

**Airco Temescal, a Division of Air Reduction Company, Incorporated and Mary Priscilla Mikesell.** Case 20-CA-5037

June 18, 1969

## DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS  
JENKINS AND ZAGORIA

On February 19, 1969, Trial Examiner Maurice Alexandre issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.<sup>1</sup> The General Counsel filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case 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 briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.<sup>2</sup>

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Airco Temescal, A Division of Air Reduction Company, Incorporated, Berkeley, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified.<sup>3</sup>

<sup>1</sup>The Respondent's request for oral argument is hereby denied because the record, including the exceptions and briefs, adequately presents the issues and the positions of the parties.

<sup>2</sup>Contrary to the Respondent's contention, we find that the Trial Examiner did not err by taking official notice of the Trial Examiner's Decision and the Board's Order in the prior case involving the Respondent Case 20-CA-4544. (unpublished) Moreover, without considering the prior case, we find that the record in the instant matter as it reveals unlawful interrogation, threats, and solicitation of surveillance, all directed specifically to Mikesell, clearly indicates Respondent's union animus.

<sup>3</sup>Add as the third indented paragraph of the Appendix the following:

WE WILL notify the above-named employee if presently served in the Armed Forces of the United States of her right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after

MEMBER ZAGORIA, dissenting in part:

Contrary to my colleagues, I would not sustain the Trial Examiner's finding that the discharge of employee Mary Mikesell was motivated by reasons proscribed by Section 8(a)(3) of the Act.

As the Trial Examiner found, Mikesell's repeated tardiness, insubordination, and use of her Employer's time for personal conversations and telephone calls were cause for numerous justifiable complaints by her immediate supervisor. Mikesell's conduct in these respects had been the subject of two warning notices given to her by Supervisor Burnett, and he had several times recommended to his superiors that Mikesell be discharged. On May 10, 1968, as a result of Burnett's several complaints and the warning notices he had given Mikesell, she was given a further written warning to the effect that if her job performance did not improve within 30 days she would be discharged. Mikesell exhibited a temporary improvement, but when her job performance again deteriorated within the next several days Burnett recommended to management that she be immediately discharged.

On May 16, 1968, Mikesell left the plant in the middle of the working day without permission or notification as to the reason for her departure, and she took with her the personal belongings she kept in the plant. Although Mikesell's unannounced departure from the plant was ostensibly necessitated by a medical emergency of such dire immediacy that she could not notify her supervisor or leave a message with other employees in the department, she nevertheless walked 50 or 60 feet to her car carrying with her a large radio, books, and other personal possessions, drove 5 or 10 minutes to her home and, after a telephone consultation with her doctor, took to her bed. When the Respondent's officials discovered that Mikesell and her personal possessions were missing they attempted to locate her within the plant, but failing in this sent a telegram to Mikesell to the effect that her absence without notification or apparent justification was interpreted as a resignation. Mikesell received the telegram late in the afternoon of May 16, but she made no attempt to contact the Respondent until the following day. On May 17 Mikesell finally notified Chief Engineer Wolf that she was seriously ill and had a doctor's appointment. According to Wolf he offered to discuss the termination with Mikesell if she came to the plant, but Mikesell made no further attempt to contact the Respondent to explain or justify her absence of the prior day.

The Trial Examiner found that Mikesell's absence from the plant without notice on May 16 unquestionably constituted a lawful basis for discharge, but he concluded that Mikesell's misconduct was seized upon by the Respondent as a pretext, and was not the motivating cause for her discharge. I find no basis upon the entire record to

discharge from the Armed Forces.

support such a conclusion.

The Respondent was aware of Mikesell's union sympathies and interests no later than May 3, and this knowledge was positively reconfirmed on May 6 when employee Shirley Beauchamp reported to the Respondent that Mikesell was "passing out cards." Had the Respondent been searching for a pretext to cloak a discriminatorily motivated discharge it could have immediately taken advantage of Burnett's several prior recommendations for Mikesell's discharge. Instead the Respondent gave Mikesell an additional 30 days to improve her job performance, and offered to transfer her to another job if her personality conflict with Burnett could not be surmounted. The Respondent, had it been searching for an excuse to terminate Mikesell, had further opportunity when Burnett reported a few days later that Mikesell had reverted to her former habits, and recommended her immediate discharge.

Contrary to the Trial Examiner's reasoning, the Respondent's refusal to act on Burnett's recommendation for Mikesell's immediate discharge does not require or support the conclusion that the May 16 termination was for other than lawful reasons. The Respondent only gave Mikesell a 30-day probationary period to improve her job performance; it did not grant her immunity from discharge for other serious misconduct during the intervening period. Accordingly, I would find that Mikesell's union activities, even though known and unlawfully discouraged by the Respondent, cannot serve to insulate her from discharge for an obviously lawful and justifiable reason.

#### TRIAL EXAMINER'S DECISION

MAURICE ALEXANDRE, Trial Examiner: This case was heard in San Francisco, California, on November 14, 1968,<sup>1</sup> upon a complaint issued on September 11,<sup>2</sup> alleging that Respondent has violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. In its answer, Respondent denies the commission of unfair labor practices. The issues are whether or not Respondent interfered with, restrained, or coerced its employees, and unlawfully discharged Mary Priscilla Mikesell.

Upon the entire record,<sup>3</sup> my observation of the witnesses, and the briefs filed by the General Counsel and by Respondent, I make the following:

#### Findings and Conclusions<sup>4</sup>

##### I. THE UNFAIR LABOR PRACTICES

###### A. The Evidence

###### 1. Background

Respondent, a New York corporation, is engaged in the manufacture of electron beam equipment, and employs *inter alia* the following admitted supervisors at its place of business in Berkeley, California: Charles d'A. Hunt, vice president; Raymond A. Wolf, chief engineer; and Gary N. Burnett, drafting supervisor.

In February 1967, the Union began an organizational drive among Respondent's Berkeley employees. On April 21, 1967, Respondent filed a representation petition.<sup>5</sup> On May 1, 1967, Respondent and the Union agreed to a consent election; and the election held on May 16, 1967 resulted in a vote of 75 to 71 against the Union. Following a hearing in February 1968 on a complaint consolidated with objections to conduct allegedly affecting the election, the Trial Examiner found that Respondent had unlawfully threatened, interrogated, and promised benefits to its employees, and that such conduct interfered with their free choice in the election. He accordingly recommended a cease and desist order, the posting of the usual notices, and the setting aside of the election.

###### 2. Events relating to Mikesell from April 1967 through April 1968

Mikesell was employed by Respondent as a printroom clerk on April 14, 1967. Shortly before and after she was employed, Mikesell and her husband hosted several employee organizational meetings at their home. About a week before the election held on May 16, 1967, she attended a meeting at the Union hall; and on one occasion a few days before the election, she spent 15 to 20 minutes distributing Union leaflets to employees at the front gate of the plant.

Prior to December 1967, Mikesell had had several successive immediate supervisors. In that month, Burnett became her supervisor. He testified that at first she did a satisfactory job; but that towards the end of February 1968, she began arriving late to work and began making an excessive number of personal telephone calls; and that he spoke to her about such conduct at least three or four times. On March 11, Burnett prepared and signed a memorandum stating that Mikesell had been warned of possible discharge for lateness and frequent use of the telephone for personal calls. Although he did not show the memorandum to Mikesell, he told her that he had placed it in her personnel file. According to Burnett, her conduct improved for a few days but once again deteriorated; she also became involved in political discussions which were disruptive; and when he reprimanded her, she became insubordinate.

In March or April, Wolf became chief engineer with supervision over Burnett. In April, Burnett complained to Wolf two or three times about Mikesell's conduct. Wolf described Burnett as being "in a rather distraught state." Because Wolf thought that Mikesell was "a capable girl" and that she could be useful to Respondent, he felt that

<sup>1</sup>All dates hereafter referred to relate to 1968, unless otherwise stated.

<sup>2</sup>Based on a charge filed on April 4 by Mary Priscilla Mikesell.

<sup>3</sup>The General Counsel's unopposed motion to correct the transcript of the hearing is granted, and the transcript errors are noted and corrected.

<sup>4</sup>No issue of commerce is presented. The complaint alleges and the answer admits facts which, I find, establish that Respondent is an employer engaged in commerce and in operations affecting commerce. I further find that International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 115 (hereafter called the Union) is a labor organization within the meaning of Section 2(5) of the Act.

<sup>5</sup>Case 20-RM-968. I take official notice of the decision of Trial Examiner Penfield, issued on July 10, 1968, in Cases 20-RM-968 and 20-CA-4544, and of the Board's Order, issued in the latter case on August 30, 1968, adopting his findings and conclusions in the absence of exceptions thereto.

drastic action against her should not be taken hastily.

### 3. May 2

Shortly before May 2, Burnett requested Mikesell to work extra time to compensate for lateness of over an hour on two occasions. He testified that on the latter date, she arrived late, came to see him, and told him that she did not feel it necessary to arrive on time if he took more than his 30 minutes for lunch. Burnett then decided to have her discharged. However, the only person present with authority to sign a termination check was Hunt, who refused to permit the discharge because Mikesell had not been given two written reprimands in accordance with Respondent's policy, and he instructed Burnett to "cool off" and follow such policy. Burnett thereupon prepared and signed a second memorandum stating in substance that Mikesell's conduct had deteriorated and that she would be discharged if there was no immediate improvement, and he gave Mikesell copies of both the March 11 and May 2 memoranda.

Upon receiving the memoranda, Mikesell prepared a letter addressed to a Field Investigator for the Board, in which she denied the misconduct referred to in the memoranda, accused Respondent of fabricating complaints as a pretext for discharging her "because of the pronoun views that I and my husband hold", asserted that a new employee in her department was being trained to take over her duties, and appealed to the Board and the Union to investigate "these continued unfair labor practices." Mikesell placed copies addressed to Hunt and Burnett in the interplant mail and mailed copies to one Danny Ramos, a Union business agent, and to the *Berkeley Barb*, a local newspaper. It is not clear whether Burnett and Hunt saw their copies the same or the following day. In any event, Burnett showed his copy to Wolf. Hunt testified that on meeting Wolf during the day, he asked Wolf whether he had seen the Mikesell letter, and that Wolf replied that he had. Wolf testified that he asked whether Hunt had seen the letter, that Hunt replied in the negative, and that Wolf then informed Hunt that he had talked to Mikesell, who had stated that she had no intention of mailing the letter and merely wanted to call attention to her grievances.

Wolf did speak to Mikesell that day. Mikesell testified that in response to his inquiry as to why she wrote the letter, she stated that she had grievances which had not been met; that Wolf then stated that there would be a meeting in approximately a week to discuss the matter; and that he also stated that he thought her action had been "too severe." According to Mikesell, she was very upset and cried. Wolf testified that he expressed concern to Mikesell regarding several matters: that the letter constituted "pretty strong action", that "she must have some real justification", that she had failed to consult him or even send him a copy of her letter. According to Wolf, he was also concerned that she was under a misapprehension regarding the new employee in her department, and he told Mikesell that he would arrange a meeting in the near future to discuss these matters.

### 4. May 6

Mikesell testified that in the spring of 1968, her husband gave her some authorization cards which he had obtained from Union Business Agent Ramos, and that she spoke to various employees concerning the Union. On May 6, Ramos went to see Hunt pursuant to an

appointment to discuss "serious charges" against Respondent. At Hunt's request, one Cariglia was present at the meeting.<sup>6</sup> Ramos stated that the serious charges had been made by Mikesell's husband. Several days earlier, Hunt had seen the May 3 issue of the *Berkeley Barb* which carried a story relating to Mikesell's husband.<sup>7</sup> Hunt asked Ramos whether he had seen the statements attributed to him by Mikesell's husband, and showed the *Berkeley Barb* to him. Evidencing shock because he had been misquoted and at the nature of the unusual contents of the paper, which included pictures of nude individuals and obscenities, Ramos informed Hunt that Mikesell was attempting to organize Respondent's female employees, not for the Union, but on behalf of an unnamed clerical union. Either that same day or possibly on the following day, Hunt called one of his clerical employees, Shirley Beauchamp, to his office and asked whether Mikesell "was trying to organize for a union, the women workers" employed by Respondent. When Beauchamp replied that she did not know, Hunt requested her to find out and tell him. A few hours later, Beauchamp reported to Hunt that Mikesell was "passing out cards." Hunt testified that he did not disclose Beauchamp's information to Wolf or Burnett.

### 5. May 9

On May 9, Wolf met with Mikesell and Burnett. Mikesell testified that they discussed the contents of the May 2 warning memorandum; that Wolf and Burnett agreed that her work was satisfactory; that "about halfway through the meeting," Burnett left at Wolf's request; that Wolf then asked her whether she was a union organizer and stated that if he found out that she was, she would be fired; that she denied being a union organizer because she feared discharge; that she told him that all she wanted was justice and an end to harassment; and that he replied that she was not normal and could not expect normal justice. Wolf's version of the May 9 meeting was quite different. He testified that he gave Burnett and Mikesell an opportunity to express their views concerning the latter's work performance; that shortly before the end of the meeting, he asked Burnett to leave because if, as he believed, there was a personality clash between him and Mikesell, there might be things she would say outside Burnett's presence; that he talked to Mikesell for about 3 or 4 minutes thereafter; that he did not say anything to her about union activities, but rather asked some questions about her education, experience, background and previous employment because she was obviously quite intelligent and would be of value to Respondent even if her problems in his department could not be worked out.

Wolf further testified that he took notes during the meeting; that thereafter, he read these back "to each one of the parties" and asked whether there were any

<sup>6</sup>Hunt testified that Cariglia was in charge of Respondent's electrical shops and had handled the bulk of Respondent's negotiations. The Trial Examiner's decision referred to above (fn. 5) states that the parties therein had stipulated that Cariglia occupied a supervisory position, and contains a finding that Cariglia engaged in unlawful conduct.

<sup>7</sup>The story recited, among other things, that Mikesell's husband, who had been discharged by Respondent, had been told by Ramos that Respondent had agreed to rehire him; but that representative of Respondent had gone to Mikesell's home, at which time several members of an organization known as the Black Panthers were present, and had engaged in a fight with Mikesell's husband; and that the latter was thereafter told by Ramos that Respondent had decided not to take him back because he was "just un-American."

corrections; that since none were requested, he had a rough draft of the notes prepared and gave each a copy; that Mikesell took her copy home to show to her husband; and that on the following day, she informed him that she had nothing to say about the notes.

#### 6. May 10

On the following day, May 10, Wolf prepared a final memorandum incorporating the notes. The memorandum stated that Mikesell's job skills were satisfactory but that she felt she could do a better job and desired more challenging work; that "she operates in an orderly fashion;" that she agreed that she had frequently been late and had made an excessive number of personal telephone calls, and would improve her conduct; that she stated that she had been disrespectful to Burnett because of an excessive amount of supervision; and that she asserted her discussions during work time concerning controversial matters had been initiated by others and carried out in louder-than-normal voice because of the noise level produced by mechanical equipment. The memorandum further stated that Mikesell was "an intelligent, useful employee" capable of handling a more challenging assignment; that a personality clash existed between her and Burnett; that she had been given a 30-day period within which to improve her job performance; that if, upon reevaluation at the end of 30 days, such performance was unsatisfactory, she would be discharged; and that if it was satisfactory but the personality differences had not been resolved, an attempt would be made to transfer her to another job if one was available. Wolf and Burnett signed the memorandum, but Mikesell refused to do so.

On the same day, Burnett remarked to Wolf that the meeting seemed to have had beneficial results, since Mikesell had shown improvement. He also expressed pleasure to Mikesell at the fact that she was trying to do her job well.

#### 7. May 13 through 16

On May 13, Mikesell met at her home with Employee Linda Back and one Joe Neeham, who explained the benefits of organizing Respondent's employees on behalf of an organization which she described as the "Office and Technical Workers Union."

Burnett testified that during the ensuing several days, Mikesell's performance deteriorated again, that she refused to carry out his instructions, and that he recommended Mikesell's discharge to Wolf. Wolf testified that he felt that Burnett "had a sort of defeatist attitude about the whole situation" and was being emotionally affected. He told Burnett that he wished to give Mikesell the 30-day trial period agreed upon, overruled his recommendation concerning immediate discharge, and in effect stated that he would assume responsibility for supervision over Mikesell.

Wolf further testified that by May 16, he felt that he had to take some positive action because the situation was getting out of hand, and that he decided to talk to Mikesell about a transfer to another department. About 3 p.m., he went to look for her but was unable to find her. Mikesell testified that she was in her menstrual cycle and had begun to feel ill that morning; that after lunch she became frightened because she thought she was hemorrhaging and decided to see her physician, who had been treating her for two weeks; that she looked for

Burnett in both the engineering and production control departments, but could not locate him; and that she walked between 50 and 60 feet to the lot where her automobile was parked and drove between 5 and 10 minutes to reach her home. Mikesell further testified that she did not inform anyone that she was leaving because she was concerned about communicating with her doctor; that two other female employees worked in the same room with her; and that it would not have taken very long to tell someone that she was leaving because of illness. Finally, she testified that upon arriving home, she telephoned her doctor who advised that she could remain at home; that she then took a tranquilizer and went to sleep; and that she planned to telephone Respondent later in the afternoon.

In an effort to locate Mikesell, Wolf, and Burnett had her paged on the plant public address system, and looked for her in other departments. Burnett informed Wolf that some of Mikesell's personal effects usually kept on her desk were gone, including her radio and books which she read during her rest periods. Wolf then went to the parking lot and ascertained that Mikesell's car was not there. He thereupon instructed the personnel department to send a telegram to Mikesell, over Burnett's name, informing her that her absence without notice or apparent justification was interpreted as a resignation from her job, and that her paycheck would be mailed that day.\* Mikesell received the telegram about 4:45 p.m. She testified that since that was after her working hours she planned to telephone Respondent the following day.

#### 8. May 17 and 18

The next morning, May 17, Mikesell telephoned Hunt and was informed by his secretary that he was not in. According to Hunt, he told his secretary that he anticipated an adversary proceeding and directed her to instruct Mikesell, if she telephoned again, to call Wolf if she wished to talk to a representative of Respondent. Mikesell testified that Burnett was on leave that day, that she talked to Wolf and asked him whether she could come to the plant or talk to him about the telegram, that he replied in the negative to both questions, but that he said she could talk to him some other time. Wolf testified that Mikesell told him she had not intended to resign, had been seriously ill and had obtained a doctor's appointment; that he stated that their discussion should not be carried on by telephone and that he would be glad to talk to her if she wished to come to the plant; and that Mikesell replied that she might do that.

Mikesell received her paycheck on the following day, May 18. Thereafter, neither Mikesell nor Respondent made any attempt to communicate with each other.

### B. Findings and Conclusions

#### 1. Interference, restraint, and coercion

The General Counsel contends that Respondent violated the Act by Hunt's conduct in soliciting Employee Beauchamp to engage in surveillance of Mikesell's union activity and by Wolf's conduct in interrogating and threatening Mikesell concerning such activity. Respondent admits the solicitation but asserts that it was not lawful because it was noncoercive and isolated. Respondent further contends that the record fails to establish either

\*Burnett did not know that his name was to be used.

interrogation or threats by Wolf. I agree with the General Counsel.

a. *Solicitation of surveillance*

There is no merit to Respondent's contention that Hunt's conversation with Beauchamp could not have been coercive since his words did not convey any expression of union hostility or of an intent to take action against Mikesell or any other employee. Hunt's instructions to Beauchamp to ascertain and inform him whether Mikesell was organizing for a union was clearly violative of Section 8(a)(1) of the Act "whether or not they were coercive in actual fact." *N.L.R.B. v. Associated Naval Architects*, 355 F.2d 788 (C.A. 4). And in view of Respondent's other unfair labor practices found below, Hunt's conduct was hardly isolated. The decision in *Poinsett Lumber and Manufacturing Co.*, 147 NLRB 1197, relied on by Respondent, is inapposite.

b. *Interrogation and threats*

Respondent asserts that it is more reasonable to credit Wolf's denial than Mikesell's assertion that he interrogated and threatened her after Burnett left the meeting of May 9. Its argument is that Respondent had no knowledge of her union activity and no union animus; and that it is most unlikely that Wolf would threaten her since the purpose of the meeting was to discuss Mikesell's job performance and her conflict with Burnett, and since Wolf made special efforts on her behalf.

Respondent's union animus "is a matter of record." *N.L.R.B. v. Winn-Dixie Greenville, Inc.*, 379 F.2d 958 (C.A. 4), cert. den. 389 U.S. 952.<sup>9</sup> It strains credulity for Wolf to testify, as he did, that the prounion views expressed in Mikesell's letter of May 2, which he admittedly saw, were meaningless to him. Even a naive individual could not escape the purport of the letter, and my observation of Wolf leads me to the conclusion that he was far from naive. Moreover, although Wolf testified that he was more concerned about another portion of letter evidencing Mikesell's misapprehension that she was to be replaced by the new employee in her department, and that one of the important purposes of the May 9 meeting was to dispel such misapprehension, it appears that that subject was not discussed at the meeting. In addition, in testifying that the prounion statement in Mikesell's letter had no meaning for him, Wolf added that she could have included the statement "for any purpose" and that her "motives were questionable." Hunt similarly testified that when he read the letter he questioned Mikesell's motives in sending the letter, believing that she was attempting thereby to immunize herself from possible discharge by bringing her prounion attitude to the attention of Respondent.<sup>10</sup> Such testimony refutes any notion that they were unaware of Mikesell's views, and I find it difficult to believe that they refrained from discussing their suspicions concerning Mikesell's motives in sending her letter.

I also find it difficult to believe that Hunt, after being informed on May 6 that Mikesell was distributing union cards, refrained from passing this information on to Wolf. Hunt testified that he instructed Beauchamp to investigate Mikesell's union activity only because he expected to be

involved in negotiations with Union Business Agent Ramos, who had given him the information concerning such activity; and wished to verify Ramos' veracity; and that he did nothing with the information. At the time of the Beauchamp incident, the status of the election of May 16, 1967 was pending before a Trial Examiner. Hunt's explanation for the incident requires the assumption that he anticipated negotiations with Ramos because he expected the election to be set aside, a second election, and a union victory. I am unable to perceive a basis for such an assumption. Moreover, if Hunt's motives were lawful, there is no reason why he should have selected such a risky method of testing Ramos' veracity, particularly since he had recently been involved in an unfair labor practice hearing. I find that Hunt solicited Beauchamp's surveillance in order to verify Mikesell's union activity *qua* activity, and that he told Wolf what he learned about such activity.<sup>11</sup> I accordingly reject Wolf's testimony and find that he was aware of Mikesell's union activity at the time of the May 9 meeting.

Wolf's version of that meeting is equally difficult to accept. He testified that he asked Burnett to leave so that Mikesell could speak freely, that he and Mikesell then talked for only three or four minutes, and that he asked her about her education, experience, background, and previous employment. It seems doubtful that these matters could be covered in such a short period. In any event, they were not matters which needed to be discussed outside the presence of Burnett. These considerations suggest that Wolf wished to discuss Mikesell's union activity but not in the presence of Burnett. Nor is Wolf's innocence shown by what Respondent describes as his special efforts on behalf of Mikesell. Presumably, Respondent is referring to his efforts to retain Mikesell as an employee despite Burnett's objections and his efforts to locate her before discharging her on May 16. Such efforts can also be viewed as part of an attempt to conceal an unlawful motive for discharge.

Considering the implausible and unpersuasive nature of the testimony given by Hunt and Wolf, their knowledge of Mikesell's union activities, Respondent's union animus, and the demeanor of Wolf as compared with that of Mikesell, I reject his denial and credit Mikesell's testimony that he asked her whether she was a union organizer and threatened her with discharge if he should learn that she was. Such conduct by Wolf, I find, constituted unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. Discrimination

The General Counsel contends that Respondent unlawfully discharged Mikesell because of her union activity. Respondent reiterates its claim that it lacked knowledge of such activity, and asserts that in any event her discharge was for cause. I agree with the General Counsel.

I am inclined to concur in Respondent's view that Mikesell sent her letter of May 2 to the Board and to Respondent pointing out her prounion attitude and accusing Respondent of contemplated unfair labor practices, in the hope of preventing the possibility of discharge referred to in Burnett's two memoranda. Of

<sup>9</sup>See the violations found in Case 20-CA-4544, *supra*, fn. 5.

<sup>10</sup>In its brief, Respondent asserts that the most reasonable interpretation of the letter was that it represented a self-protective device by Mikesell.

<sup>11</sup>It is also likely that Wolf had been informed of Ramos' statement to Hunt by Supervisor Caraglia, who was present when the statement was made, and who had committed some of the violations found in Case 20-CA-4544.

course, the fact that Mikesell brought her union views to Respondent's attention would not protect her if she was discharged for cause. On the other hand, Mikesell's attempt to utilize the Board's processes as a strategem for immunizing herself from discharge for cause, although not to be condoned, does not exonerate Respondent if the discharge was unlawfully motivated.<sup>12</sup>

There is no doubt that Burnett had at least some justification for his complaints against Mikesell. She herself admitted having been late on occasion and having been told to lower her voice during a discussion in which she engaged during working time. Moreover, I have no reason to question the sincerity of Burnett's complaints. There is no evidence that he was aware of her pronoun views on May 2, when he gave her copies of his warning memoranda. Nor is there anything to suggest that he had learned of those views when he made subsequent complaints about her. Burnett appears to have been regarded as a minor supervisor who was not always kept informed of his superior's plans relating to personnel matters.<sup>13</sup> However, it is unnecessary to decide whether or not the evidence establishes that there was justification for Burnett's recommendations that Mikesell be discharged, for the fact remains that Respondent does not claim it believed there was such justification prior to the afternoon of May 16. By his own admission, Wolf had little confidence in Burnett's judgment, felt that the principal problem was a personality clash between Burnett and Mikesell, and was of the opinion that she was intelligent and capable and had the potential for becoming a useful employee, preferably in his own department, but in another department if the clash of personalities could not be resolved. For these reasons, according to Wolf, he gave her a 30-day trial period, rejected Burnett's recommendation that she be discharged, displaced Burnett and assumed personal responsibility for supervision of Mikesell, and had no intention of discharging her for reasons of unsatisfactory performance prior to the time he was unable to locate her on May 16. Wolf's decision to discharge her at that time must, therefore, be examined in the light of his earlier views.

Respondent's position is that Mikesell's absence from the plant without notice constituted the first actual experience for Wolf which confirmed the correctness of Burnett's recommendation, and made further toleration of Mikesell as an employee impossible. However, although Respondent makes much of Wolf's efforts to locate Mikesell before sending his telegram, it does not explain why he felt it necessary to discharge her then and there, and could not wait until the following day to learn the reason for her absence. If Mikesell had the potential which Wolf claims, it is difficult to understand why she could not be given an opportunity to explain her disappearance. Wolf testified that he was "upset" by what he considered "bad faith on her part with respect to me." At the same time, he insisted that his decision to discharge her was not the result of personal disappointment but was dictated by policy considerations.<sup>14</sup> The policy which Wolf had adopted on May 9 called for a 30-day trial period, at the close of which Mikesell's performance would be reevaluated. Wolf's re-evaluation of her performance after only 1 week can hardly be regarded

as conforming to his own policy.

Respondent has also failed to give a satisfactory explanation for its curious telegram to Mikesell. Wolf testified that he couched the telegram in terms of a resignation because "discharge" is a "harsh term," and acceptance of her resignation "would perhaps make it more realistic if she applied for a job elsewhere."<sup>15</sup> What Wolf meant by "more realistic" is somewhat obscure. Perhaps he meant that he wished to avoid placing a blot on Mikesell's employment record. If so, his self-professed charitable impulse would be more convincing if it had not been preceded by his failure to wait just a little longer for an explanation before taking action against Mikesell. Wolf's explanation for sending the telegram in Burnett's name is similarly unsatisfactory. Wolf testified that he used Burnett's name because Burnett was Mikesell's immediate supervisor.<sup>16</sup> At the same time, he testified that it was he rather than Burnett who made the decision to discharge her because he felt that she had acted in bad faith toward Wolf and, therefore, that he "prefer[red] to keep [Burnett] isolated from any event such as this." Wolf's use of Burnett's name on the telegram was, to say the least, a strange method of isolating him from the discharge.

Respondent's explanation of its reasons and actions in discharging Mikesell do not have the ring of plausibility, and I am unable to accept them. Respondent contends that if Wolf were seeking a pretext for discharging Mikesell, he could have seized upon Burnett's renewed complaints and recommendation of discharge between May 10 and 16. His failure to do so, it is argued, established the purity of his motive. This argument overlooks the fact that only a few days of her 30-day trial period had elapsed. It must have been obvious to Wolf that since he had already refused to rely upon Burnett's complaints, a discharge prior to the expiration of that period based on nothing more than a renewal of such complaints would be difficult to explain. It is thus understandable that Wolf would not accept Burnett's renewed recommendation.

Mikesell's absence from the plant without notice on May 16 unquestionably would have constituted a lawful basis for her discharge if it had been the motive therefor. Based on the record before me, I am not persuaded that it was the motive. I have already found that Respondent possessed union animus, that Hunt and Wolf knew of Mikesell's union activity, and that Wolf threatened Mikesell with discharge for engaging in such activity. Having rejected Respondent's explanation for the discharge, I find that the General Counsel has established a prima facie case of unlawful discharge for such activity

<sup>12</sup>Wolf's testimony was as follows:

Q And, but notwithstanding that, it was your decision to discharge her; right, sir?

A. I was the one who went to Personnel and said, "I think we ought to confirm her absence as a resignation."

Q This, notwithstanding the fact that you concluded that what she had done by being absent was a breach of faith, is that right, sir?

A You keep bringing up the word "personal." This was a policy that's been stated, and we all understood; this was nothing to do with me, personally.

<sup>13</sup>Since Respondent concedes that it discharged Mikesell and makes no claim that she resigned, the unexplained disappearance of her radio and books from her desk on May 16 is immaterial. It is also immaterial whether Wolf was willing to discuss the discharge with Mikesell after the fact.

<sup>14</sup>Wolf testified that on the only other occasion when he discharged an employee in his department in writing, the discharge telegram was signed by the personnel department.

<sup>12</sup>A similar conclusion applies to Respondent's suggestion that Ramos acted in tandem with Mikesell in reporting her union activity to Hunt.

<sup>13</sup>For example, Wolf requested him to leave the May 9 meeting before he interrogated and threatened Mikesell, and he did not advise Burnett that the discharge telegram was being sent over his name.

which Respondent has failed to rebut. Accordingly, I find that the discharge violated Section 8(a)(3) and (1) of the Act.

## II. THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action which I find necessary to remedy and remove the effects of the unfair labor practices and to effectuate the policies of the Act.

Affirmatively, I shall recommend that Respondent offer to Mary Priscilla Mikesell immediate and full reinstatement to the position which she held at the time of her discharge or to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, dismissing if necessary an employee hired subsequent to the date of such discharge. I shall further recommend that Respondent make Mikesell whole for any loss of earnings suffered because of her discharge by paying to her a sum of money equal to that which she would have been paid by Respondent from the date of her discharge to the date on which Respondent offers reinstatement as aforesaid, less her net earnings, if any, during the said period. The loss of earnings under the order recommended shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

## CONCLUSIONS OF LAW

1. By unlawfully soliciting an employee to engage in surveillance of Mikesell's union activity, and by unlawfully interrogating and threatening her concerning such activity, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. By unlawfully discharging Mikesell, Respondent engaged in unfair labor practices within the meaning 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.

## RECOMMENDED ORDER

It is recommended that Airco Temescal, a division of Air Reduction Company, Incorporated, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully soliciting any person to engage in surveillance of the union activities of its employees, and from unlawfully interrogating and threatening employees.

(b) Unlawfully discharging employees or otherwise discriminating in regard to their hire, tenure of employment, or any term or condition of employment.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of any of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer to Mary Priscilla Mikesell immediate and full reinstatement to her former or a substantially equivalent position, and make her whole for any loss of earnings she may have suffered by reason of Respondent's discrimination against her, in the manner set forth in the section herein entitled "The Remedy."

(b) Notify the above-named employee if presently serving in the Armed Forces of the United States of her

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 and the right of reinstatement under the terms of this Recommended Order.

(d) Post at its place of business in Berkeley, California, copies of the attached notice marked "Appendix."<sup>17</sup> Copies of said notice, on forms provided by the Regional Director for Region 20, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent 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 the Regional Director for Region 20, in writing, within 20 days from the receipt of this Decision, what steps it has taken to comply herewith.<sup>18</sup>

<sup>17</sup>In 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."

<sup>18</sup>In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify the Regional Director for Region 20, in writing, within 10 days from the date of this Order, what steps the 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 and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT unlawfully discriminate against Mary Priscilla Mikesell or any other employee.

WE WILL offer to Mary Priscilla Mikesell immediate and full reinstatement to her old job and pay her for all back earnings lost as a result of the discrimination against her.

WE WILL NOT solicit any person to engage in surveillance of the union activities of employees, or unlawfully interrogate or threaten our employees, or in any other manner interfere with them in the exercise of their guaranteed statutory rights.

AIRCO TEMESCAL, A  
DIVISION OF AIR  
REDUCTION COMPANY,  
INCORPORATED  
(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, 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102, Telephone 556-0335.