

Crane and Breed Casket Company and International Union of District 50, United Mine Workers of America. Cases 9-CA-4721, 9-CA-4804, and 9-CA-4843

June 3, 1969

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS
BROWN AND ZAGORIA

On March 10, 1969, Trial Examiner Samuel M. Singer issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that Respondent had not engaged in certain other alleged unfair labor practices and recommended dismissal of those allegations of the complaint. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

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 Trial Examiner's Decision, the exceptions and brief, and the entire record in these cases, and hereby adopts the findings, conclusions,¹ and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Crane and Breed Casket Company, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

¹These findings and conclusions are based, in part, upon the credibility determinations of the Trial Examiner, to which the Respondent excepts. On the basis of our own careful review of the record, we conclude that the Trial Examiner's credibility findings are not contrary to the clear preponderance of all the relevant evidence. Accordingly, we find no basis for disturbing those findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3).

TRIAL EXAMINER'S DECISION

SAMUEL M. SINGER, Trial Examiner: This proceeding, tried before me at Cincinnati, Ohio, on November 13-21, 1968,¹ concerns allegations that Respondent Company violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by acts of interference, restraint, and coercion and by discriminatorily discharging and failing or refusing to reinstate two employees on account of their union sympathies in order to discourage union membership and activities.

All parties appeared and were afforded full opportunity to be heard and to examine and cross-examine witnesses. Briefs were received from Respondent and General Counsel. Upon the entire record² and from my observation of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent, an Ohio corporation, manufactures caskets in Cincinnati, Ohio. During the representative past year Respondent shipped in interstate commerce from its Cincinnati plant to points outside Ohio, and received at that plant in interstate commerce from such points, products valued in excess of \$50,000. I find that at all material times Respondent has been and is engaged in commerce within the meaning of the Act and that assertion of jurisdiction here is proper.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party (herein called the Union or District 50) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background; Issues

During the period here involved, Respondent employed approximately 160 employees — 40 to 62 in its "YC" department. Respondent's officials included Executive Vice President Bible, Personnel Director Hartke, Secretary-Treasurer Heffron, and Plant Manager Allen. Schweiger and Pullum at different times were foremen of the YC department.

For many years prior to the events here involved, Respondent's employees were represented by Casket Makers Union, an unaffiliated labor organization. On January 10, 1968,³ Casket Makers President Fletcher and a fellow employee (Cochran) visited District 50 to solicit its assistance in organizing the plant. The Union (District 50) thereupon launched an organizational drive and on January 23 filed a representation petition with the Board. Hearings on the petition, with Casket Makers an intervenor, were held in August and September. Respondent there took the position that Casket Makers was a party with Respondent to a contract which was a bar to an election.⁴

¹The complaints, issued on August 6 and 29 and October 1, 1968 (based on charges filed on May 14, July 17, and August 19, 1968), were consolidated by an order dated October 1, 1968.

²Transcript corrected by my order on notice dated February 11, 1969.

³Unless otherwise indicated all subsequent dates are 1968.

⁴This representation case is presently pending before the Board (Case

The complaint here alleges: (a) acts of employer interference, restraint, and coercion during District 50's organizational campaign; and (b) discriminatory discharge during this drive of District 50 adherents Fletcher and Montgomery.

B. Interference, Restraint, and Coercion

1. Foreman Pullum's alleged threat to discharge Montgomery if he visited NLRB

On January 10, employee Fletcher requested Foreman Pullum to give him and employee Montgomery time off to visit the National Labor Relations Board. He did not disclose the purpose of the intended visit. Pullum gave Fletcher the requested leave. According to Fletcher, however, Montgomery later reported to him that Pullum had threatened to "fire" Montgomery if the latter accompanied Fletcher. Pullum denied the threat, explaining that he separately told Montgomery and Fletcher that each had permission to go to the Board, but nowhere else. Pullum admitted telling Montgomery that if he went elsewhere he could "lose [his] job," stating that he needed Montgomery's production.

I credit Pullum's testimony in this instance, particularly in view of the following: (1) Fletcher did not personally hear the alleged threat, admitting at one point that he only "understood him [Montgomery] to say Mr. Pullum had made [the] statement"; (2) Montgomery, who testified on other matters, was silent on this subject; and (3) Pullum's testimony was to an extent corroborated by the fact (as hereafter shown) that during the period in question Pullum had indeed pressed Montgomery for increased production.⁵

In view of the absence of substantial credible evidence with regard to this threat allegation, it is found not to be established.

2. Personnel Director Hartke's characterization of employees as "troublemakers"

Employee Fletcher testified that "every time" he (in his capacity as union spokesman) would take up the complaints of three particular employees (Montgomery, Smith, and Howell) with Personnel Director Hartke, the latter "would refer to the three . . . as troublemakers" — irrespective of the nature of the complaint, "whether it be a salary dispute or anything." Hartke admitted that he called the three men "troublemakers," but explained that he did this because they had raised "rather small" grievances adding that Fletcher himself "would be pretty well needed by them."

I find that Hartke's characterization of the employees in question as troublemakers constitutes nothing more than expression of annoyance or pique at what Hartke regarded as picayune complaints and nuisance to himself and the Union's spokesman. I cannot infer from the record as made that these remarks were designed to

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⁵Fletcher also testified that he reported Pullum's alleged threat to Personnel Director Hartke who told him that "the foreman could fire him, but why put him in the middle . . . why put the guy in the middle." Hartke credibly testified that he told Fletcher "why put the foreman in the middle," meaning that "a foreman, in ignorance, could do something improper" so that Fletcher should have requested permission to leave directly from Hartke, the personnel director. I find nothing illegal or improper in Hartke's statement to Fletcher.

discourage, or had the effect of discouraging, the filing of grievances. I conclude that in the circumstances it has not been shown that Hartke's comments were unlawful or improper.

3. Foreman Pullum's alleged threats to lay off or discharge Union adherents

The complaint alleges that during February Foreman Pullum threatened "certain employees with discharge, layoff or both because of their activities on behalf of the Union." This allegation is unsupported by substantial credible evidence. While Fletcher was laid off for 2 or 3 days in February, neither Fletcher nor any other witness for General Counsel claimed that it was discriminatorily motivated. The record establishes other layoffs (e.g., on January 2 and March 29); so far as appears, however, these were the result of production problems. Fletcher's testimony that shortly after the March 29 layoff (Montgomery was one of the three or four men terminated at that time, *infra*, sec. C) Pullum told him that the layoff "was one way of getting rid of his undesirables . . . weeding them out" does not, without more, support the inference that by "undesirables" Pullum was referring to Union adherents. Nor is Fletcher's testimony at odds with that of Pullum, who testified that he had informed Fletcher that the March 29 layoff resulted from "a casket buildup" by "somebody . . . deliberately damaging the finish . . . and creating one hell of a bottle neck," requiring "readjust[ment of] the department to . . . relieve this problem."⁶

I find the allegation under consideration not sustained.

4. Vice President Bible's July 5 speech

On July 5 (prior to the representation case hearings in August and September), Vice President Bible delivered a speech to all employees assembled in the Company cafeteria. There is a sharp dispute as to whether Bible confined his remarks to a written manuscript before him (as he and two other Company officials testified) or whether he went beyond the prepared text in uttering certain coercive remarks (as four employee witnesses testified).

In his written script, Bible told his employees that this was the first time he was talking to them as a group and that although he did not "like the idea of having to stick to a written outline . . . we will make the best of it." He referred to competition from automated plants, dwelling on the need for improved efficiency. Accusing some departments of "slowing down deliberately" and some employees of "deliberate damage to the finishes on caskets," Bible said, "We have some employees of this type at this meeting." He also mentioned similar "production trouble" formerly experienced by another Cincinnati firm. Then referring to District 50's pending election petition, Bible said:

Have any of you had any help from these strangers? Do you know how much they want to get in your pockets for . . . These strangers and some of your fellow employees would have you believe that Crane and Breed is unfair. This, all of you know, is not true.

⁶For reasons hereafter shown, Montgomery's testimony that at the time of his discharge (on March 29) Pullum told him that Respondent was "using every trick in the book to weed you guys out" is not credited. This alleged statement accordingly does not support a finding that Pullum threatened reprisals for union activity.

It hurts us to hear and know how you employees have been forced, even threatened into giving consideration to these strangers. This is especially so after knowing how all of you have gained so much . . . through your Casket Makers Union.

Bible then reminded the employees of the Company's "Open House Policy" under which all employees "have been able to take your complaints, requests or wants directly to management" and pointed out to them that "for many, many years working conditions, wages, insurance, etc., has [sic] been worked out and great gains made through your Casket Makers Union."

Employees Fletcher, Dameron, McGinnis, and Cochran testified that in the course of his talk Bible also stated that Respondent would find a way to get rid of the two instigators of District 50's organizational campaign. Dameron quoted Bible as saying, "The Union was no good . . . Two individuals were pushing it . . . they were going to have to find ways to do away with them." Cochran recalled Bible characterizing the two employees as "morons," stating that "[t]here are going to have to be means or ways to get rid of these individuals." McGinnis testified in like manner, recalling that Bible referred to the two men as "morons and imbeciles" and stated that "it would be best to get rid of these two individuals that . . . were nothing but troublemakers!" According to McGinnis and Fletcher, Bible also said that "all that worked in the Company were bums." Fletcher and Cochran further quoted Bible as saying that the Company "would close the doors before he would let another union come in and take us over."

All circumstances considered, I cannot credit Bible's testimony that he confined his remarks to his prepared text. I credit the testimony of the employee witnesses that Bible, departing from the literal text of his speech, made the remarks: (1) that Respondent could find a way of getting rid of the District 50 instigators; and (2) that the Company would close down before it would let District 50 organize the plant. Observing all four employee witnesses to testify in a sincere and straightforward manner, I cannot believe that three of the four who are still employed by Respondent (Fletcher's discharge is discussed *infra*, section D), would conjure up and maintain under cross-examination a trumped-up figment involving so vividly memorable an experience and, indeed, jeopardize their employment by fabrication under oath concerning their employer. Furthermore, two of the four (Dameron and McGinnis) have not been identified as District 50 adherents and, so far appears, are disinterested witnesses. On the other hand, Respondent did not call even 1 of the 170 assembled employees to corroborate its officials' self-serving version. The two officials (Allen and Heffron), who sought to corroborate Bible, testified that they read the speech before delivery and could not recall any deviation by Bible from the written script. (It is not claimed that they had copies of the script to follow as it was being delivered.) It would indeed be difficult, at such late date as the hearing — after an interval of 4 months following the speech — to recall the precise words spoken by Bible and that these were strictly limited to those in the prepared text, even assuming that they were cognizant of that text with exactitude. Nor, contrary to Respondent's contention, does the fact that the written text (essentially uncoercive) was prepared by its counsel in any way establish that Bible did not stray therefrom to interpolate the coercive statements attributed to him by the employee witnesses.

I find and conclude that Bible's July 5 speech to the employees exceeded permissible bounds of employer communication to employees, in that it contained threats of reprisal for engaging in protected concerted and union activity, in violation of Section 8(a)(1) of the Act.

C. Discharge of Montgomery

Frederick Montgomery, hired in October 1965, worked as an arch solderer in the YC department until discharged on March 29, 1968. His union activity consisted of turning in 25 to 30 signed authorization cards to Fletcher, chief employee organizer for District 50. Although Fletcher described Montgomery as an active unionist, he testified that other employees signed up more employees.

It is undisputed that Montgomery's performance — both as to quality and quantity — was far below par for a considerable period prior to about January 1968. Former Plant Manager Hamilton, who left the Company in March 1968, testified that Montgomery's work was of "very, very poor quality" with "pinholes, low spots, irregularities in the arch, some holes that you could crawl through . . ." Schweiger, Montgomery's YC department foreman until April 1967, testified that it "got to be a standing joke" that "when a job was bad, they knew that [the] number on the job was 139," Montgomery's number. According to Pullum, Schweiger's successor and Montgomery's foreman until his discharge, Montgomery was a constant problem regarding quality and quantity and was "the poorest. . . [he] ever worked with in all [his] years at Crane and Breed." Montgomery himself testified, "I knew my work was bad" until several months before his discharge, stating that he received two written reprimands and many more verbal complaints from management.⁷

There is sharp dispute, however, concerning the nature of Montgomery's performance in the 3 months preceding his dismissal (January — March 1968), General Counsel contending that Montgomery became a good employee and performed satisfactorily during that time. According to General Counsel (br. p. 4), the "timing of Montgomery's discharge is commensurate with the pick up in the antiunion campaign conducted by Respondent and indicative of discriminatory motive." Respondent, on the other hand, adduced evidence to show that Montgomery's performance in the 3 months preceding his discharge was no better than before then, and contends that union activity played no role in that discharge.

Although Montgomery first testified that his work "improved" to such an extent "within the last six-month period" that "there were no complaints" about it, his subsequent testimony on this subject is too vague, and indeed too inconsistent, to warrant crediting it. Thus, on cross-examination, Montgomery admitted that "they had talked to me about my work" in the last few months of his employment, but he contended that he was not "reprimanded." He went on to say that "I could have been told that there was something wrong with a job . . . in a casual way, by Mr. Pullum." On direct examination, he testified that about 3 months before his discharge, Pullum in fact complimented his work, stating that it

⁷According to Montgomery, the last written reprimand came about 6 months before discharge and this was followed by "verbal" reprimands from Pullum. Describing his deficiencies, Montgomery said, "I would drop the arches too much or not enough. This would cause an opening in the rim of the casket. Also . . . there would be air bubbles in some of the solder that would show up in the grinding of the head of the casket."

"was much better . . . that I was showing improvement, great improvement," but he could not state even the month he was so complimented. He also admitted that he was "possibly" singled out in the last six months" for doing poor work, but he construed this only as "constructive criticism."

On the other hand, Foreman Pullum testified that he continued to complain about the quality and quantity of Montgomery's performance in the last 3 months of his employment, citing three specific instances when he talked to him about leaving his bench, "playing around, horsing around," and producing defective work. According to Pullum, operators on the line would often call him to inspect defects in Montgomery's work such as holes and poor alignments, and he, in turn, would personally escort Montgomery to the section to show him the defects. Pullum testified that he decided to dismiss Montgomery late in the afternoon on March 28, when an operator (George Allender, Jr.) again called him to check on pinholes in Montgomery's work. Throwing "his hands up" and exclaiming that he was "fed up with the matter of doing [Montgomery's] work over and over" the operator told Pullum, "I don't mind catching a few when it happens, but one right after another . . . Something has to be done." The next morning, Pullum selected at random several sets of casket tops handled by Montgomery and, finding them "full of holes, low spots, pinholes that would not pass the finish inspection," went to Personnel Manager Hartke and told him that he was determined to fire Montgomery. Hartke agreed to go along, and at the end of the day Pullum told Montgomery that he "has got to the point where I have to dismiss" him for not heeding Pullum's repeated warnings to improve his work.

I resolve the conflicting testimony concerning the nature of Montgomery's performance in the period prior to his discharge in favor of Pullum rather than of Montgomery. To begin with, Montgomery impressed me as carefully striving to conform his testimony to what he considered to be his best interest in order to fashion a case against the Company. I cannot believe that Montgomery, one of Respondent's worst employees (if not the worst) for months before January 1968, suddenly became as good as he portrayed himself. Nor can I accept the broad and generalized testimony of three General Counsel's employee witnesses (Smith, Fletcher, and Wagers) that, based on their observations, they detected an "improvement" in Montgomery's work after January 1968. It seems that neither Smith (like Montgomery, an arch solderer) nor Fletcher (an assembler of casket lids previously worked on by arch solderers) was in a good position to really know and evaluate Montgomery's work. Although Wagers indicated, also in general terms, that as arch repairman subsequent to February 1 (when he claimed to have taken over Bob Rose's job) he noticed a "lot less" of Montgomery's work in need of repair, the substantial credible evidence (including Wagers' work record) establishes, and I accordingly find, that Wagers did not succeed to Rose's repairman position (and therefore was not in position to check on Montgomery's work) until March 23 or 27, immediately prior to Montgomery's discharge. On the other hand, Pullum's testimony is not only corroborated by that of former Plant Manager Hamilton, but by objective evidence consisting of samples of Montgomery's defective work a day or two prior to his discharge.

Based on the entire record, I find and conclude that Respondent discharged Montgomery on March 29 because

it regarded him as a poor worker and not because of his membership and activities on behalf of District 50. This conclusion is fortified by the circumstances: (1) that although Respondent undoubtedly preferred dealing with the independent union (the Casket Makers) rather than with District 50, it did not manifest real hostility to District 50 until Company Vice President Bible addressed the employees on July 5 (more than 3 months after Montgomery's discharge); (2) that Respondent retained other District 50 adherents, including an active union leader like Cochran who (together with Fletcher) instigated the District 50 drive;⁴ (3) that Respondent laid off other employees for efficiency reasons on the day of Montgomery's discharge (March 29, *supra*, sec. B, 3); and (4) that there is no substantial credible evidence establishing Company knowledge of Montgomery's District 50 activities.⁵

I conclude that General Counsel has failed to meet the burden of establishing by a preponderance of the credible evidence that the March 29 discharge of Montgomery was discriminatorily motivated, in violation of Section 8(a)(3) and (1) of the Act.

D. Discharge of Fletcher

1. Fletcher's union activity

Edward Fletcher, hired in March 1960, worked as an assembler in the YC department when discharged on August 13, 1968. He was president of the Casket Makers Union for 3 years until January 1968 and, as such, vigorously pressed employee grievances. Thus, Personnel Manager Hartke testified that he had "a visit from Mr. Fletcher practically daily . . . about some new complaint." According to Hartke and Vice President Bible, when dissatisfied with Company grievance dispositions, Fletcher would comment that he was "going down to the Labor Board." Bible testified that after informing Fletcher in December 1967 that the Company would omit its usual year-end employee bonus, Fletcher warned that he "would get another union in."

As previously noted (*supra*, sec. A), in January 1968, Fletcher and another employee (Cochran) got in touch with District 50 and began to organize the plant for that union. Fletcher became "head of [the] organizing campaign" and the employees' contact with District 50. It was Fletcher who distributed the Union authorization cards among the employee card solicitors, collected them, and turned them over to District 50. There is no question that Respondent became aware of Fletcher's Union role early in the campaign. Thus, Hartke testified that he knew

⁴The fact that an employer retains some union employees does not, of course, in itself, preclude an inference that the discharge of others is unlawfully motivated. See *N.L.R.B. v. W.C. Nabors Company*, 196 F.2d 272, 276 (C.A. 5). It is nevertheless a relevant circumstance.

⁵Company officials Hartke and Bible expressly denied knowledge of Montgomery's union membership and activities. The only direct evidence on such Company knowledge is Montgomery's testimony that on the day of his discharge Pullum called him aside and told him, "As a friend I like you, but they are using every trick in the book to weed you guys out. Some are getting fired, some are being laid off." In the light of the entire record, including the nature of Montgomery's performance, I do not credit Montgomery's self-serving testimony, nor the implication therefrom that Respondent was at that time attempting "to weed" out the District 50 adherents. Pullum credibly testified that he "absolutely [did] not" make the statement attributed to him. It is to be noted that Montgomery admitted that Pullum also told him that he was being fired for "bad work."

of Fletcher's Union association shortly before or after receiving District 50's January 23 representation petition. And Fletcher's coorganizer (Cochran) testified, without contradiction, that soon after he and Fletcher contacted the Union, their foreman, Schweiger said, "I hear that you people are affiliating yourself [sic] with District 50 . . . I would have found a different union because that union is going broke. They could not pay their benefits now."

Furthermore, Fletcher credibly testified regarding an incident in which then Plant Manager Hamilton warned him about his union activity. Early in March, Fletcher asked Hamilton to get Foreman French to stop "riding" and "to lay off" employee Miles who was working under French, indicating that the Company apparently "had the idea that the man was one of the organizers for District 50." Hamilton remarked, "Heck, we know that you are behind it, so we are not riding you, are we?" When Fletcher replied, "I don't think you have good enough guts to . . . ride me," Hamilton retorted, "Let me give you some advice. Watch it. They are after you."¹⁰

2. The discharge

The episode leading to Fletcher's discharge — a "fight" with another employee (Herschel Gregory) — is largely undisputed. While Respondent contends that the discharge was motivated by this incident, General Counsel contends that the reason advanced by Respondent is pretextuous, the real reason being Fletcher's outstanding advocacy of District 50.

On August 13, at approximately 1 p.m., assemblers Dameron and Fletcher and employee Norton (a serviceman) began "teasing" Herschel Gregory, another assembler in the YC department, about one of Gregory's jobs. Dameron asked Gregory why he left a piece of wood out of a casket. Gregory denied that it was his work, stated that he had been "soldering longer than they have being living" and, turning to Fletcher, said that he "could put an iron, a soldering iron in his a — ." Fletcher thereupon crossed to Gregory's nearby bench and "grabbed hold" of Gregory's shirt, whereupon Gregory "swung" at Fletcher. Fletcher then said, "I don't know why you got mad. We are only teasing you. . . . Settle down. I don't want to hit you." In the meantime, Dameron and Norton "walked over to break it [the altercation] up, but they split apart before [they] got down there."¹¹

Shortly thereafter, Gregory reported this incident to Foreman Pullum.¹² Pullum in turn reported the matter to

Personnel Manager Hartke and got hold of the employment records of the two employees. Pullum then told both that they were "fired for fighting." When Fletcher asked if he was being fired over just an "argument," Pullum remarked that if what he heard was true, he was "fired" and told both men to accompany him to Hartke's office to hear both sides of the story.¹³

In Hartke's office, both men first claimed that they "just had an argument." Gregory admitted, however, taking "a swing" at Fletcher and the latter admitted grabbing Gregory by the shirt front. Hartke asked Pullum what he was going to do about it and Pullum said that he had made his decision to fire both. When Hartke inquired whether he had informed Vice President Bible of his decision, Pullum went to check with Bible; upon returning, he told the two employees, "I have made the decision upstairs and I am holding pat."¹⁴

3. Conclusions

As found, Fletcher was involved in a "fight" on the day of his discharge. There is no question that Respondent could lawfully dismiss him for this, irrespective of the degree of Fletcher's fault or his role in the fight, since an employee may be discharged for any reason — "for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated." *N.L.R.B. v. Condenser Corporation of America*, 128 F.2d 67, 75 (C.A. 3). The key issue here is one of motivation — whether Respondent in fact terminated Fletcher because of this "fight." "[T]he rule is well established that although ample valid grounds may exist for the discharge of an employee, that discharge will violate Section 8(a)(3) if it was in fact motivated, even partially, by the employee's union activity [citing cases]. Thus, where there are legitimate reasons for the discharge of an employee, the question is whether those were in fact the only grounds for the dismissal, or whether they were 'put forth as a mere pretext to justify an impermissible discharge.'" *N.L.R.B. v. Pembeck Oil Corp.*, 404 F.2d 105, (C.A. 2).¹⁵ Viewing the record as a whole and bearing in mind that "human qualities, such as motive, can only be shown circumstantially where the possessor has not previously revealed them directly" (*N.L.R.B. v. Tepper, d/b/a Shoenberg Farms*, 297 F.2d 282, 284 (C.A. 10)), I find that the preponderance of evidence and the reasonable inference to be drawn therefrom establish that the discharge of Fletcher was in fact motivated by Respondent's opposition to his union activities.

Admittedly, Respondent did not look favorably upon District 50's establishment at the plant, preferring to deal with the independent union (Casket Makers). In his July 5 speech to the assembled employees, Vice President Bible characterized the District 50 men as "strangers" who

¹⁰I do not credit Hamilton's testimony that he "positively" never talked to any employee, including Fletcher, about the Union. Hamilton insisted that he confined his remarks "about the possibility of Local 50 coming in" to management officials. Although acknowledging that Fletcher had spoken to him about a complaint Miles had made concerning Foreman French, he fixed the time of this conversation as December 19, 1967. He admitted once warning Fletcher — between October 1967 and March 1968 (he could not "pin it down to a definite date") — that he "had better watch your step," but claimed that he did this in connection in an entirely different situation, namely: when Fletcher "on the verge of insubordination" called Hamilton and other company officials "liars" in pressing a matter in his capacity "as union president." I was not impressed with Hamilton's collection of the Miles incident. Thus, for example, he was confused as to when the incident took place in relation to District 50 activity, finally, confessing that he "could not . . . truthfully" place the time in relation to District 50's advent at the plant.

¹¹Based on the composite and mutually corroborative testimony of Fletcher and Dameron; Gregory and Norton did not testify. Pullum and other management officials did not witness the incident.

¹²According to Pullum, Gregory's description of the "fight" was essentially as heretofore described, except that (according to Pullum) Gregory also reported that there "was name calling," with Fletcher using obscene language. Pullum also quoted Gregory as saying that Fletcher "grabbed his shirt front and he shook the hell out of him" and that Gregory, in turn, "took a couple of swings at [Fletcher] to release the hold."

¹³Based on the credited testimony of Pullum.

¹⁴Based on credited portions of the testimony of Pullum, Hartke, and Fletcher

¹⁵See also *Wonder State Manufacturing Company v. N.L.R.B.*, 331 F.2d 737 (C.A. 6); *N.L.R.B. v. Murray Ohio Manufacturing Co.*, 326 F.2d 509, 517 (C.A. 6); *N.L.R.B. v. Whitin Machine Works*, 204 F.2d 883, 885 (C.A. 1).

"want[ed] to get in your pockets." He pointed to past employee benefits obtained through the independent union and stated that it "hurt us to hear" that the employees were "giving consideration to these strangers." He went on to warn the men that Respondent could find ways of ridding itself of District 50 instigators and threatened to close the plant rather than allow it to be worked under District 50. Fletcher became District 50's chief proponent after giving up his leadership in the Company-favored independent union. Respondent knew him as an aggressive promoter of employee causes, both as head of the independent and later of District 50. It was Fletcher who warned Vice President Bible that he would bring in an outside union when Respondent discontinued its usual employee year-end bonus in December 1967. Fletcher (along with another employee) then contacted District 50 representatives and personally spearheaded the ensuing District 50 drive. Early in March 1968 — while pressing a complaint on behalf of an employee (Miles) — the then plant manager (Hamilton) cautioned Fletcher, "Let me give you some advice. Watch it. They are after you."

All of these factors — Respondent's opposition to District 50, Fletcher's key position in that Union, Respondent's knowledge of Fletcher's union role, and the plant manager's warning that "[t]hey are after you" — are more than sufficient to establish a *prima facie* case of unlawful discrimination. After observing the witnesses, in my view, Respondent's explanation for the discharge is unconvincing and falls short of rebutting this showing.

Personnel Manager Hartke testified that Fletcher was fired pursuant to Company policy to discharge employees on a second "physical contact fight." Hartke's testimony, as well as that of employee witnesses, indicates that fighting in and of itself was not a cause for discharge. According to Hartke, it was Company policy "to allow one physical contact fight."¹⁶ He cited two prior encounters in which Fletcher was involved. The first, in 1960 or early 1961, occurred when Fletcher approached Gregory (the same employee involved in the August 13, 1968, altercation) and the latter threatened to strike Fletcher with a hatchet. Admittedly, however, "[t]here was not any physical contact at the time." The second — in August 1962 — did involve some "contact." Foreman Schweiger testified that this incident took place when Fletcher, annoyed by a stockboy who "mixed up" stock, called the boy a "s — of a b — ." When Schweiger warned Fletcher against "using that kind of language" and told him to bring any complaints he had directly to Schweiger, Fletcher "grabbed" Schweiger who "thought that he was going to hit [him]."¹⁷

Based on my assessment of the probabilities in the light of all the evidence and demeanor as observed, I am not persuaded that Respondent discharged Fletcher in accordance with an alleged two-physical contact rule. To begin with, there is no substantial credible evidence corroborating Hartke's self-serving testimony that such rule existed. Indeed, neither Pullum nor any other Company official even testified that a rule of this nature

¹⁶Apparently the degree of seriousness of a *first* fight was not considered to be critical. Thus, the record shows that neither combatant involved in at least one "bloody" brawl was discharged, Hartke explaining that neither had been involved in a previous fight. Furthermore, the record indicates that "horseplay" in the plant was not uncommon; even Foreman Pullum had exploded firecrackers under an employee's bench.

¹⁷According to Schweiger, although he "fired" Fletcher on the spot, after consulting Hartke he reinstated Fletcher with an admonition that if he "use[d] any more abusive language" or gave him "any more trouble" he would be fired.

was in effect. And Hartke admitted that the rule was never published or communicated to employees. Nor has it been established that he or Pullum (who made the decision to fire Fletcher) informed Fletcher that he was being fired for violating a two-physical contact rule — something, if not the natural thing, that an employer acting on the basis of such rule would have done. Furthermore, Hartke admitted that Respondent never actually dismissed any employee involved in a second "fight," although citing two plant episodes involving two physical contacts. One was the November 1963 "pushing match" between employees Tucker and Virgil Noe, with Respondent admittedly retaining the two employees on a "promise" that "they would never have another fight." It again passed up the opportunity to apply its claimed two-physical fight rule in the Schweiger-Fletcher episode (*supra*, fn. 17). The claimed rule, applied for the first time to the key District 50 leader in the organizational drive, without even telling the employee of the rule or the claimed violations, smacks of afterthought, disguised to conceal Respondent's true discriminatory motivation. Respondent's reliance on two prior (1961-62) incidents, 6 or 7 years before the events here involved, to establish violation of an alleged rule has the flavor of attempt "to revive . . . ancient (and apparently forgotten) complaint[s], and make [them] serve as the proffered excuse or reason for [Fletcher's] discharge." *Peoples Motor Express, Inc. v. N.L.R.B.*, 165 F.2d 903, 906 (C.A. 4). I so find.

In reaching the conclusion that Fletcher's discharge was discriminatory, I have not overlooked the circumstance that Respondent also dismissed Gregory, not shown to have been a District 50 suppur *ex*. While a relevant factor, this is not determinative. As the Court observed in *Steves Sash & Door Company v. N.L.R.B.*, 401 F.2d 676 (C.A. 5), an employer may discharge an employee "in order to lend credence to the pretextual discharge of a fellow employee unionist." See also *Wonder State Mfg. Co. v. N.L.R.B.*, 331 F.2d 737, 738 (C.A. 6). Where, as here, the real target of the employer is the union sparkplug, the employer may be willing to permit "some white sheep [to] suffer along with the black." *Majestic Molded Products, Inc. v. N.L.R.B.*, 330 F.2d 603, 606 (C.A. 2).

For all of the foregoing reasons, I find and conclude that the reason advanced by Respondent for Fletcher's August 13, 1968, discharge is pretextuous. I conclude that the discharge was, at least in substantial part, motivated by union animus, in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSION OF LAW

1. By threatening employees with reprisals (including plant closure and discharge) to discourage union membership and activity, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

2. By discharging Edward Fletcher on August 13, 1968, and thereafter failing or refusing to reinstate him, in order to discourage union activities, Respondent has discriminated in regard to hire and tenure of his employment, in violation of Section 8(a)(3) and (1) of the Act.

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

4. It has not been established that Respondent has violated Section 8(a)(1) by other acts and conduct alleged

in the complaint, nor Section 8(a)(3) by discriminatorily discharging Frederick Montgomery because of union or protected concerted activities.

THE REMEDY

The recommended order will contain the conventional provisions entered in cases involving findings of interference, restraint, and coercion, and discriminatory discharges, in violation of Section 8(a)(1) and (3) of the Act. These will require Respondent to cease and desist from the unfair labor practices found, to offer reinstatement with backpay to the employee discriminated against, and to post a Notice to that effect. In accordance with usual requirements, reinstatement shall be to the discriminatee's former or substantially equivalent position, without prejudice to his seniority and other rights or privileges. The discriminatee shall be made 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 normally would have earned from his date of discharge (August 13, 1968), to the date of offer of reinstatement, less net earnings during such period, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

It is also recommended, in view of the nature of the unfair labor practices 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.

RECOMMENDED ORDER

Upon the entire record in the case and the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, it is recommended that Respondent, Crane and Breed Casket Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with plant closure, discharge, or other reprisals for union membership or activity; or in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

(b) Discouraging membership and activities in International Union of District 50, United Mine Workers of America, by discriminating in regard to the hire and tenure of employment of Respondent's employees, or by discriminating in any other manner in regard to any term or condition of their employment, in order to discourage membership or activities therein.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Offer Edward Fletcher immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of his discharge, in the manner set forth in "The Remedy" section herein.

(b) Notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all

payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(d) Post at its plant in Cincinnati, Ohio, copies of the attached notice marked "Appendix."¹⁸ Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.¹⁹

IT IS FURTHER ORDERED that the complaint be dismissed in all other respects.

¹⁸In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

¹⁹In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board

After a trial at which all sides had the chance to give evidence, it has been decided that we, Crane and Breed Casket Company, violated the National Labor Relations Act, as amended and we have been ordered to post this notice.

The National Labor Relations Act gives you, as an employee, these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through a representative of your own choosing

To act together with other employees to bargain collectively or for other mutual aid or protection; and,

If you wish, not to do any of these things

Accordingly, we give you these assurances:

WE WILL NOT do anything that interferes with any of your rights listed above.

WE WILL NOT threaten to close our plant or to punish you or treat you differently because you want a union.

WE WILL NOT fire or take any reprisal against any of you because you have joined or supported, support, or will support the organizational campaign of International Union of District 50, United Mine Workers of America, or any other union.

WE WILL offer to give back his job, with full seniority and all other rights and privileges, to employee Edward Fletcher, who was found to have been discharged because he supported the

organizational campaign of the above-named Union.

WE WILL also make up all pay Edward Fletcher lost, with 6 percent interest.

WE WILL notify Edward Fletcher if he is presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act, as amended, after discharge from the Armed Forces.

All of you are free to join or not to join, support, assist, or be active on behalf of International Union of District 50, United Mine Workers of America, or any other union, as you see fit, without any interference, restraint, or coercion from us in any way, shape, or form.

CRANE AND BREED
CASKET COMPANY
(Employer)

Dated

By

(Representative)

(Title)

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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407, Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513-684-3686.