

**Aerojet Ordnance and Manufacturing Company, Division of Aerojet General Corporation and Edna Howerton. Case 26-CA-3913**

June 15, 1972

**DECISION AND ORDER**

BY MEMBERS FANNING, JENKINS, AND  
KENNEDY

On August 27, 1971, and February 29, 1972, Trial Examiner Herbert Silberman issued the attached Decisions in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Respondent filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decisions in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

**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 hereby orders that the complaint herein be, and it hereby is, dismissed.

**TRIAL EXAMINER'S DECISION**

**STATEMENT OF THE CASE**

HERBERT SILBERMAN, Trial Examiner: Upon a charge filed on February 5, 1971, by Edna Howerton, an individual, a complaint dated March 18, 1971, was issued alleging that Aerojet Ordnance and Manufacturing Company, Division of Aerojet General Corporation,<sup>1</sup> herein called the Company, terminated the employment of Edna Howerton, on December 28, 1970, and thereby has engaged in and is engaging in conduct constituting unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relation Act, as amended. Respondent's answer to the complaint, as amended at the hearing, denies that it has engaged in the alleged unfair labor practices and interposes an affirmative defense. A hearing in this proceeding was held in Batesville, Arkansas, on June 8 and 9, 1971. At the conclusion of General Counsel's case-in-chief, Respondent moved to dismiss the complaint on the ground that a *prima facie* case was not established. The hearing thereupon was recessed pending a

decision on the motion. Briefs with respect to the motion have been received from General Counsel and from Respondent. Upon consideration of the record in this case and the arguments advanced by counsel in their briefs and at the hearing, the pending motion to dismiss the complaint is disposed of in accordance with the findings and conclusions set forth below.

**I. THE BUSINESS OF RESPONDENT**

The Company, a Delaware corporation,<sup>2</sup> operates a plant in Batesville, Arkansas, where it manufactures and sells ordnance products. Only Respondent's Batesville facility is involved in this case. During the 12 months preceding the issuance of the complaint, the Company in the course and conduct of its business purchased and received at its Batesville, Arkansas, plant goods and materials valued in excess of \$50,000 which were shipped from points outside the State of Arkansas, and during the same period Respondent manufactured, sold, and shipped from its Batesville plant products valued in excess of \$50,000 directly to points outside the State of Arkansas. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

**II. THE ALLEGED UNFAIR LABOR PRACTICES**

The single issue is whether the employment of Edna Howerton was terminated on December 28, 1970, for a reason which violates the Act.

During the times material hereto, the Company has had a collective-bargaining agreement with International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 33 and Local Lodge No. 2248, herein called the Union. While Mrs. Howerton was employed by Respondent she was a member of the Union and worked in a job classification covered by the Union's contract. Upon reporting for work on December 28, 1970, Mrs. Howerton's foreman gave her a termination notice which, in pertinent part, reads as follows:

Voluntary quit. Three (3) consecutive days unreported absence—21, 22, 23 Dec. 70—assumed voluntary quit pursuant to provisions of Article VIII, Paragraph 803(a) of the current labor agreement.

The reference is to the following provision of the applicable contract:

An employee shall lose his seniority for any of the following reasons:

(a) Resignation. Three (3) consecutive days' unreported absence on scheduled work days shall be considered a resignation.

General Counsel contended at the hearing that the reason alleged by Respondent for her discharge is pretextual and that Edna Howerton was unlawfully discharged in violation of Section 8(a)(1) and (3) of the Act because of "her concerted activity in efforts she made . . . to rectify safety standards at the plant and also [because of] her extremism in seeking proper representation through

<sup>1</sup> At the time the complaint herein was issued the Respondent's name was Batesville Manufacturing Company. The Company's name was later changed. The caption reflects the present name of Respondent.

<sup>2</sup> Aerojet General Corporation, the parent company, is an Ohio corporation.

her union, the International Association of Machinists." More specifically, General Counsel argued that Mrs. Howerton was discharged because she sought to press grievances on behalf of herself and other employees<sup>3</sup> and because she, together with other employees, complained to the Arkansas Department of Labor about the Company's alleged violations of safety standards.<sup>4</sup>

#### A. *The Alleged Protected Activity*

Edna Howerton had worked for the Company approximately 3 years when she was discharged. During this period and prior thereto the business of the Company had fluctuated considerably. Peak employment was reached in 1966 when 1,400 persons worked at the plant while by December 1970 employment had dropped to 275 persons. The evidence adduced by General Counsel to support the complaint for the most part concerns the 2 months preceding Howerton's termination and relates to incidents which with but one exception are concerned with personal complaints on the part of Howerton.<sup>5</sup>

Chronologically the first incident described by Mrs. Howerton occurred in November 1970. She had been absent from work for 2 days because of illness. When she returned her foreman, Phillip Harmon, informed her "that they had told him [Harmon] to give me [Howerton] a reprimand . . . [b]ecause I had been off too much sick." In their further conversation, Harmon informed her "that he didn't really want to give [her] a reprimand, that they told him to and he would have to."<sup>6</sup> The Company's written absence record for Edna Howerton shows that on November 5, 1970, she was given a verbal reprimand "for excessive absenteeism." According to Howerton, she asked the union stewards to file a grievance because of this reprimand, but they refused.<sup>7</sup>

The next incident occurred on a Thursday in late November or early December. Howerton testified that after she had clocked in, she went to the restroom and as a result reported to her place of work 2 or 3 minutes after her

shift started at 4 p.m. The other girls in the area had not yet begun to work. Nevertheless, her foreman, Darrell Garrison, told Howerton that he was giving her a reprimand for being late. She explained to Garrison that she had stopped in the restroom, but he said it didn't make any difference. Then, according to Howerton, "He got real mad when I refused to accept [the reprimand] and he said I had to accept it and I told him I didn't have to accept anything. I told him just because he wore a tie didn't make him any better than anyone else working out there and he really got mad about that." Howerton observed Garrison then go to Clark Knapp,<sup>8</sup> the general foreman, and talk with Knapp. When their conversation concluded, Garrison returned and told Howerton that they were going to give her a written reprimand. Howerton responded that she would refuse that also and Garrison answered that she couldn't. The next day Howerton asked Garrison if he was going to give her the reprimand. Garrison answered that there had been no time to type it. The following Monday Garrison told Howerton that they had decided not to give her a written reprimand although she then asked for one. Mrs. Howerton spoke to Union Stewards Shipman and Crawford about the incident and was told by Shipman that "it [the oral reprimand] didn't make any difference, it didn't mean anything."

On the Friday of the same week, Howerton was informed after she had arrived at the plant that there was no work because the machines in her department were not operating.<sup>9</sup> The office employee who told Howerton that there would be no work also advised Howerton that they had tried unsuccessfully to reach her before she had left for the plant. Howerton testified that she should have been paid for 4 hours' time on that occasion. She complained to Union Steward Joey Shipman who said it would be taken care of. However, she never received pay for the 4 hours.

The fourth incident involves a dispute between Howerton and Garrison regarding the operation of a machine. The Company manufactures ordnance items for the United States Department of Defense. In that connection,

<sup>3</sup> Prior to her discharge, no grievance on behalf of Edna Howerton had ever been filed with the Company. She testified that, although she had tried, she never succeeded in convincing the union stewards to file a grievance for her. General Counsel argued at the hearing "that Edna Howerton was prodding the Union for better representation of employee complaints and that the Employer was aware of this as evidenced by her numerous complaints to the Company at the time she was receiving reprimands." However, in his brief, General Counsel does not refer to Howerton's unsuccessful efforts to file grievances as among the ascribed unlawful reasons for her termination.

<sup>4</sup> General Counsel in elaboration of his position argued at the hearing. Various acts of Howerton may have influenced Respondent's decision to discharge her. Although some of these acts fall within the statutory area of protected activity and some may not, Respondent's "total intent was unlawful." Furthermore, "[t]he final event that took place that caused her discharge was this concerted participation in preparing and then having signatures of other employees and sending the letter to the Department of Labor. That is what caused the discharge." In his brief General Counsel seems to limit the significance of the evidence which he adduced in support of the complaint. In his brief he argues that "the real reason [for Howerton's termination] was the Company's disfavor with Howerton in reporting them to the ADL and her letter to the Union [referring to a letter she wrote to the Union's International president on December 14, 1970 in which she enclosed a copy of her letter of the same date to the Arkansas Department of Labor]." Thus, the "final event" to which General Counsel referred in his argument appears to be the only event to which he refers in his brief.

<sup>5</sup> The applicable collective-bargaining agreement provides that before a

grievance may be processed beyond the first (oral) stage it shall be reduced to writing. The chief steward is responsible for processing all grievances. Prior to her termination no written grievances had been filed on behalf of Mrs. Howerton. Mrs. Howerton testified that there were "3 or 4, maybe more" times when she had asked the Union to file grievances but always without success. However, her prehearing affidavit given to an agent of the Board states that she had asked the Union to file a grievance only on one occasion. Mrs. Howerton explained that the Board's agent misinterpreted what she had told him.

<sup>6</sup> If credence is given to this testimony, then it would appear that long before December 14, 1970, the Company, for reasons that are not stated in the record, had been seeking excuses to discipline Mrs. Howerton.

<sup>7</sup> Howerton testified that she spoke to Area Steward Joey Shipman and Chief Steward Jay Crawford about filing a grievance, but they told her that the oral reprimand she had received "didn't mean anything." She protested to them "that if it didn't mean anything, why did they harass me with giving me one like that?" Howerton also testified that "I had tried to file grievances before and I didn't have any luck." Referring to the reprimand from Harmon, Howerton testified, "They told me that it didn't mean anything and I asked Mr. Crawford if it didn't mean anything, then, why do they give you a reprimand? I said I had been told that after three that you would be fired."

<sup>8</sup> Respondent's motion to correct the record to reflect the correct spelling of the name, Clark Knapp, is granted.

<sup>9</sup> The layoff on this particular Friday admittedly was for legitimate economic reasons.

at the times material to this case, 13 government inspectors were stationed at the plant. According to Edna Howerton, on the night of December 2, 1970, she refused to operate the warhead hydrostatic machine at a pressure less than the government specifications called for. Foreman Darrell Garrison told her to operate the machine "as long as it would run when no government inspector was around." Howerton said she would not. Garrison responded that she would do anything he told her to, but she insisted that she would not run the machine when the specified pressure could not be maintained. According to Howerton, "He [Garrison] got real mad and said that I would even sweep the grass if he told me to and I said I wouldn't sweep any grass" She and Garrison spoke to Union Steward Joey Shipman who told Howerton to do whatever Garrison told her to do. After 10 or 15 minutes of conversation, Howerton, decided to follow Garrison's instructions. When she returned to her work station Garrison sat close to her, checked the pressure gauges for her, and told Howerton when to run the machine and when not to run the machine.<sup>10</sup> In connection with the same incident, Howerton further testified that Garrison had told her about a dozen times that if she didn't run the machine she would be fired.<sup>11</sup>

The final incidents relate to complaints made by Howerton to the Arkansas Department of Labor. According to Lester W. Burdick, the Company's manager of industrial relations, who was a witness called by General Counsel, the Arkansas Department of Labor has conducted numerous routine investigations of the Company's operations. In addition, in 1970, three investigations were instigated by complaints filed with the department. The first complaint was made in May 1970 by Chief Union Steward Jay Crawford because one of the foremen had removed the chairs from a line of machines so that the female employees were unable to sit down at times when their work didn't require them to be on their feet. A

grievance had also been filed with respect to the same incident. The chairs were replaced by the time the Arkansas Department of Labor investigator arrived at the plant to make his inspection. The next complaint of which the Company had knowledge was also filed by Jay Crawford. In September, several people had been overcome by an odorless gas in the processing area of the plant. The Company immediately began to investigate the problem. According to Burdick, a chemist employed by the Company ultimately came to the conclusion that some type of gas was being generated in sump holes where drains emptied prior to the material being pumped out of the plant. Based on this determination, the Company pumped out the sumps and filled the holes with concrete so that there would be no further collection of waste material within the plant. In connection with this matter, Chief Union Steward Jay Crawford called the Arkansas Department of Labor. Crawford informed Burdick of his action and said that his reason for complaining to the Arkansas Department of Labor was that Crawford hoped that the State's safety engineers might assist the Company in overcoming the problem. Because of Crawford's complaint, Benjamin F. Davis, safety director with the Occupational Safety Division of the Arkansas Department of Labor, made an inspection of the Company's plant on September 16, 1970.<sup>12</sup> Edna Howerton also wrote to the Department of Labor for the State of Arkansas complaining that employees had been overcome by gas in the plant. Her letter is dated September 15, 1970. Davis did not learn of Howerton's complaint until after he had returned to his office following his inspection on September 16. There is no evidence that at any time prior to her termination the Company had knowledge that Howerton had written such a letter.

On December 14, 1970, Edna Howerton composed another letter to the Arkansas Department of Labor.<sup>13</sup> The next day she carried the letter with her to the plant and

<sup>10</sup> Howerton also testified that after she finished work that night she wrote a letter to the Federal Bureau of Investigation. There is no evidence that the Company learned about Howerton's complaint to the Bureau at any time before February 1, 1971.

<sup>11</sup> For about 2 weeks after the above incident, her chair was removed so that she had to stand during all her working hours.

<sup>12</sup> Benjamin F. Davis was a witness for the Respondent who was called out of order. He testified that his inspection on September 16 showed that the Company was in the process of making the necessary corrections to eliminate the problem and therefore he made no recommendations in the matter. Davis also testified that "The attitude of the Company was exceptionally good. I was received quite cordially."

<sup>13</sup> The letter is as follows:

Arkansas Department of Labor  
Commissioner of Labor  
Little Rock, Arkansas

December 14, 1970

My Dear Commissioner

Please refer to your file, Letter from Edna Howerton, Employee, Batesville Manufacturing Co. On or about the 14 Sept 1970 I charged Batesville Manufacturing with violations of Sec 24-81-401 Sec 25-81-402, Sec 16-81-108

We are at present continuing to breathe large amounts of PHOSPHATEX TRICHLOROETHYLENE, MELTEX

We are exposed to fire Hazards, Recently a rag caught in between these stacked barrels burst into flame

I was given reprimand for being allergic to these chemicals, my Doctor Paul Gray, M D Examined me in a condition of severe hives, the plant Nurse Glenda Mills made a report of this that night. Glenda Mills was

shortly laid off after I got My reprimand

Our Union Seems to be a toothless old dog. Our chief Steward J Crawford Should Have followed this through and corrected this situation but, He has a long Record of not processing complaints. This is why we are sending a copy to The I A M President and charging him with certain charges to be tried before the Grand Lodge. The company's foreman Gene Bingham Told me if I refused to run my Machine in a unsafe condition I would be fired. He Said it as friendly advice

This was in direct violation of labor contract agreement Reference 600 if such unsafe claim is made Mildred Thomas's Machine was reacting to air pressure in a erratic manner, she Notified Foreman Darrell Garrison, He did nothing, told her to tell Gene Bingham when and if he comes by Gene Bingham Came by, we yell at him, he stopped and said he would come back, he never came back

One of our most difficult positions is that if the line is closed down for safety conditions, the foreman may not reach productions quota, Our union area steward works under the maintenance foreman he is hampered by this company authority over him

I have a daily record of events and abuses being carried on here WE have to use dirty gloves most of the time, some of us have been refused any gloves because they said they were saving them for the day shift

I am filing unfair labor practice against the company with the N L R B I have sent them a blow by blow account of the abuses here Respectfully

/s/ Edna Howerton

Edna Howerton

/s/ Inez Matlock

/s/ Harry Curtis

about 5 minutes before the end of her shift (quitting time is 12:30 a.m.) she obtained the signatures of eight other employees to the document. According to Howerton, Foreman Darrell Garrison was standing 10 or 12 feet away at the time it was signed by three of the employees and Garrison saw them sign it.<sup>14</sup> The letter resulted in another investigation by Benjamin F. Davis which was made on December 23, 1970. The report filed by Mr. Davis shows that he found no justification for the complaint.<sup>15</sup> Although neither Howerton nor the Arkansas Department of Labor advised the Company of Howerton's December letter, Union District Representative Randolph Jiles, on December 21 or 22, telephoned Burdick and advised Burdick that Jiles had received a call from the Arkansas Department of Labor informing him that Mrs. Howerton had filed a complaint. Thus, the Company knew that Howerton had filed a complaint with the Arkansas Department of Labor at the time her termination was effected.

### B. Howerton's Discharge

The events directly leading to Howerton's discharge began on December 11. While at work that night a piece of steel became stuck in her finger. She and another employee tried to remove it. During the next 3 or 4 days the finger became sore although not so bad that she thought it necessary to see a doctor. However, according to Howerton, after she had reported for work on Friday, December 18 at the usual hour of 4 p.m., "about 8:00 or shortly after the blood poisoning had reached my elbow and it was very painful, I wasn't using it at all. I asked Mr. Garrison for a pass to go home and he said I didn't need a pass, that I couldn't find a doctor anyway and wait and go Saturday to the Company doctor."<sup>16</sup> In her conversation with Garrison, the latter told her to do whatever work she was able to do. At the end of the shift, Howerton told Garrison that she was going to go to the hospital. Garrison then said that he would leave a note for the nurse, who would be working on Saturday, advising the nurse that Howerton was going to the hospital. Howerton testified that on the night of December 18 she made no complaint either to any of the women who were working in her immediate area or to the union steward that Garrison would not give her a pass to leave the plant.

Howerton entered a hospital at 2:30 a.m. on December 19 and remained there until 6 p.m. on December 23. She

/s/ William Cooper

/s/ Al Huff

/s/ Retha Hall

/s/ Mildred Thomas

/s/ Norma Jean Smith

/s/ Earnest Branscum

<sup>14</sup> Contrary to her testimony at the hearing, in a statement which Mrs. Howerton gave to an investigator for the National Labor Relations Board, she said that no supervisor saw the letter being signed.

<sup>15</sup> Davis testified that he was cordially received by management and that the Company cooperated with his investigation in every respect.

<sup>16</sup> Although the Company did not employ a nurse for the afternoon shift, when Howerton reported for work that day she passed the nurse who works on the day shift. Howerton did not mention her injury to the nurse because, according to Howerton, the nurse "was not qualified." In an affidavit which Howerton gave to an investigator of the National Labor Relations Board, she stated, "I did not go to the nurse for fear of getting a reprimand."

<sup>17</sup> In a pretrial affidavit which Howerton gave to an investigator for the National Labor Relations Board, she states, "I do not know of anybody

learned of her termination when she reported for work at the start of the 4 p.m. shift on Monday, December 28.

At the time Howerton entered the hospital, she knew of the rule calling for the termination of employees for 3 consecutive days of unreported absence.<sup>17</sup> Her husband was also aware of the rule.

Burdick testified that the rule is uniformly enforced. However, the Company accepts reports of absences in many ways. "The one thing we insist upon is that the absence be reported to the foreman of the individual." Among the accepted methods used by employees to report their absence from work are: a note delivered to the foreman by another employee; a report to the foreman by telephone; or a report to the plant's telephone operator or guard for transmission to the employee's foreman. In effect, Burdick testified that so long as a report of the absence is somehow relayed to the employee's foreman the report will be considered acceptable. Burdick also testified that if an employee asks a third person to report the employee's absence and the third person should fail to notify the Company, the absence would be excused because the employee had attempted to notify the Company and the fault lay elsewhere.<sup>18</sup>

Because of the Company's 3-day rule, while in the hospital, Edna Howerton requested her husband to notify the Company of her absence. According to Edna Howerton, "I insisted that he notify somebody that I was in the hospital to be positive." William C. Howerton, Edna Howerton's husband, testified that he did not wish to take a chance making the report by telephone. His wife had told him that "because she called in the FBI she would be fired, that she wanted me to, well, eyeball it, tell somebody." In like vein Mrs. Howerton testified that she told her husband that "if he didn't notify the Company [of her absence] that they would fire me, that they were looking for an excuse . . . ." Accordingly, Mr. Howerton drove to the plant on Tuesday, December 22, arriving between 6 and 6:30 p.m. He testified that he didn't see any activity within the plant, although the shift to which Mrs. Howerton was assigned was at work. He sat in his car for about 3 to 5 minutes and then drove to a supermarket. While there he recognized Glynn Fuller who is a foreman for the Company. Howerton testified, "I asked him if he was Glynn Fuller and he said, 'Yes,' and I told him, I asked him if he worked at BMC. Well, I made a statement there 'Do you know Edna Howerton?' and he said, 'Yes, how is she doing?' and I said, 'Well, she's still in the hospital,' and I said, 'I want to see Darrell Garrison, real bad.' And he says, well, why

who has missed three work days consecutive days and did not call in and was not discharged."

<sup>18</sup> There is no evidence in the record sufficient to indicate that there has been any deviation on the Company's part in the application of the 3 days' unreported absence rule. However, Burdick, who was called as an adverse witness by General Counsel, testified somewhat inconsistently as to the application of the rule. At one point in his testimony he testified that after the 3 days had passed the only way Edna Howerton could have changed the Company's action terminating her employment was "if she could establish that her absence had been reported or that she was unconscious and absolutely unable or anybody else unable to report her absence." Later in his testimony he indicated that Howerton's separation might have been rescinded if an attempt had been made to report her absence and there was a failure on the part of somebody to carry out her wishes. However, in her case, according to Burdick, the Company's investigation indicated that no attempt had been made to tell the Company of her absence.

came up [sic] and I told him I wanted to notify him, and we thought at that time that she may lose her arm; the infection hadn't went down I says, 'I want him notified,' and he said, 'I'll be sure and tell him.' " On cross-examination, Howerton testified that his meeting Fuller was accidental and he knew Darrell Garrison, not Fuller, was his wife's supervisor.

On cross-examination, Mr. Howerton was asked whether he went to the plant on December 22 to pick up his wife's paycheck. At first he denied that fact. However, after being shown his pretrial affidavit,<sup>19</sup> he testified that one of the reasons, but not the main reason, for going to the plant was to pick up his wife's paycheck. Mrs. Howerton also testified that one of the reasons her husband went to the plant was to pick up her paycheck. He reported back to her that "no one was there."

When Mrs. Howerton reported for work in the afternoon of December 28, her foreman, Darrell Garrison, gave her a termination slip and told her she was fired. Howerton did not ask Garrison why she was discharged or tell Garrison that her absence had been reported.<sup>20</sup> However, she asked to see a union steward Garrison told her he didn't know where there was one but that she could see Mr. Burdick. Mrs. Howerton went to the office of Burdick who was not then in. When Burdick arrived, according to Howerton, "I asked him what about this blue slip [termination notice] and he said there wasn't anything he could do about it . . . . So I said, 'I guess we'll have to wait and see about that,' and left. I told him that he had been notified—the Company had been notified."<sup>21</sup> According to Burdick, "She came in and she had the slip in her hand and she, I think her words were, 'What about this?' I said, 'Well, you were absent for three days unreported and there's nothing I can do about it.' She said she was in the hospital and not able to report I said, 'Well, the hospital staff or your husband or somebody could have reported your absence for you and there's nothing I can do about it.' I asked her if there was anything else she had to say and she said, 'No, not at this time,' and she left." Burdick testified that Mrs. Howerton did not make any claim to him that her husband had reported her absence.

Burdick who was called as an adverse witness by General Counsel was questioned extensively regarding the Company's decision to discharge Mrs. Howerton. Burdick testified that, although he did not learn of Howerton's hospitalization until December 28, he knew that she had been in the hospital before the decision to terminate her was reached. However, according to Burdick, "My investigation established to my satisfaction that her absence had gone unreported for three consecutive days and we uniformly applied the rule, as we had done in many cases before." The termination slip form given to Mrs. Howerton calls for four signatures. Each of the persons who signed or initialed the form participated in the decision to separate Mrs.

Howerton. They included the department head (O. K. Davis), the receiving department head (Moore), personnel head (Burdick), and general manager (Robert H. King). The final decision rested with King, the Company's president and plant manager. Burdick testified that he informed King that Howerton had been in the hospital but recommended that "we uniformly apply the rule just as we had done in every other case."

In describing the procedure which led to Mrs. Howerton's discharge, Burdick testified that on December 23, prior to the beginning of the 4 p.m. shift, Mr. Davis' secretary informed him that Mrs. Howerton had been absent for 2 days and that if she did not report on the 23d it would be her third consecutive day of unreported absence. Burdick further testified that such reports are standard for the Company. "It's to alert us." That afternoon Clark Knapp, who is the general foreman, left a message for Garrison to check all records at the close of his shift to ascertain whether Mrs. Howerton had reported her absence.<sup>22</sup> At the end of his shift, Garrison left word that Mrs. Howerton had not reported her absence. Garrison's report was available on Monday morning, December 28, when the question of separating Mrs. Howerton was raised. Burdick testified that the procedure followed in connection with Mrs. Howerton's separation was no different from that in the cases of other employees who were separated for the same reason.

On December 29, 1970, Mrs. Howerton wrote a letter to the Company protesting her discharge. In her letter, among other things, she advised the Company about her hospitalization and that on the evening of December 22 her husband had spoken to Glynn Fuller who promised that he would tell Darrell Garrison about her hospitalization. Following receipt of this letter, Burdick made a further investigation of the matter and spoke with Fuller. Fuller informed him that Mr. Howerton had spoken with him (Fuller) on the evening of December 22 and told him that Edna Howerton was in the hospital and was suffering from blood poisoning. However, Mr. Howerton did not ask Fuller to report the matter to Garrison or anyone else and Fuller forgot about the incident and did not mention it until he was questioned by Burdick on December 30.

### C. Conclusions

In the absence of contrary Board precedent, I shall apply the same standards in deciding the instant motion as do the district courts of the United States in the application of Section 41(b) of the Rules of Civil Procedure. Accordingly, I shall draw such inferences as are reasonable after evaluating and weighing all the evidence introduced in the record and shall deny or grant the motion depending on whether I find or do not find that General Counsel has proved the allegations of the complaint to the same degree as he would be required to do if the Respondent, as well as

<sup>19</sup> The pretrial affidavit which William Howerton gave a Board investigator says "On Dec 22, 1970, around 6 p m I went to the Batesville Manufacturing Company to pick up my wife's check (Edna Howerton) I was also going to advise the plant that my wife was in the hospital"

<sup>20</sup> Edna Howerton testified that before she left the plant on December 18 she told her foreman, Darrell Garrison, that she was going to the hospital. However, she did not tell Garrison that if she did not report for work the following Monday he should assume that she was still in the hospital

<sup>21</sup> The next day, December 29, Howerton wrote the Company a long detailed letter recounting the events leading to her discharge. In this letter, she does not mention that during her interview with Burdick she told him that her absence had been reported.

<sup>22</sup> According to Burdick, a report of absence would have been timely if it had been received before the conclusion of the shift on the third day, in Howerton's case before 12 30 a m, December 24

the General Counsel, had rested its case at this stage of the proceeding.<sup>23</sup>

While the reliability of both Mr. and Mrs. Howerton's testimony may be subject to question, for the purposes of this motion, I shall accept as true Mr. Howerton's testimony that he requested Glynn Fuller to report his wife's hospitalization to Foreman Garrison and Fuller agreed that he would do so.<sup>24</sup> Also, Mrs. Howerton had been confined to a hospital as a result of an injury sustained in the course of her employment. In these circumstances Mrs. Howerton's separation, or at least the Company's refusal to reconsider her separation, would appear to have been unduly harsh. This then raises a question as to what other factors might have influenced the decision to terminate Edna Howerton.

The incidents described above involving Howerton's reprimands from Harmon and from Garrison and her dispute with Garrison were personal matters and not "concerted" activity. Accordingly, if these incidents contributed to Howerton's discharge no violation of the Act is spelled out therefrom. General Counsel argued at the hearing that, with respect to those matters and to her claim for report-in pay, the Company knew that Howerton sought to prosecute grievances through the Union, and among the reasons for her discharge were her efforts to induce the Union to file grievances on her behalf. The paramount defect with this argument is the absence of proof that the Company was aware of Howerton's described difficulties with the Union and her efforts to get the Union to process grievances for her. (General Counsel does not press this argument in his brief.) There remains only the December 14 letter to the Arkansas Department of Labor. That, of course, falls within the area of protected

<sup>23</sup> See *Southern Arizona York Refrigeration Company v Bush Manufacturing Company*, 331 F 2d 1 (C A 9), *Huber v American President Lines*, 240 F 2d 778 (C A 2), *Trask v Suskind*, 376 F 2d 17 (C A 5), *Palmentere v Campbell*, 344 F 2d 234 (C A 8), 5 *Moore's Federal Practice*, at 1155

<sup>24</sup> Even crediting Mr. Howerton in this respect there is no evidence that Fuller had communicated to Garrison that Mrs. Howerton was in the hospital. Furthermore, although both Mr. and Mrs. Howerton testified that it was their intention to be positive that Mrs. Howerton's absence was reported because they feared the Company might be seeking an excuse to discharge her, nevertheless, they went no further than to ask Fuller whom Mr. Howerton accidentally met in a supermarket and with whom Mr. Howerton had never previously spoken to report Mrs. Howerton's hospital confinement. Respondent argues, for reasons more fully set forth in its brief, that, on December 22, Mr. Howerton went to the plant only to get his wife's paycheck and as of that date she had no intention of returning to work.

<sup>25</sup> In his brief, General Counsel advances the following argument: "It is imminently [sic] clear that the Company's asserted reason, 3 days' unreported absence, is a pretext and the real reason was the Company's

concerted activity. However, there is no evidence that the Company was any more aggrieved by Howerton's complaint to the Arkansas Department of Labor than it was by the two earlier complaints made by Crawford. Furthermore, the investigation which was instigated by Howerton's complaint resulted in no adverse recommendation and the inconvenience suffered by the Company in connection with the investigation was minimal. In these circumstances, the record will not justify an inference that Howerton's complaint to the Arkansas Department of Labor was a motivating factor contributing to the decision to discharge her. Also, the reason advanced by Respondent for Howerton's discharge is not so conspicuously bad that it necessarily gives rise to an inference that the Company must have been concealing an unlawful motive.<sup>25</sup>

Upon consideration of the evidence offered by General Counsel in support of the complaint herein, I find that he has not established *prima facie* the violations of the Act alleged in the complaint. Accordingly, I grant Respondent's motion to dismiss the complaint.

#### CONCLUSION OF LAW

General Counsel has failed to prove that the Respondent has violated Section 8(a)(1) and (3) of the Act as alleged in the complaint.

Upon the foregoing and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER

The complaint is dismissed in its entirety.

disfavor with Howerton in reporting them to the ADL and her letter to the Union." While the Company was informed by Jiles that Howerton had lodged a complaint with the Arkansas Department of Labor, there is no evidence that the Company saw the letter she wrote to the Department of Labor prior to the time she was terminated. Also there is no evidence that the Company knew that she had complained to the Union's International president. In any event, General Counsel does not explain why an inference should be drawn that Howerton's December 14 letters to the Arkansas Department of Labor and to the Union's International president influenced the decision to terminate her. There is no evidence that the Company, or any of its officials, resented or were inconvenienced by the Department of Labor's inspections or were disposed to visit reprisals on employees who instigated such investigations. On the other hand, Howerton testified that in November she was informed by Foreman Harmon that he was instructed to give her a reprimand which suggests that months before her separation she had gained the Company's disfavor, and twice in December she had acrimonious disputes with her foreman, Darrell Garrison, which might well have prompted him to search for a convenient excuse to seek her discharge.