had been told by Higgs "to keep my damn cotton-picking hands off the machine."

Foreman Stover testified that he attempted three or four times a month to call Higgs at his home for repair services, but that he would be unable to locate him. Stover testified, however, that sometimes Higgs would come in later and that when he made the phone calls for his services it would be after midnight. Stover stated that Higgs accused all of us of "fooling" with the machines, but that he never had any arguments with him.

Foreman Wilkerson testified that when he could locate Higgs his work was satisfactory, but that arguments had resulted between them, and that he was also accused by Higgs of "messing" and "tampering" with the machines.

Foreman Hayes testified that he also had several arguments with Higgs at various times, and that when he would request his services he was given excuses and as a result the production was slowed down. Hayes testified that when Higgs actually did make repairs for him, his services were satisfactory.

Foreman Hudson testified that he had an argument with Higgs in 1958, but that when he called him for repair services Higgs would usually come shortly after his request.

D. Analysis and conclusions

1. Interference, restraint, and coercion

Relative to the independent 8(a)(1) allegations of the complaint, the Respondent mainly contends that the statements and remarks by General Manager Gibbs were privileged under Section 8(c) of the Act as predictions or prophecies.

Preston Higgs and Maurice Williams credibly testified that Gibbs, prior to the representation election on February 27, made a statement in their presence to the effect that if he caught any employee working for the Union they would lose their employment. Gibbs admitted in his testimony that he and Higgs had discussed union activity, but stated that it was as one stockholder to another, and then further testified as to what he might have told Higgs on this occasion, but denied that he had made any threat to fire anybody. As to this incident the Respondent contends that Higgs was a supervisor at the time in question and was, therefore, excluded from the protection of the Act. As to the status of Higgs, between the time of his initial employment in 1956 and until Vanover was hired as the maintenance department foreman on March 9, 1959, there is considerable evidence in the record bearing on his exact functions and duties. It was established that Higgs was considered by everyone in management as the foreman until March 9, and that he operated the maintenance department from its inception and was duly consulted when additional men were employed for the department. In this respect the record also reveals that Higgs signed all the rate cards, contacted mechanics for employment purposes, suggested and authorized pay increases, and in general, directed the actual work operations and assignments of the maintenance department. However, even in accepting the Respondent's argument that Higgs was in a supervisory capacity at the time of the incident here in question, and which contention is not seriously opposed by the General Counsel, nevertheless, the threatening statement credibly attributed to Gibbs was overheard by an employee, Maurice Williams. It has been determined by the Board that coercive remarks made by a company official to a supervisor and actually overheard by an employee is violative of Section 8(a)(1). *Ford Radio & Mica Corporation*, 115 NLRB 1046. Also in viewing Gibbs' own testimony as to what he might have said to Higgs, it should be noted that in determining whether an employer's conduct amounts to interference and coercion, the test is not the employer's intent or motive, but whether the conduct is reasonably calculated or tends to interfere with the free exercise of the right guaranteed by the Act. This is especially so in the period of insecure organization efforts as here where the statement of discharge for union activity was made shortly before a representation election, and I find accordingly that the Respondent was in violation of the Act.

At the company meetings on March 4, as aforesaid, Simon Clayton credibly testified that Gibbs asked him why he had voted for the Union, and inquired if it was because of Clayton's argument with Supervisor Hyatt. Employee Carter substantiated Clayton's testimony as to this incident, and Gibbs admitted that he had made a statement indicating his surprise and concern on how Clayton had voted at the February election. Arguments were developed at the hearing and in the Respondent's brief as to the application of the *Blue Flash Express, Inc.*, test, 109 NLRB 591, relative to the interrogation by Gibbs. The Board has pointed out in *American Furniture Company, Inc.*, 118 NLRB 1139, that in *Blue Flash* the interrogation had a legitimate purpose, was accompanied by assurances against reprisals, and occurred in an atmosphere free from hostility to unions. In *Union Furniture Company, Inc.*, 118 NLRB 1148, the *Blue Flash* rule, the majority stated, "was not intended to license or immunize the use of interrogation as an integral part of an unlawful campaign to defeat a union, simply because the interrogation, if considered in isolation separate from such a campaign, would not be found independently coercive." Here the inquiry credibly attributed to Gibbs might be sufficient to constitute a violation within itself, but in this case the interrogation of Clayton does not stand alone but occurred in a context and pattern with other unfair labor practices, and the Board has repeatedly held that under these circumstances such conduct is a violation of the Act, and I so find.

As to the allegation in the complaint that Gibbs asked an employee if he had talked about the Union to others, I find that the evidence is unsubstantiated and insufficient to establish by a preponderance of credible evidence any violation of the above allegation, and that portion of the complaint is hereby dismissed. The remaining 8(a)(1) allegations relative to Gibbs' remarks as to oiling his shotgun if outsiders came in, and that had the Union won the dies would be pulled out, and even though made in context of unlawful interrogation, were equivocal expressions of predictions and personal opinion which contained no warning or threat of reprisal to his employees. *Jud L. Sedwick, d/b/a Armstrong County Linc Construction*, 124 NLRB 134.

2. The alleged discriminatory discharge of Preston Higgs

The General Counsel contends that Higgs was discharged as a result of his union activity; the Respondent's contention is that he was discharged for cause by his foreman. It is undisputed that James Vanover was hired as the foreman of the maintenance department on March 9, and that at the time of discharge, March 18, Higgs was not in a supervisory status but an employee within the maintenance department. It was also established that Higgs had considerable difficulty and arguments with numerous foremen over certain installations and as to the repair of machines when breakdowns occurred, and as Higgs himself testified these differences developed "friction" and "tension."

The Respondent contends that the complaints registered against Higgs became more numerous during the later stages of his employment, that Higgs became unavailable at times, that he was slow in responding to service requests by foremen, and that on several occasions could not be reached or located although personnel in maintenance work were subject to call on a 24-hour basis. There is also testimony in the record that Higgs was considered a capable employee, and that his work was satisfactory especially in the initial years of his employment. This record reveals that Higgs kept his union activity on a secretive basis and even denied it to management, but that company officials, nevertheless, became aware of his efforts, and that Supervisor Hyatt was informed by employee Greenwell, before the February election, that Higgs was a union man.

In resolving whether or not Higgs was discharged for his union activities or for cause, a principle of law I consider applicable here is that stated by the First Circuit Court of Appeals in *NLRB v. Whittin Machine Works*, 204 F 2d 883, as follows:

In order to supply a basis for inferring discrimination it is necessary to show that one reason for the discharge is that the employee was engaging in protected activity. It need not be the only reason, but it is sufficient if it is a substantial or motivating reason, despite the fact that other reasons may exist [citing cases]. Although the discharge of an inefficient or insubordinate union member or organizer is lawful, it may become discriminatory if other circumstances reasonably indicate that the union activity weighed more heavily in the decision to fire him than did the dissatisfaction with his performance.

In this proceeding it is conceded and recognized that Higgs and the plant foremen had differences between them, but there are instances in this record which indicate

that Higgs had arguments and differences with foremen in the departments long before the Union started its campaign, and it is noted that the Company did not reprimand or consider any corrective action necessary at this time. It should also be noted that the complaints against Higgs became more numerous as the union activity increased, and after Higgs had declared his open support by voting at the representation election.

As to the events and testimony in the actual discharge of Higgs, Foreman Vanover stated that he made up his mind to fire Higgs on March 17 when he did not report back to him. The Respondent's testimony established that there was a great deal of informality in the plant, and according to Vanover's own testimony he had never requested that Higgs report back after working on a machine. Higgs credibly testified that his work on the Lester machine was experimental and that there was another like machine which was being used only part of the time, and that he advised the production foreman when he had completed his experimental work. Vanover stated that production was the main concern, and yet there is no evidence by the Respondent that Higgs, on the 17th, in any way disobeyed his duties or in any manner interfered with production other than carrying out the specific instructions given to him by his foreman. From this testimony, and the evaluation thereof, it appears highly unlikely to me that without the elements of antiunion motivation, an employee, who was very much instrumental in the initial setting up of the plant machinery, who had been foreman of the maintenance department for a considerable time, who was acknowledged as a good mechanic in his field, who provided his own personal tools so that maintenance work could be properly done, and for performing a specific job assigned to him, would then be summarily discharged without even a warning, and on the basis of a nonexistent rule that he should have reported back to Vanover when he had completed his job, which factor suddenly became so important to the production efforts, but on which there is no evidence that Higgs in any way interfered other than doing the job he was supposed to do.

Vanover testified that other reasons for the discharging was his feeling that Higgs was no longer interested in the job, and his insubordination. Evidence bearing on these reasons discloses that when employee Becker complained of a hose leak, Higgs referred the request to Vanover as the foreman, and Higgs was then instructed to repair the leak which he did. On cross-examination Vanover testified that Higgs did not argue with him when he asked him to work on the Lester machine. Higgs credibly testified that after Vanover had requested him to replace a switch on a certain machine, he immediately worked on it, which is not denied, but a fire had burned identification off the wires and he was unable to make the replacement without the blueprint which were then under the control of Vanover. As to the contention that Higgs was not interested in his job and statements to the effect that he was unavailable, General Counsel's Exhibit No. 8 discloses that in January and February 1959, Higgs worked his full 40 hours each week with an approximate average of 19 hours per week overtime, and that during March, the month of his discharge, worked his full straight time of 40 hours, for the week ending March 7 put in 25 overtime hours, and for the week ending March 14 worked 20.6 hours overtime. It was also credibly established that when company supervisors made phone calls in contacting Higgs at his home, the message would frequently be relayed to him, and that on several occasions Higgs reported back to the plant in response to the calls. Vanover also testified that the changing of Higgs' phone number on the 17th was not a consideration in the decision to discharge him.

In prior sections of this report it has been duly established that General Manager Gibbs was very much opposed to union organization within the plant, and that he registered considerable feeling as to Higgs in connection with his desire to vote at the representation Election. I credit Higgs' testimony to the effect that up until the time of the election he and Gibbs had a friendly relationship and would frequently discuss business and other matters in the plant, but that the attitude of Gibbs changed subsequent thereto, and as Higgs stated, "After the election he [Gibbs] wouldn't speak." Additional consideration also substantiates that Gibbs made a direct reference to Higgs at the company meetings on March 4, to the effect that he would not be surprised if Higgs voted for the Union, and which is further indicative of the Respondent's motivation for the discharge a few weeks subsequent thereto. Gibbs admittedly had knowledge of the long-standing difficulties between Higgs and the foremen, but at no time prior to the union election were they of sufficient significance to even warrant a reprimand, but after discovering that Higgs was closely associated with the union efforts, they suddenly became monumental and could no longer be tolerated.

In reviewing this record as a whole and in my conclusion here, I point out that the Respondent's reasons for the discharge of Higgs were numerous and had considerable fluctuation. The Company first decided to discharge Higgs because he did not report back to his foreman; a rule and a custom that was nonexistent. Next it was stated that the real reason for discharge was that Higgs was not interested in his job; the testimony which I have credited and the exhibit of his working hours are to the contrary. The Respondent then ventured on the release given to Higgs that the discharge was due to a reduction in force. The testimony of Gibbs shows that in the weeks prior to March 18 business had increased, and it was further admitted that this reason had no validity in fact. Next it was decided that regardless of what Higgs had been given or told, the company records should contain the "right" reasons, and as a result, insubordination, reduction of expenses, and complaints from foremen and other employees were then recorded for company purposes. I reject these reasons as without merit and mere pretext for the discharge in question here.

From my observations and demeanor of the witnesses, and for the reasons as given herein, it is accordingly found that the Respondent terminated the employment of Preston Higgs on March 18, 1959, in violation of Section 8(a)(3) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

It having been found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It will be recommended that the Respondent offer employee Preston Higgs immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he would have earned as wages from the date of the discrimination against him to the date of offer of reinstatement, and in a manner consistent with Board policy set out in *F. W. Woolworth Company*, 90 NLRB 289, and *Crossett Lumber Company*, 8 NLRB 440.

It will also be recommended that the Respondent preserve and, upon request, make available to the Board, payroll and other records to facilitate the computation of the backpay due.

It will be further recommended, in view of the nature of the unfair labor practices the Respondent has engaged in, that it cease and desist from infringing in any manner 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, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Union United Automobile, Aircraft & Agricultural Implement Workers of America, UAW-AFL-CIO, is a labor organization within the meaning of the Act.
3. By discriminating in regard to the hire and tenure of employment of Preston Higgs, thereby discouraging membership in the Union, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
4. By engaging in the conduct set forth in section D, 1, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]