

WE WILL NOT discourage membership in Hotel and Club Employees Union, Local 6, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, or any other labor organization of our employees, by discharging or otherwise discriminating against any employee in regard to his hire, tenure of employment, or any term or condition of employment, except as authorized in Section 8(a)(3) of the Act, as amended.

WE WILL NOT threaten employees with reprisal if they engage in activity on behalf of the aforesaid Union, or any other labor organization.

WE WILL NOT prevent employees from attending union meetings by requiring employees who otherwise would be free to do so to attend, instead, meetings deliberately and for that purpose called by us for the same time.

WE WILL NOT promise or grant economic benefits to our employees at the time of any union-organizing campaign where the purpose thereof is to induce employees to refrain from, or abandon, union membership.

WE WILL NOT interrogate employees concerning their union views, membership, or activities, in a manner constituting interference, restraint, or coercion within the meaning of Section 8(a)(1) of the Act.

WE WILL NOT in any other manner, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join the aforesaid labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, and 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.

WE WILL offer Steven Lizaso, Stanley Korman, and Rene Giro immediate and full reinstatement to their former or substantially similar positions without prejudice to their seniority and other rights and privileges and make them whole for any loss of pay suffered as a result of the discrimination against them.

All our employees are free to become, remain, or refrain from becoming or remaining, members of any labor organization, except as that right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act. We will not discriminate in regard to the hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any labor organization.

TRAVELERS HOTEL, INC.,  
Employer.

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

Dated \_\_\_\_\_  
(HAROLD L. FROMKIN)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

**Midstate Hauling Co., Inc. and William F. Howell and Harold R. Holderbaum.** *Cases Nos. 12-CA-900 and 12-CA-905. January 5, 1961*

DECISION AND ORDER

On May 20, 1960, Trial Examiner Phil Saunders issued his Intermediate Report in the above-entitled proceeding, finding that Midstate Hauling Co., Inc., hereinafter called 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.

The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint, and recommended that these allegations be dismissed. Thereafter Respondent and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.<sup>1</sup>

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Jenkins, and Fanning].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record herein, and adopts the Trial Examiner's factual findings to the extent that they are consistent with this Decision. For the reasons stated below, we find merit in the Respondent's exceptions.

1. The complaint alleged, and the Trial Examiner found, that Respondent had violated Section 8(a)(3) of the Act by discharging employee Holderbaum. We do not agree.

In the first place, we disagree with the Trial Examiner's conclusion that, at the time it discharged Holderbaum, Respondent had knowledge of his union activity. In concluding that Respondent had such knowledge, the Trial Examiner said:

I find that the Respondent had knowledge of Holderbaum's union activities on the basis of the credited testimony of Jack Caldwell, wherein General Manager Hallowell had openly stated to Caldwell that he knew Holderbaum was "hooked" up with the Union, and which statement was in no way denied even by the testimony of Hallowell himself.

There is no dispute that Hallowell made the above statement to Caldwell and that he did not deny making it. However, the Trial Examiner failed to note that the statement was made to Caldwell, after the discharge of Holderbaum and after Holderbaum at the time of his discharge had openly informed Respondent that he was engaged in union activity. Nor does the Trial Examiner mention the rest of the conversation between Caldwell and Hallowell, as Caldwell also testified that Hallowell told him that Holderbaum's discharge had been because of truck breakdowns.

We therefore reject this statement of Hallowell, made after the discharge and after Holderbaum had informed Respondent of his union activity at the time of his discharge, as probative of Respondent's knowledge of such activity before Holderbaum's discharge.

---

<sup>1</sup> Respondent also filed a motion to quash the exceptions and brief of the General Counsel on the basis of nonconformity with the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8. In view of our disposition of the case on the merits, we find it unnecessary to pass on the motion.

Accordingly, in the absence of any other probative evidence showing that the Respondent knew of Holderbaum's union activity before his discharge, we conclude that the General Counsel did not maintain the burden of proof in this respect.

In the second place, we disagree with the Trial Examiner's conclusion that the facts show the reason Respondent assigned for the discharge was in fact a pretext, and that the real reason was Holderbaum's union activity.

As found by the Trial Examiner, Holderbaum was hired in January 1959 and was discharged on February 23, 1959. As an allegedly experienced tractor driver, he was assigned to drive one of two new International Harvester tractor trucks. He had two truck breakdowns while on the road, on January 23 and February 12, 1959. In each instance the collar and sleeve on the fifth gear transmission was broken. Such a break may be caused by one of two factors; either the part might be defective or the driver might be "lugging" the truck, that is, driving it too fast or too slow for the gear in which it is engaged. On the first occasion, Respondent attributed the break to a defective part; but Holderbaum was cautioned to be careful in operating the truck. When the second breakdown occurred, Respondent had the broken part examined by International Harvester and, on obtaining Harvester's opinion that the part was not defective and that the break was caused by lugging, Respondent discharged Holderbaum.

In finding a pretext discharge, the Trial Examiner relied, in great part, on the fact that Respondent required 11 days, from February 12 to 23, to determine whether Holderbaum had improperly operated the truck. The Trial Examiner also noted that, coincidentally, in the same approximate period, union activities had been initiated. Not adverted to by the Trial Examiner however, is Respondent's reason and explanation for the 11-day delay in question. In this connection, Ritten, Respondent's superintendent of truck maintenance, testified without contradiction as follows. Respondent's plants are at Jacksonville and Orlando, Florida. Ritten's headquarters are at Jacksonville, but Ritten spends 3 days a week at Orlando, where Holderbaum worked. On February 12, the day of the second breakdown, Ritten had been at Orlando. At 10 p.m., on his return to Jacksonville, Ritten received a telephone call from Morton, Respondent's mechanic at Orlando, advising him of the second breakdown. Ritten immediately told Morton that the driver "had to go," ordering the mechanic to keep the broken parts for Ritten's inspection the following week upon his return, in the usual course of his duties, to Orlando. On February 17, Ritten in fact returned to Orlando and, after inspecting the broken parts, determined that they were not defective. Ritten then conferred with Hallowell, Respondent's general manager, and

discussed discharging Holderbaum. At this conference it was agreed that Holderbaum would be fired if International Harvester confirmed Ritten's opinion about the parts. On Friday, February 20, Ritten returned to Jacksonville and had the parts examined by Harvester. Harvester, after examination of the parts, confirmed the fact that the parts were not defective and attributed the break to the driver's lugging of the truck. Ritten, that evening, called Hallowell at his home in Jacksonville, and, as a result, Hallowell instructed Foreman Earwood to discharge Holderbaum. As Holderbaum was not scheduled to work on Saturday, February 21, Earwood called him at his home on Monday morning, February 23, to inform him of the discharge.<sup>2</sup>

We therefore find, on the record as a whole, that Holderbaum was discharged for cause, arising out of his negligent operation of Respondent's equipment, and we shall dismiss the complaint in this respect.

2. The Trial Examiner found that Respondent violated Section 8(a)(1) of the Act by three instances of interrogation of employees as to union activities. We do not agree.

(1) The Trial Examiner found that Foreman Earwood interrogated employee Jack Caldwell as to whether he was involved in the Union, if he had signed a card, and if employee Conrath was also involved in the Union. This finding of the Trial Examiner is apparently based upon the testimony given by Caldwell, a General Counsel witness, on direct examination. However, the record shows that Caldwell unequivocally testified on cross-examination that Earwood had never asked him whether he had signed a union card or whether others had. Consequently we find Caldwell's testimony as to the alleged interrogation of no probative value.

(2) The Trial Examiner found that Foreman Earwood unlawfully interrogated employee Milton. This finding was based on Milton's testimony that sometime in early February, before the commencement of union activity at the plant, Earwood had asked him if anyone had been talking to him about the "union." Milton did not identify the Union. In this connection, Earwood testified that early in February there had been union picketing of the plant of another company where Respondent's trucks were picking up stone for road construction. Earwood testified further that his questions to Milton concerned the picketing of this plant and whether Respondent's trucks could

---

<sup>2</sup> It is pertinent to note that Holderbaum knew on February 12 that the second breakdown might subject him to company action. On that date, he had been accused by Respondent's mechanic of causing the breakdown by lugging the truck. On February 13, as found by the Trial Examiner, Holderbaum initiated union activity at Respondent's plant by writing a letter to the Union, requesting that a representative contact him. In this letter Holderbaum stated that he "would probably be fired before he got to see the union."

cross the picket line. Earwood's testimony that he was concerned with the effect of such picketing is corroborated by Caldwell. Under these circumstances, and in view of the fact that union activity did not start at Respondent's plant until some time subsequent to Earwood's conversation with Milton, we find Earwood's questioning of Milton did not relate to any union activity at the Respondent's plant and, in the context in which it occurred, was not coercive.<sup>3</sup>

(3) The Trial Examiner found that General Manager Hallowell had unlawfully asked Caldwell who else was "hooked up" in the union besides Holderbaum. Though Caldwell so testified on direct examination, on cross-examination he testified that Hallowell had never so questioned him, and that, in fact, Hallowell "had never mentioned the union" to him, at any time. In view of this obvious inconsistency in Caldwell's testimony, we cannot predicate any finding thereon.

We therefore find that Respondent did not unlawfully interrogate its employees in violation of Section 8(a)(1) of the Act.

We therefore find, on the entire record herein, that Respondent did not violate the Act and shall dismiss the complaint herein.

[The Board dismissed the complaint.]

<sup>3</sup> *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 Orlando and Jacksonville, Florida, on September 28-30, 1959, and January 18-19, 1960, on a consolidated and amended complaint of the General Counsel,<sup>1</sup> and answer of Midstate Hauling Co., 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. Both parties presented excellent oral arguments, and the Respondent also filed a brief which have all been duly considered herein.

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 a Florida corporation with offices and principal place of business in Orlando, Florida, where it is engaged as a common carrier in the hauling of sand, gravel, and aggregates to various employers. The parties stipulated that the gross amount received by the Respondent from Hubbard Construction Company for haulage, during 1958, exceeded \$50,000; and that the Hubbard company, in turn, during 1958, completed work totalling approximately \$375,000 for the Orlando Air Force Base and the Sanford Naval Air Base. The parties also stipulated, "That Midstate Hauling Co., Inc., during 1958, purchased materials, supplies, fuel and replacement parts in an amount in excess of \$50,000.00, and the amount expended for such materials, supplies, fuel and replacement parts which originated from

<sup>1</sup> The initial consolidated complaint set forth as Charging Parties Fred A. Wilkerson and Marvin R. Wisell. Upon requests from the above Charging Parties the General Counsel moved to withdraw all allegations of the complaint as to Wilkerson and Wisell, in Cases Nos. 12-CA-1063 and 12-CA-1064, respectively, and the motion was so granted.

outside the State of Florida during 1958 exceeded \$50,000.00, although such materials, supplies, fuel and replacement parts were not shipped directly to Respondent from outside the State of Florida."

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

Truck Drivers, Warehousemen & Helpers Local Union #512, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE 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) whether or not the Respondent discriminatorily discharged Harold R. Holderbaum. The complaint, as amended, alleges, and the answer denies, that the Respondent interrogated employees concerning their union activities and membership, threatened economic reprisal, warned its employees against union membership, and discharged employee Holderbaum for his union activities. There is no 8(a)(3) contention as to William F. Howell, and Howell only remains a Charging Party in this proceeding insofar as the 8(a)(1) allegations are concerned. The Respondent contends that Holderbaum was discharged for cause, and that the 8(a)(1) allegations were within the realm of free speech, or at the most were mere isolated remarks which cannot be construed as coercive.

The record reveals that Holderbaum was initially employed by the Company as a truckdriver in January 1959, and that he was discharged on February 23, 1959.<sup>2</sup> The controversy as to Holderbaum involved two breakdowns while he was driving Respondent's truck number 36. It was established that the Company purchased two International Harvester trucks in December 1958 with overdrive fifth gear transmissions, that the Company had fully discussed the features of such transmissions and had been told by the International Harvester dealer that for the particular hauling operations involved they might have trouble with the overdrive functioning on this type of transmission. It was also established that truck number 36, driven by Holderbaum, was one of the new International Harvesters, and that the two breakdowns involved herein occurred on or about January 22 and February 12.

### B. *The testimony*

Holderbaum testified that he had 14 years' experience in driving all types of trucks, and that Respondent's truck number 36 was driven on a 24-hour basis by himself and Richard Caldwell. Holderbaum credibly testified that the Company had an incentive mileage plan wherein the drivers with the most miles for a 30-day period would be given extra compensation, and that in his last 30 days truck number 36 had achieved high mileage. As to union activity, Holderbaum stated that he and William Howell started talking to several of the company drivers about the Union during the second week in February, and on February 17, after writing for information, met with a union representative and at that time also signed an authorization card as did Howell and J. Conrath, but did not solicit other drivers of the Company until after his discharge. Holderbaum further testified that on the night of February 21, he along with William Howell, Richard Caldwell, and Jack Caldwell, discussed the Union, and that Richard Caldwell, his fellow driver on truck number 36, "was very much against it."

As to the two breakdowns on truck number 36 involved herein, Holderbaum testified that on January 22 and 23 he was driving the truck to Brooksville to load up and was in overdrive and then shifted into "direct fourth gear," and, when approaching a stop sign, "pushed it into third gear and the transmission just froze up." Holderbaum stated that there was no warning or noise to indicate any trouble, and that a few days afterwards he talked to Supervisor J. W. Earwood and asked him if he thought it was his fault, and that Earwood had replied, "No it was just a faulty bearing." The second breakdown occurred on February 12, and according to Holderbaum the truck at the time was in third gear when he pushed the clutch in while coming to a stop sign, and the transmission again froze. Holderbaum

<sup>2</sup> All dates are 1959 unless specified otherwise

testified that on February 23 he received a call from Supervisor Earwood, and was then informed of his discharge as it had been determined by the company mechanics that the transmission trouble was Holderbaum's fault. Holderbaum testified that he then told Earwood, "You know it is through the Union that this is all about." Holderbaum also stated that later the same day he again had a conversation with Supervisor Earwood, and told Earwood that he did not believe the transmission trouble was the reason for his discharge, and that Earwood replied, "Maybe not," and Earwood also told Holderbaum that he would not go with the Union, and that if he signed "every card that came up they would go out of business." Holderbaum testified that he knew he would be discharged because William Howell had been fired earlier in the morning, and also stated that he had never received any warnings or reprimands.

Joe Milton, a former employee of the Company, testified that during the second week in February Holderbaum and Howell talked to him about the Union. Milton also stated that during the first week in February he had a discussion with Earwood, and that Earwood had inquired if anyone had been talking about the Union to him, and that "he just wondered."

Jack Caldwell testified that during the first part of February, Howell and Holderbaum talked to him about the Union, and that at this time there were about 18 truckdrivers working for the Company at Orlando. Caldwell also testified that on February 19 or 20, he had a conversation with Earwood and stated, "We was discussing the Union and the way it moved into the outfit and in a roundabout way he got around to asking me if I was involved in it." Caldwell further testified that another employee then walked by, and that Earwood remarked "he wouldn't doubt but that he was involved in it too," and also inquired of Caldwell if he had signed a card. Caldwell testified that this conversation was "in a laughing manner," and that Earwood had also made a reference to labor trouble at the Florida Crushed Stone Company, and that they had discussed the picket lines which had been established there. After the discharge of Holderbaum, Caldwell related a conversation with the Respondent's General Manager Hallowell to the effect that Holderbaum had been discharged because of the transmission trouble, and that he was "definitely not" discharged for union activity, and in furtherance of the discussion Hallowell made remarks as to difficulties in making his house payments in event of a strike, and if such happened he would have to drive a truck himself along with the others not involved in the Union. Caldwell testified that Hallowell also told him that he knew Holderbaum and Howell "were hooked up in it," and then inquired as to "who else is hooked up in it?" Caldwell testified that everyone knew that Holderbaum and Howell were the union "ringleaders," and that "we all knew about it around the first week" in February, and stated further that everybody knew the Company was antagonistic toward a union.

Albert Woodham testified that there were union discussions among the employees in January and February, and about a week after the discharge of Holderbaum, Supervisor Earwood stated to several employees that, "He felt that the boss would close the shop before going Union."

The Respondent produced testimony through William Ray to the effect that the Company was advised at the time when purchased, of possible difficulty with the two new International Harvester trucks equipped with overdrive transmission, and that any "lugging" of the trucks while loaded would result in trouble and breakage of certain parts in the transmission.<sup>3</sup> Ray testified that the proper transmission would be trucks with a direct fifth transmission, and further testified as to the approximate revolutions per minute for proper operations in the shifting of an overdrive truck.

Morton Benham testified that a company mechanic asked him to remove a sleeve from a shaft out of the transmission, and stated that the collar was not frozen but it was difficult to remove, which indicated that the truck had to be in fifth gear to cause the vibrations and the resulting damage.

A mechanic at the Company, John Morton, testified that he was familiar with the new International Harvester, number 36, which Holderbaum had been driving, and had worked on the truck after the two breakdowns. Morton testified that after the first breakdown by Holderbaum he had found that the transmission on number 36 was locked in fifth gear, but testified that he did not make the service call on the road and when the truck came into the company garage the drive line was disconnected, and further stated that keeping the trucks in fifth gear with a resulting pull would cause a vibration. As to the second breakdown by Holderbaum, the road call was made by Morton, and he testified that his helper noticed the truck

<sup>3</sup> Lugging was defined as driving a vehicle too slow in a particular gear with inadequate power and vibrations resulting.

being in fifth gear and called his attention to it, and had also found the fifth gear sleeve broken and the shaft scored. Morton testified that the parts purchased to make the necessary repairs cost \$8.63.

Thomas Ritten, maintenance supervisor for the Company, testified that new trucks should get 40,000 miles without major repairs, and stated that truck number 36 was "lugged" in its operation. Ritten also testified that after the second breakdown by Holderbaum he had experts of the International Harvester people examine the sleeve for defects, but they had concluded there was no flaw in the sleeve and that "it was the negligence of the driver."

Supervisor J. W. Earwood testified that it was the company policy to terminate employment when drivers tear up equipment, but that the International Harvester dealer had explained to them that they might have trouble with overdrive transmissions. Earwood stated that after the first breakdown on truck number 36 he warned Holderbaum "to take it easy," and that the truck was out of service for 12 or 13 hours. After the second breakdown it was determined that the trouble resulted from "lugging," Earwood testified, and as a result the decision was made to discharge Holderbaum. As to union activity and statements to employees heretofore attributed to him, Earwood testified that in the early part of February he had "heard a little bit about the Union," and had heard through the "grapevine" that the men were talking about the Union at the Company. As to his discussion with Joe Milton during the first week in February, Earwood testified that they were discussing union activities at the Camp's mine in Brooksville where the Company hauled from, and was inquiring of Milton if they were having any trouble crossing their picket lines. As to his statements to employee Woodham relative to closing the shop, Earwood testified that this conversation took place in April, and that he and Woodham were in a joking way discussing the union "deal over to the mine," and that he then stated, "That other guys in the state might close down shop, that I [Earwood] didn't know whether Mr. Hallowell would or would not close shop." Earwood testified that he did not give Holderbaum any warning after the second breakdown on February 12, and that he was discharged on February 23.

General Manager Hallowell testified that the Company discharges drivers if they have a "repeated" type of breakdown, and that he had told Earwood to instruct the drivers not to "lug" the two International Harvester's trucks with overdrive transmission.

### C. Analysis and conclusions

#### 1. The discharge of Holderbaum

I credit the testimony of the General Counsel's witnesses to the effect that union efforts were instigated at the Company during the first weeks in February, and that Holderbaum was one of the active union supporters. I find that the Respondent had knowledge of Holderbaum's union activities on the basis of the credited testimony of Jack Caldwell, wherein General Manager Hallowell had openly stated to Caldwell that he knew Holderbaum was "hooked" up with the Union, and which statement was in no way denied even by the testimony of Hallowell himself. It is also noted that Supervisor Earwood testified that in the early part of February he had heard about the Union.

In resolving whether or not Holderbaum was discharged for his union activities or for his negligence in "lugging" truck number 36, a principle of law I consider applicable here is that stated by the First Circuit Court of Appeals in *N.L.R.B. v. Whitin 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 concluded and recognized that the Respondent's International Harvester truck number 36 had two breakdowns when Holderbaum was the driver. It is also noted that after the second breakdown on February 12, until Holderbaum's discharge on February 23, actual contracts were made with the Union for organizational information by Holderbaum, and that he was also very much instrumental in the initial discussions about the Union with several of the company drivers.

As to the Respondent's contention that Holderbaum was discharged as a result of his "lugging" the truck, the record reveals that before the purchase of this equipment the Company had been duly informed by the International Harvester dealer that an overdrive fifth gear transmission was not the best type for heavy loads, and that they might have trouble with it. The record in this proceeding also established that the Company had a driver's incentive plan whereby the operators of a truck with the most mileage for a 30-day period were given additional compensation, and that Holderbaum, and his fellow driver on truck number 36, Richard Caldwell, were top mileage drivers in the immediate 30-day period preceding Holderbaum's discharge. Holderbaum testified that in his 14 years of operating all types of trucks he had never had transmission trouble before and denied any lugging on his part in driving truck number 36. Joe Milton creditably testified that with this type of truck and transmission the best time is made "by not lugging." From the above it appears highly unlikely to me that 2 drivers would achieve first standing among 16 others, in the Company's incentive mileage plan, and at the same time 1 of the drivers would be operating the winning truck in a manner fundamentally inconsistent with the most expeditious practices.

In a review of this record there was also creditable testimony that the Company had some trouble with the transmission in truck number 36 after Holderbaum was discharged, and that Richard Caldwell, who was the other driver on truck number 36, had received a subsequent promotion to foreman. In this respect it is noted that Holderbaum related a discussion about union matters with Richard Caldwell 2 days prior to his discharge, and upon which Holderbaum stated, that Richard Caldwell "was very much against" the Union. Richard Caldwell did not testify nor were his antiunion sentiments attributed to him by Holderman denied by any other witness.<sup>4</sup> From this background, and sequence of circumstantial events, it appears to me that transmission trouble on truck number 36 was directly related and consequential to the union viewpoints of the drivers, and the latter a final and controlling determination insofar as Holderbaum was concerned.

General Manager Hallowell testified that drivers were discharged for "repeated" type of breakdowns. Holderbaum stated that after his first breakdown, he had inquired of Supervisor Earwood if the transmission trouble was his responsibility, and that Earwood replied, "No, it was just a faulty bearing." As to this incident, Earwood testified that he had warned Holderbaum "to take it easy," but Earwood did not otherwise deny or refute the above statement attributed to him on this occasion. It is noted that the first breakdown occurred on or about January 22 before any union activity started, and from the sequence and pattern of events I credit the testimony of Holderbaum. In consideration of the above, and even assuming *arguendo* the Respondent's contention as to the second breakdown, the discharge in question here then resulted from only one mishap, and which is in direct contradiction to the general manager's testimony that under normal company policies the employment of drivers were terminated for "repeated" types of breakdown.

This record further indicates, through the testimony of Respondent's witness, William Ray, that the overdrive fifth gear, with an extremely heavy load, was a very poor transmission if there was any lugging by the driver. In this respect it was established that both the breakdowns by Holderbaum occurred when truck number 36 was empty and en route to be loaded. There was no explicit clarification as to the effects on the transmission if there was any lugging of the truck while not under a heavy pull. While certain witnesses were of the opinion that the second breakdown was a result of lugging, the actual circumstances in this specific incident, and the testimony I credit, shows that Holderbaum was in high third gear in coming up to a stop sign. Mechanic Morton testified that the truck was past the stop sign when he made the service call, but on cross-examination admitted that he had never driven a truck over this particular road, and also admitted considerable doubt as to exact location of the stop sign or that he had any recollection of the other pertinent terrain features in this area. Morton testified that his helper noticed that the truck was in fifth gear, but the helper remains unidentified, and there is no credited corroborated proof or testimony that the truck was in fifth gear at the time of the breakdown, outside of the mere implication by Morton, that the "helper" called his attention to it.

In my conclusion here it is again noted that the Company required 11 days, from February 12 to 23, to finally determine if Holderbaum had improperly operated

<sup>4</sup> Both Richard Caldwell and Jack Caldwell were truckdrivers with the Company but of no relation, and Jack Caldwell testified in this proceeding as aforesated.

truck number 36, and coincidentally in the same approximate period union activities were initiated, and were then gaining intensity by the signing of union authorization cards on or about February 17, and open discussions on February 21 with at least one driver, Richard Caldwell, who was opposed to the Union. From this record it is also noted that Holderbaum's accusations of union reasons for his discharge, stated to Supervisor Earwood on the day of his discharge, were not explicitly denied. The Respondent contends that it was not incumbent upon the Company, when Holderbaum stated to Earwood that he did not believe his discharge was due to transmission trouble, to make a positive statement that this was the reason. Whether or not it was incumbent for the Company to make such assurances, the facts of this incident is that Earwood replied "maybe not," to Holderbaum's inquiry as noted above, and further told Holderbaum that the Company would go out of business if he signed all the cards that "came up." It appears most unlikely to me that these statements would be made to Holderbaum, and remain largely unrefuted, unless his union activity was actually the predominant consideration in the discharge. This record, as stated herein, shows that the prior warnings and forecast by the International Harvester dealer, that the Company might expect trouble with an overdrive transmission, were basically correct; and in view of the pattern of union efforts here, further substantiates the General Counsel's contention that Holderbaum was discriminatorily discharged, and that his union activities were the prime motivating factors. I reject the Respondent's contentions as without merit, and mere pretext for the discharge.

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 Harold R. Holderbaum on February 23, 1959, in violation of Section 8(a)(3) of the Act.

## 2. Interference, restraint, and coercion

In determining whether an employer's conduct amounts to interference, restraint, or coercion within the meaning of Section 8(a)(1), 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 rights guaranteed by the Act. *N.L.R.B. v. Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7). Then, too, on the issue of whether the Respondent violated Section 8(a)(1) of the Act, it is not required that each item of the Respondent Company's conduct be considered separately and apart from all others, but consideration must be given to all such conduct as a whole. *N.L.R.B. v. Popeil Brothers, Inc.*, 216 F. 2d 66, 68 (C.A. 7). If the setting, the conditions, the methods, the incidents, the purpose, or other probative context of the particular situation can be appraised, in reasonable probability, as having the effect of restraining or coercing the employees in the exercise of such rights, such activity on the part of the employer is violative of this section of the Act. *N.L.R.B. v. Protein Blenders, Inc.*, 215 F. 2d 749, 750 (C.A. 8).

In applying these principles to the evidence in this case, I find that Respondent's course of conduct violated Section 8(a)(1) of the Act, in the instances and for the reasons hereinafter indicated.

The creditable evidence shows that in the week preceding the discharge of Holderbaum, Supervisor Earwood talked to driver Jack Caldwell in a pickup truck at the company terminal. The conversation itself is un rebutted, and relative thereto Caldwell testified that Earwood asked him if he was involved in the Union, if he had signed a card, and also asked Caldwell if employee J. Conrath was involved in the Union. Joe Milton also testified that Earwood inquired of him as to whether anybody had been talking about the Union, and Earwood's testimony, while admitting the conversation with Milton, largely related his recollection as to the general subject of unions, and that he was inquiring as to labor difficulties at another plant. On the basis of the above, I credit Milton's testimony. In addition to the above, Caldwell also related a conversation with General Manager Hallowell who inquired as to other employees in the Union, and there is no denial by Hallowell of this inquiry attributed to him.

The surrounding circumstances and pattern of events in this proceeding, which under all the conditions, reasonable probability, and conduct creditably attributed to the Company, are singularly and in combination unfair labor practices, and upon which it is found Respondent violated Section 8(a)(1), for the reasons hereinstated, are: (1) Earwood's interrogation of Jack Caldwell as to his and other employees union activities; (2) Earwood's interrogation of employee Milton as to the Union's

organizational efforts; and (3) General Manager Hallowell's interrogation of employee Jack Caldwell as to the union membership of other company employees.

It is found, therefore, that the conduct described above has had the effect of interfering with the rights guaranteed to employees by Section 7, and constituted interference, restraint, and coercion in violation of Section 8(a)(1) of the Act.

The complaint in this case also alleged, as aforesaid, that the Respondent threatened economic reprisal against employees who engaged in union or concerted activities. Employee Woodham testified that Supervisor Earwood had stated that he felt the management would close the plant if the Union was successful in its organizational efforts. Earwood testified that his remark was directed as to what other employers might do, and that he had no specific knowledge as to what the Company would actually do in the event the Union organized. I find the above allegation and testimony in support thereof, under the particular conditions and circumstances, as aforesaid, not sufficiently coupled with threats or promises to constitute other than predictions or prophecies, and as such protected by Section 8(c) of the Act.

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

The activities of the Respondent as set forth in section III, above, occurring in connection with its 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 Harold R. Holderbaum 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 make available to the Board, upon request, 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. Truck Drivers, Warehousemen & Helpers Local Union #512, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of the Act.
3. By discriminating in regard to the hire and tenure of employment of Harold R. Holderbaum, 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 C, 2, 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.]