

All our employees are free to become, remain, or refrain from becoming or remaining members of United Steelworkers of America, or any other labor organization.

MARSHFIELD STEEL COMPANY,
Employer.

Dated _____ By _____
(Representative) (Title)

NOTE.—We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

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

Employees may communicate directly with the Board's Regional Office, 1200 Rialto Building, 906 Grand Avenue, Kansas City 6, Missouri, Telephone No. Baltimore 1-7000, Extension 731, if they have any question concerning this notice or compliance with its provisions.

Que Enterprises, Inc. and Gilbert S. Medina, Otto G. Laube, Robert W. Anderson, R. T. Bogue. Cases Nos. 28-CA-808-1, 28-CA-808-2, 28-CA-808-3, and 28-CA-808-4. February 1, 1963

DECISION AND ORDER

On September 21, 1962, Trial Examiner Eugene K. Kennedy issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief. The General Counsel filed a brief in support of the Intermediate Report.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in these cases,¹ and finds merit in certain of the Respondent's exceptions.

The Trial Examiner found, as alleged in the complaint, that the Respondent on the afternoon of March 30, 1962, unlawfully discharged five employees because they had engaged in protected concerted activities. The sole extent of such activities by the discharged

¹The Respondent requested oral argument. As the record, including the exceptions and briefs, adequately sets forth the issues and positions of the parties, the request is hereby denied.

employees consisted in their signing, sometime during the 10 days prior to their discharges, one of two blank sheets of paper handed them by employee DeMar to obtain, as DeMar testified and told the other employees, a list of those interested in improving working conditions.² Nine employees, including the five dischargees, signed. As subsidiary findings to support his ultimate conclusion that the employees were unlawfully discharged, the Trial Examiner found that Underwood, Respondent's vice president and manager who ordered the discharges, knew prior to the afternoon of March 30 that some employees were engaging in concerted activities and that the five discharged employees had signed the lists.

In making these findings and conclusions the Trial Examiner relied wholly on the testimony on direct examination of DeMar whose testimony, he observed, "establishes the entire case of the General Counsel." There DeMar stated that he asked Underwood on the morning of March 30 why the employees were accusing him of having a list; that Underwood replied he would find out; and that in the afternoon prior to the time of the discharges Underwood told him, DeMar, that he, Underwood, had found out all about it and would put a stop "to that sort of thing permanently." Still on direct, DeMar further testified that during the morning of March 31 Underwood told him that he, Underwood, had a list of nine names of people who had joined the Union and that was the reason he had discharged the five employees the previous day. On cross-examination, however, DeMar testified, not that Underwood stated on March 31 that he, Underwood, had a list, but rather, that Underwood accused him, DeMar, of having a list of some 9 or 10 employees who wished to organize. Further on cross, DeMar, in detailing the March 31 conversation with Underwood, failed to mention altogether any statement by Underwood to the effect that the employees had been discharged for signing the list or for joining a union. In considering the above-outlined testimony of DeMar we need not disagree with the impression of the Trial Examiner that he was a "conscientious and truthful witness." However, the inconsistencies between his testimony on direct and cross-examinations show on the face of the record that he was confused concerning precisely what was said during his crucial conversation with Underwood on the morning of March 31.

Furthermore, the Trial Examiner in crediting DeMar's testimony on direct, did so in part on the grounds that Underwood and his secretary, Charlene Haller, both of whom gave testimony inconsistent with that of DeMar,³ were not credible witnesses. This rather in-

² Shortly before his discharge Leonard Leech also accompanied DeMar on a trip to two union offices for the purpose of seeking union aid for the employees. No one was present at either office, and apparently no further attempts were made to enlist union support.

³ Thus, Underwood stated he decided on March 28 to discharge the five employees for economic reasons and also denied knowing about DeMar's list or making the statement

verted method of substantiating DeMar is in the circumstances here without substance, for the reasons apart from demeanor for discrediting these witnesses are either as a matter of law or on the face of the record untenable. Thus, in discrediting Underwood, the Trial Examiner relied in part on Respondent's refusal to consent to an agent of the New Mexico Employment Security Commission testifying concerning an alleged communication to him from Underwood privileged under State law and upon Underwood's failure to respond voluntarily to a subpoena. Neither of these matters bears upon the credibility of a witness.⁴ As for Haller, she was discredited in part upon "the content" of her testimony which on the face of the record is plausible and consistent and clearly does not contain the ambiguities and inconsistencies possessed by that of DeMar.⁵ Consequently, little or no support for crediting DeMar can be found in the Trial Examiner's discrediting of Respondent's witnesses.

Thus, DeMar's testimony stands alone and essentially unsupported on the crucial matters of company knowledge of concerted activity and its motivation for the discharges. It is on these matters, as concluded above, confused and somewhat inconsistent. Consequently, it will not support a finding that the Respondent discharged the five employees for reasons proscribed by the Act. Furthermore, though the case is one that raises perhaps certain doubts concerning the legality of the discharges, nevertheless, Respondent's defense that it discharged the employees for economic reasons, though not as compelling as it would have us believe, is clearly more than frivolous.⁶ Consequently, we conclude, contrary to the Trial Examiner, that the General Counsel has failed to establish by a preponderance of the evidence that the discharges of Gilbert Medina, Otto Laube, Robert Anderson, R. T. Bogue, and Leonard Leech on March 30, 1962, violated Section 8(a)(3) and (1) of the Act.

The Trial Examiner also found, as alleged in the complaint, that the Respondent violated Section 8(a)(1) by unlawfully threatening and interrogating employees. He failed, however, to specify the particular conduct upon which such finding was predicated. We fail to find in the record any evidence of improper interrogation, while that

attributed to him on March 31 that union considerations played a part in the discharges Haller testified she made up the final paychecks for the five employees on March 29, or a day or so before Underwood, under even DeMar's testimony, allegedly had any knowledge of concerted activities in the plant.

⁴ Neither does Underwood's failure to respond to the subpoena warrant, as contended by the General Counsel, striking all of his testimony.

⁵ We also find that the Trial Examiner was in error in associating a bias reflecting adversely on the credibility of Hunt and Balok in testimony supporting the Respondent because they were at the time of the hearing employees of, and working for, the Respondent.

⁶ Thus, in the quarter preceding the discharges the Respondent's machine shop operations had not been profitable and the five dischargees had at least on certain jobs not performed in a wholly satisfactory manner. Also, in April and May 1962, the Respondent discharged a number of other machine shop employees assertedly for economic reasons and such discharges have not been challenged as unlawful under the Act.

relating to unlawful threats is a part of DeMar's testimony which we found above to be confused and contradictory and, thus, insufficient to support a conclusion that Respondent violated the Act. Accordingly, we further find that the General Counsel failed to establish an independent Section 8(a)(1) violation.

In view of the foregoing, we shall dismiss the complaint.

[The Board dismissed the complaint.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

A hearing in this proceeding was held in Albuquerque, New Mexico, on June 26, 27, 28, and 29, 1962, before Trial Examiner Eugene K. Kennedy. The issues litigated were whether Respondent discharged five employees because of their expressed interest in organizing for collective bargaining, and whether Respondent made certain threats with respect to the consequences of union organization.¹

Upon the entire record, my consideration of briefs submitted by Respondent and the General Counsel, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent corporation is engaged at Albuquerque, New Mexico, in research and development in the field of electronics and machined products. It is now, and has been at all times material herein, an employer engaged in commerce within the meaning of the Act.²

II. THE UNFAIR LABOR PRACTICES

A. Background

Respondent's operation here involved has an electronic and mechanical department. The employees of the mechanical department, or machine shop, are machinists or helpers with varying degrees of skill. There were approximately 15 employees in the machine shop on March 30, 1962, which is the key date with relation to the issues litigated.

Ralph Underwood was the owner of the operation until about a year and a half prior to this proceeding. At that time in order to obtain additional capital the business was incorporated and he continued as the responsible manager, vice president, and part-owner.

The employees of Respondent have never been represented by collective-bargaining representatives. Underwood's attitude toward union organization is reflected in his following testimony which he gave concerning a talk made by him to the machine shop employees about 1½ weeks prior to March 30 when the five alleged discriminatees were discharged:

Q. Now when you talked in March and talked to your employees what did you say about the right to work laws?

¹ Respondent's motion to correct the transcript in certain respects is hereby granted. The motion and order granting said motion are included in the record as Trial Examiner's Exhibits Nos. 1 and 2, respectively.

² During the 12-month period immediately preceding the issuance of the complaint, Respondent purchased in excess of \$50,000 worth of materials originating out of the State of New Mexico, which were purchased from enterprises located in the State of New Mexico which enterprises had received such materials directly from outside the State of New Mexico. During the same period Respondent sold products valued in excess of \$100,000 to the Sandia Corporation and to ACF Industries, Inc., each of which enterprises annually ship goods valued in excess of \$50,000 outside the State of New Mexico and are engaged in commerce within the meaning of the Act. During the same period Respondent manufactured and sold goods valued in excess of \$50,000 to prime contractors with the Atomic Energy Commission which had a substantial impact on the national defense.

A. I think it is the only way the State of New Mexico will become famous as an industrial state, that is the gist of my conversation; it is the only way that this state will ever be recognized as an industrial unit in this country.

Q. What did you say about unions?

A. That I thought the union had very little place, and I thought it was on the down hill because of the communist activity and the crooked work that has been going on in it. It has developed its own black name.

Underwood also equated circulating a union petition in his shop with *guilt*. This reference in his testimony concerned the suspected activity of Harold DeMar.

Underwood also gave the following testimony with respect to the day that DeMar asked him about being accused of organizing a union:

Q. Did you do anything else with respect to the union at that time?

A. No.

Q. Or shortly after?

A. Other than probably say a few choice words to myself.

Q. Was it a matter of concern to you that the man [sic] were talking about organizing a union?

A. The union doesn't bother me. It's the fact of production that I was worrying about, is this excessive loss in anything that agitates people in the shop reflects in loss to the company whether it's good or bad for the people or the company, anything to upset the regular routine of a company—of an employee, reflects in cost structure.

B. The events

Approximately 1½ weeks prior to March 30, 1962, Underwood called a meeting of the employees in the machine shop and spoke to them for a period of time exceeding an hour. He stated that there was poor workmanship being performed and told the employees about the advantages of the right-to-work law and included a criticism of an archbishop who had previously spoken out against the right-to-work law. There had been several meetings of this type previously in which criticism of the employees' work had been made. Following this meeting in March, Harold DeMar, a machinist in Respondent's employ, obtained the signatures of nine other employees, signifying their interest in union organization. DeMar along with one of the alleged discriminatees, Leonard Leech, visited two union offices in Albuquerque but failed to obtain any aid or assistance in either one.

With reference to the purpose for which the signatures were executed DeMar testified as follows:

Q. Now, who solicited the signatures on the list?

A. Well, this Leonard Leech and I talked it over, and he wanted to do it, but actually, I rather done it myself because I didn't—at that time I didn't know Leonard very well and still don't, and so I circulated the list around employees that I knew that we had talked about this here several times, it was just an exploratory list of people who would be interested in improving the conditions there, getting away from this here general chewing out all the time that had been going on ever since I had been there.

This list referred to in DeMar's testimony contained the signatures of 10 employees including the 5 alleged discriminatees: Gilbert Medina, Otto Laube, Robert Anderson, R. T. Bogue, and Leonard Leech.

C. Circumstances attending the discharge

Gilbert Medina, Otto Laube, Robert Anderson, R. T. Bogue, and Leonard Leech were discharged without prior notice at 3:30 p.m., 1 hour before the usual quitting time, on Friday, March 30, 1962. Approximately 2 days before this, two employees of the machine shop, Morris Hunt and Chester Balock, approached DeMar at work and accused DeMar of starting the union. On the following day another employee, Ernie Fitchner, a welder, came up to DeMar and said, "Where is those ten names you got on the list?" and "I'd like to put mine on there, how come you didn't ask me?" Underwood identified Fitchner as one of the employees who had told him that DeMar should be watched as he was in favor of a union.³

³ The record is not clear whether DeMar spoke to Underwood on the same day that Fitchner asked him about the list, although it seems probable that it was on the following day. In any event, it is not significant whether Fitchner made the inquiry on the same day or the preceding day.

With respect to March 30, 1962, DeMar testified as follows:

The WITNESS: I asked, later this morning Ralph Underwood came by and I asked him why, how come they were accusing me of having the list, and he kind of shrugged his soulders [sic] a little bit, and says, "I'll find out," and and I asked him how come they were accusing me of starting a union, and he says, well, he didn't know but he'd find out. So a little later that morning he came by and he said, "I found out all about it," this was in the afternoon, I believe, it was in the afternoon he came by, and he says, "And I'll put a stop to that sort of thing permanently," he says

Q. Now, then, did you have any further—do you recall any further conversation with Mr. Underwood?

A. The next day.

Q. Next day?

A. The next day was Saturday—wait a minute, now, let me think just a minute. That was the same day, and the men were discharged that night, that I talked to Ralph Underwood in the morning, the men were discharged the same night. The next morning he called me in his office, after these men were discharged in this little inspection room, and told me he found out. He says "I have a list of nine or ten names of people that joined the union," and he says that's the reason he let these five men go, and he says, "There will be more," and so I told him then if he was sure of that, I asked him how come he didn't fire me too. He says, "There is time for that, there will be more," and he proceeded to tell me that there was twenty-eight men before in his organization that he went down the line and chopped them off, just right on down the line, he says, and for the same reason. And I asked him then, "even if they were the best men in the house," and he said it didn't matter to him if they were the best men or not.

Q. Do you recall anything further being said during that—

A. There was mention made that if the union come in there that he couldn't pay the three and a half an hour that the union demanded, that he would have to knock off all the overtime and probably some help.⁴

D. Respondent's justification for discharges

Respondent claimed that the five employees were discharged because their poor workmanship was causing Respondent to lose money. In support of this contention certain financial statements were offered along with testimony by Underwood and also records pertaining to the work of the five discharged employees, as well as Underwood's testimony as to the work of the employees. The financial information offered will first be considered and then the alleged shortcomings of the employees.

Underwood testified that sometime in mid-February he was advised by his accountant that his Company was in serious financial condition. He then testified that

⁴ Although admitting DeMar interrogated him on the morning of the discharge about an accusation that DeMar had been trying to start a union, Underwood denies DeMar's version of the conversation in the afternoon as well as DeMar's testimony concerning the conversation between himself and DeMar the following morning.

DeMar's testimony establishes the entire case of the General Counsel. In excess of 800 pages of testimony and many exhibits which constitute the record in this matter may correctly be regarded as primarily concerned with the question of whether DeMar's or Underwood's testimony should be accepted. Consequently, in a sense this report is substantially devoted to the question of credibility of Underwood and DeMar. Considerations leading to the acceptance of DeMar's testimony and rejecting that of Underwood's will be found in the body of this report. DeMar exhibited the impression of a conscientious and truthful witness.

Some of the considerations in making a determination of credibility in addition to the demeanor of the two witnesses include the fact that Underwood refused to comply with a subpoena duly served by the General Counsel and appeared at the hearing only after the General Counsel had completed his case. Also, Respondent refused the opportunity of having an apparently objective and neutral witness testify with respect to what Underwood told him was the reason for the discharge of the five employees on March 30, 1962. The General Counsel sought to elicit this testimony from an employee of the New Mexico Employment Security Commission. This employee claimed that the communication to him by Underwood was privileged under New Mexico laws and although the General Counsel agreed to have the testimony included in the record, Respondent would not, which would be the only basis on which the New Mexico official would, voluntarily, give the testimony.

he spent a couple of weeks going over the reports of his superintendent, John Glover, and comparing those with the information he received from the accountant. These reports by Glover were not made a part of this record and there is no basis other than Underwood's testimony that there was any variance between these reports and the information supplied him by his accountant. Underwood claimed that on the basis of the accountant's report and the discrepancies in Glover's records he decided to fire Glover and did so.⁵

Underwood then stated that he began an examination of the records of the employees in the machine shop and also spent some time in the shop observing their performance and finally on the evening of March 28, 1962, he spent several hours going over the individual records and concluded that the five alleged discriminatees should be discharged. He further testified that on the morning of March 29 he gave orders to his secretary to make out the final checks for the five alleged discriminatees including 8 hours on March 30.⁶

The financial statements submitted by Respondent appear at best equivocal and are incomplete. However, they show that the pattern of profit and loss for 1962 was approximately the same as in the preceding year. There seems some merit in the thought expressed in Underwood's testimony to the effect that his board of directors were dissatisfied with the financial statements as well as himself because an examination of them did not adequately reflect the financial status of Respondent. Despite Respondent's contention of financial loss in the spring of 1962, sometime prior to the hearing herein, an expansion project involving construction of a new plant had been initiated by Respondent. I find the financial statements as submitted by Respondent are unpersuasive in establishing any unusual financial loss attributable to the five alleged discriminatees, and in any event, even assuming that they do reflect this contention of Respondent, I find that the alleged financial considerations were not the reason for the discharges.

Turning now to the Respondent's claimed reasons for discharging each of the employees on March 30, Respondent's contentions with respect to each will be examined separately.

Gilbert Medina

Underwood testified he discharged Medina because he was too slow and made too much scrap. There was introduced on behalf of Respondent a record which purportedly shows that a job that Medina worked on resulted in a loss of \$84. Underwood also assigned as a reason for Medina's discharge that he was too slow in tapping holes on a steel bracket and made a mistake in sawing raw material. These last two reasons lose their validity in view of the fact that Underwood claimed that he had made his decision to discharge Medina on a Wednesday evening and the work of tapping holes and sawing raw material was performed on the following day. The record is uncontroverted that Medina was complimented by Foreman Goodman on the excellent nature of his work. He had received no prior warning of his discharge and at the time he was fired on March 30, 1962, he had not completed a job on which he was performing work.

Otto Laube

Laube had worked for Respondent since May 1961, and had received two raises including one during the first or second week of his employment. Foreman Goodman gave Laube as well as the other four alleged discriminatees their checks on March 30, 1962. Goodman had no knowledge of the impending discharge of these five employees until Underwood turned over the checks to him despite the fact that he testified that the performance of each man in the shop was reviewed practically every week in conference between himself and Underwood.

At the time of discharge Laube was about two-thirds through a job on which he was working. Underwood stated one of the main reasons for discharging Laube was the low quality of workmanship in connection with this job and Respondent submitted documentary evidence purporting to show that Laube was responsible for a loss in connection with it. However, scrutiny of this evidence, which includes

⁵ Although Underwood on direct examination stated several times that he had fired Glover, on cross-examination he admitted that Glover had quit.

⁶ It is appropriate to note here that Charlene Haller, a witness called by Respondent, testified that she was employed by Respondent and her duties included making out paychecks and that the only time that she had ever made out a final paycheck, except on the day employees were terminated, was in the case of the five discriminatees. She could recall the dates that she made out the checks for the discriminatees and DeMar but could not recall the date she made out checks for any of the other people that were terminated during her approximate 6 months of employment.

a letter from the Sandia Corporation addressed to Respondent, reflects that of the 22 claimed estimated hours that Respondent was being backcharged for, welder Fitchner was responsible for 16 hours. Four hours involved work that was not performed at all by Respondent. It is doubtful from this record whether Laube was responsible for even two of the backcharged hours. Whether he was or not, it seems incongruous on Respondent's part to offer this letter to support Laube's discharge when it demonstrates others were primarily responsible for the backcharge and claimed loss.

Underwood also attributed Laube's discharge to slow work on aluminum brackets. In attempting to corroborate his estimate of Laube's slowness, he stated that the work had subsequently been done more rapidly by an apprentice. However, on cross-examination he admitted that the work done by the apprentice had to be done over and that he was fired for scrapping material.

Robert Anderson

Respondent claims that Anderson was discharged for poor quality of work on items called shoulder bolts and for being too slow in his performance in connection with making certain shafts and his inability to obtain a proper finish on adjustment screws. At the time of his discharge on March 30, Anderson inquired from Foreman Goodman as to the reason for the discharge and Goodman told him, "Well, the boss said we have been making too much scrap in the shop, so we put all the names in a hat and drew out five and yours was one of them."

In connection with the shoulder bolts Anderson's testimony is credited to the effect that part of the difficulty in connection with the work on those items was because the specifications were changed. In connection with the work on shafts the record reflects that 2 days prior to his discharge Respondent received an order for another large amount of these shafts, and Underwood brought the blueprint out and told Anderson that because he had done such a "damn good job" they had gotten another order.⁷ In connection with the adjustment screws, Anderson's testimony is credited that he never performed any work on these screws. Although Respondent produced certain selected work records of employees' work on particular jobs, there was no work record produced in connection with Anderson's alleged working on the adjustment screws, and I find that he did not work on these screws, contrary to Underwood's testimony.

R. T. Bogue

The alleged poor workmanship involving Bogue related to work on items called coathangers. Bogue was working on this job on March 29, 1962. Underwood claims that the inspector informed him on March 25, 1962, that there were deficiencies and errors in this work performed by Bogue. If this were true, it seems incredible that Bogue would be permitted to continue working without being advised by Underwood as to what was wrong and how to correct it. Since the record does not reflect this, it seems probable that it was not done and that Underwood's testimony was incorrect, and I so find. Further, in connection with work on this same job, the record is uncontradicted that in the presence of Foreman Goodman, Bogue was complimented by an inspector, who stated "that he was glad to see that somebody could finally fix these pieces right, so that they could pass final inspection."

On March 30, the day of his discharge, Bogue started working on a job which would have required approximately a month's work.

Leonard Leech

Leech was an experienced tool-and-die machinist, representing the highest degree of skill in the trade. Even so, he started at \$2.70 an hour, which was considerably below the top rate paid by Respondent. His primary work with Respondent was in an operation involving grinding some discs. According to the credited testimony of Leech, this job was a novel operation and I find Leech's testimony more credible than Underwood's and Foreman Goodman's to the effect that there was not poor workmanship involved in connection with the disc job or excessive time consumed, considering the difficulties attached to the job.

On the occasion when Leech was fired on March 30, 1962, at 3:30 p.m., just before leaving the plant, he said to Foreman Goodman, "Well, Bill, tell me exactly what

⁷ Underwood admits telling Anderson they had another order but denied any compliment was included in his comment to Anderson.

happened." And Goodman replied, "The —— hit the fan and the whole bunch got fired."

Examining the alleged reasons for terminating these five employees, it is apparent that in developing the alleged reasons for their discharge, Respondent developed further reasons for not crediting the testimony produced in its behalf.

Assuming that in the context of a vacuum the reasons offered by Respondent would provide a basis to justify the discharges, in the circumstances here present I find that the evidence preponderantly points to union animus as the predominant factor in causing the discharges. Even though the records produced by the Respondent reflect some shortcomings on the part of the alleged discriminatees, this evidence loses any significant probity by reason of the fact that a performance record of employees who did not sign the list evincing interest in union affiliation was not presented for comparison, the only exception being that the record of Fitchner's work reflected that he was responsible for a much greater loss to Respondent than could have been correctly attributable to Laube. Fitchner was the employee who interrogated DeMar about the list but who did not sign it and also told Underwood that DeMar was really for the union although he spoke against it.

E. Other testimony offered by Respondent

Although as indicated above, a resolution of all the issues here is effected in crediting DeMar's testimony as against Underwood's, examination of the testimony of other witnesses, offered by Respondent, adds to the credibility attached to DeMar's testimony and detracts from the trustworthiness of Respondent's witnesses.

Foreman Goodman testified that during his employment of approximately 3 years with Respondent and its predecessor he had never actually fired anyone. This is in conflict with Underwood's testimony wherein he stated with relation to a list of several employees terminated between April 6 and June 8, 1962, as follows:

. . . I don't personally supervise the people, so how do I know whether he quits or gets fired. The fact that he leaves over the job is incidental to whether he quits or gets fired.

* * * * *

TRIAL EXAMINER: Does Mr. Goodman have authority to hire and fire people?

The WITNESS: Yes, sir, in fact possibly a lot of these people could have been fired by Mr. Goodman or by Mr. Glover. They weren't hired by myself, so this puts me in a little different position.

* * * * *

TRIAL EXAMINER: I don't think Mr. Underwood really knows whether these people were fired or quit, some of them, is that right? . . .

The WITNESS [Underwood]: There is a possibility, yes, because Mr. Goodman has the prerogative of firing as well as myself, and people that is there a short time you don't learn a hundred percent people by their name, what they do, the problems when you have a turnover of personnel.

Not only does this testimony conflict with Goodman's testimony but it conflicts with Underwood's own testimony given previously wherein he said he made a personal decision to fire 11 employees for the same reasons that he fired the 5 alleged discriminatees,

Contained in Goodman's testimony is the statement that when he advised the alleged discriminatees how to do their work better, they substantially followed his directions. Goodman also admitted that he had complimented Medina for the high quality of his work. Since Medina was there only a short time, this seems inconsistent with the testimony of Goodman that he had recommended to Underwood that Medina be let go shortly after he was employed.

Charlene Haller had been employed by the Respondent as a clerical employee for about 6 months prior to the hearing, and was currently in Respondent's employ at the time of her testimony. Included in her duties was the making up of payroll checks. With respect to the people that were either discharged or quit between April 6 and June 8, she testified that their termination check was made up on the day that they quit or were fired. However, she testified that in the case of the five alleged discriminatees, at the instruction of Underwood, she made up their checks on a Thursday morning, the day prior to their discharge. She also testified that the only payroll checks that she made out on a day other than on the date of termination were in the case of the alleged discriminatees. Based upon her demeanor and upon the content of her testimony, I find it to be not credible and reject it, insofar as it relates to her preparing the payroll checks on Thursday, March 29, 1962.

Morris Hunt, an employee for 3 years and in the employ of Respondent at the time of hearing herein, also testified for Respondent. Respondent first developed the fact that he was a member of the Machinists union, presumably to show that Respondent had no antipathy toward hiring a union member. However, on cross-examination it developed that Hunt worked only part time for Respondent and was a union member at his main place of employment where there was a compulsory union shop and in working for Respondent was engaged in "moonlighting" which was frowned upon by his Machinists union. This suggests Hunt had an interest in keeping a union out of Que Enterprises, Inc., since he might not be permitted to work there, and also at his main place of employment in the event Respondent's plant became organized.

Significantly, Hunt testified that he had heard of the union organizing approximately a week prior to the end of March, and also gave the following testimony which is regarded as significant with respect to corroborating DeMar's testimony, relating to his conversation with Underwood about the list. Hunt testified as follows:

Q. (By Mr. MAST.) Now, you say there was a lot of talking generally. What do you mean by that, Mr. Hunt?

A. Well, it was common knowledge in the shop the next morning—I wouldn't say common knowledge, but common talk that a list had been turned in to Mr. Underwood that I knew nothing about. Other than that, why, I know no more.

Q. Now, what list?

A. The people—from what was spoken, that were requesting that the Machinists represent the employees there.⁸

The final witness produced by Respondent was Chester Balock. He had been employed by Respondent for about 3 years prior to the hearing and was currently in its employ at the time he gave his testimony. Balock, as well as Hunt, denies that he accused DeMar of trying to organize or start a union. The testimony of Balock and Hunt in this respect is rejected, based on their demeanor as witnesses and due to the bias which I associate with their being currently in the employ of Respondent. This rejection of their testimony, although not on an issue basic to a resolution of the issues here, flows in large part from a rejection of the testimony of their employer.

Balock also heard about the Union organizing shortly before the end of March. Balock stated that he had heard the five discriminatees had engaged in union activities, probably the following week after their discharge. Balock also testified as follows:

I heard that something, whoever was trying to talk the fellows into turning the list in to Mr. Underwood.

Q. You heard that Mr. Underwood had been given the list?

A. Yes.

Balock testified that he had heard this approximately a week after March 30.

F. Concluding findings

The events here took place in a group of about 15 employees. Ten of these employees evinced their interest in organizing by putting their names on a list circulated by Harold DeMar. Respondent through Ralph Underwood obtained knowledge of this on Friday, March 30. Respondent in all probability could rule out Hunt and Balock who testified for Respondent, as well as the welder, Ernie Fitchner, and also Don Keefer, who Underwood said shortly after March 30 told him that DeMar was "talking out of both sides of his mouth" and was "really for the Union although he protests not to be." The precipitous discharge of five employees in the context of this record appeared calculated to destroy any union organization, and for the time being, in any event, the calculated effect was achieved.

The credibility of witnesses has been alluded to previously. However, it should be added that a careful reading and rereading of this record confirms with each additional reading the contention of the General Counsel that the defenses offered by Respondent were contrived. Numerous inconsistencies and implausibilities in

⁸ Whether or not this testimony is hearsay is not significant in this context as an independent finding that Underwood obtained the names on the list is derived from the testimony of DeMar. It is noteworthy, however, that Underwood did have sources of information about the Union among his employees. This conclusion is derived from Underwood's own testimony that two employees came to him shortly after March 30, 1962, and warned him about DeMar's being really for the Union although he was talking against it.

Respondent's testimony not mentioned are reflected in a careful examination of the record. In view of the above findings no useful purpose would be served by detailing them.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section II, above, occurring in connection with the operations of 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 Respondent has engaged in certain unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondent unlawfully discriminated with respect to the tenure of employment of Gilbert Medina, Otto Laube, Robert Anderson, R. T. Bogue, and Leonard Leech. It will therefore be recommended that Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any rights or privileges, and make them whole for any loss of pay they may have suffered by reason of discrimination, by paying to them a sum of money equal to that which they normally would have earned as wages from the date of their discharge to the date of Respondent's offer of reinstatement, plus their net earnings during that period, in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289-294.

As the unfair labor practices found above indicate a deliberate and flagrant attempt to thwart the right of employees in duly selecting their bargaining representative and the likelihood of the recurrence of such action appears likely, a broad cease-and-desist order will be recommended.

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. By discharging Gilbert Medina, Otto Laube, Robert Anderson, R. T. Bogue, and Leonard Leech, Respondent discriminated with the respective employment of said employees because they engaged in concerted activities for the purposes of collective bargaining or mutual aid and protection, thus violating Section 8(a)(3) and (1) of the Act.
2. By interrogation and threats addressed to any employee, Respondent interfered with, restrained, and coerced its employee in the exercise of his rights guaranteed by Section 7 of the Act and thus Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

[Recommendations omitted from publication.]

The Great Atlantic and Pacific Tea Company (Family Savings Center) and Retail Clerks International Association, Retail Store Employees Union, Local 1407, AFL-CIO and Amalgamated Meat Cutters and Butcher Workmen of North America, Amalgamated Food Employees Union, Local 590, AFL-CIO, Party to the Contract. Case No. 6-CA-2492. February 1, 1963

DECISION AND ORDER

On October 5, 1962, Trial Examiner Samuel M. Singer issued his Intermediate Report in the above-entitled proceeding, finding that 140 NLRB No. 89.