

**Hadco-Tiffin, a Division of A-T-O, Inc. and Russel
Martin. Case 8-CA-6485**

August 10, 1972

DECISION AND ORDER

**BY CHAIRMAN MILLER AND MEMBERS
KENNEDY AND PENELLO**

On March 9, 1972, Trial Examiner Maurice S. Bush issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting 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 Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings, conclusions, and recommendations, only to the extent consistent herewith.

The Trial Examiner found that the Respondent (1) threatened employee Russell Martin with reprisals if he persisted in carrying his complaint, about not being called for Saturday overtime work, to his fellow employees instead of utilizing exclusively the grievance procedure of the collective-bargaining agreement in violation of Section 8(a)(1) of the Act; and (2) discharged Martin on June 8, 1971, because of a threat to file a grievance pursuant to the collective-bargaining agreement in violation of Section 8(a)(3) and (1) of the Act. Respondent has filed exceptions to these findings and we find merit in such exceptions for the reasons stated below.

The essential operative facts concerning Respondent's conduct involving Martin are not in dispute. Martin was hired on May 3, 1971, as a probationary employee. Under the terms of the collective-bargaining agreement a probationary employee does not obtain seniority rights until he has served a 30-day probationary period of 30 working days. The Respondent has had a bargaining relationship with the Union for more than 10 years and all contracts, including the current contract, have contained grievance-arbitration provisions. The record is entirely devoid of any evidence of union animus on the part of the Respondent and its relationship with the Union has been amicable over the years. Probationary employees, the same as regular employees, are permitted to file grievances under the contract and there are no contentions that any employee has ever been restricted in this right.

On Friday, June 4, 1971, Martin's foreman, Reinhart, polled about 10 men to determine whether they wished to work overtime on Saturday. Martin

and one other employee were not asked. "Polled overtime," unlike "scheduled Saturday work" under the collective-bargaining agreement, does not require posting and does not involve all employees. Under long-established practice when the overtime is "polled" the foreman has the right to select the employees he desires or thinks are needed. The employees selected have the right to decline. Martin complained to Foreman Reinhart about not being selected, but to no avail.

On Monday morning, June 7, Martin sought out the departmental steward, Morrow, to complain. The grievance provisions of the collective-bargaining agreement provide for an initial informal discussion with an employee's foreman in the presence of the employee's departmental union steward. Such a conference was arranged for that afternoon among Martin, Union Steward Morrow, Foreman Reinhart, and Plant Manager of Manufacturing Collins. It is Collins' alleged remarks to Martin, toward the end of the conference, on which the Trial Examiner bases his 8(a)(1) finding.

As set forth in the Trial Examiner's Decision, there are various versions as to what utterances were made by Collins at the conference in question. According to Collins' own testimony, he admonished Martin against "bending fellow employees' ears or guard-house tactics" about his gripes about not getting overtime work. Collins testified that he merely intended to warn Martin to avoid discussing his complaint with other employees while they were at work and that he did not want Martin to start any "general discussion throughout the plant when a problem arises without trying to get the solution to the problems through proper channels." Collins further testified that he inquired of Martin and the union representative if they were satisfied with the results of the conference and further informed them that if they were satisfied they must follow procedures and he would tolerate no other method. Martin indicated he was not satisfied by the results of the grievance conference.

The Trial Examiner concluded, accepting Collins' own version, that his statements to Martin were so broad that they constituted interference with, restraint, and coercion of Martin's Section 7 rights in violation of Section 8(a)(1) of the Act, since they were an attempt to prevent Martin from engaging in concerted activity for the purpose of mutual aid and protection in regard to his grievance. For the reasons discussed below, we do not agree.

Significantly, Union President Sholl's undisputed testimony was that, immediately after the above conference, he contacted Martin to find out the results of the meeting and Martin related that he was told that if he "went out to start raising a lot of

trouble *on the floor*, they'd have him back in there again." (Emphasis supplied.) Sholl further testified that Martin denied any remarks were made to him about being threatened or reprimanded or disciplined for filing any grievance. Later that day, the union steward came to Martin during worktime for the purpose of discussing the alleged grievance and both he and Martin left their jobs and punched out for the purpose of filing a grievance pursuant to contract provisions. Martin reported that he did not himself seek or obtain permission to check out.

We are unable to conclude on the basis of the above facts and the record as a whole that Collins' remarks to Martin during the conference in question were calculated to, or would be reasonably interpreted by employee Martin to, threaten his right to complain to his fellow employees about his failure to receive overtime and to seek their aid and protection on the overtime issue. At best, we find that Collins' remarks were an admonition for Martin not to disrupt the work of others and to follow the customary procedures and were so understood by Martin. In the circumstances, we find that Collins' statements to Martin were not violative of the Act and, accordingly, we do not adopt the Trial Examiner's findings of a violation in regard thereto.

As to the alleged discriminatory discharge of Martin, the record shows that after the above June 7, 1971, grievance conference, there was a company management meeting during the evening in the office of Plant Manager McBride. Foreman Reinhart and Plant Manager Collins were also present. It was customary for Reinhart and Collins to meet daily at that time to discuss various plant problems. Among the questions discussed at the June 7 meeting was that Martin's probationary period was nearing an end and that a final evaluation of his work should be made in order to determine whether he should be retained as a permanent employee. Foreman Reinhart testified that based on the caliber of his performance it was his recommendation that Martin not be made a permanent employee, in that Martin's performance as a material expeditor was grossly inadequate and that he required too close supervision. Collins corroborated Reinhart's testimony. Based on Reinhart's recommendation, the decision to terminate Martin was unanimous. The next day, June 8, Martin was formally discharged.

In finding that Martin was discharged for discriminatory reasons, the Trial Examiner placed weight on the fact that at no time during the 26 or 27 days of his probationary period had Martin been warned or given any indication that his work was unsatisfactory and the timing of the decision to discharge him was almost immediately after the June 7 grievance meeting at which he indicated he would file a

grievance. In the circumstances, the Trial Examiner concluded that the reason for Martin's discharge on the ground of dissatisfaction with his work was pretextual and concluded that the real reason was that he raised an issue about not receiving Saturday overtime and had threatened to file a grievance on the matter. The Trial Examiner, therefore, found that Martin's discharge was violative of Section 8(a)(1) and (3) of the Act. In our opinion there is insufficient evidence upon which to ground such a finding of a violation.

It is true that some of the circumstances surrounding Martin's termination raise a possible suspicion that he might have been discharged for reasons other than those stated, such as a threat to file a grievance. However, mere suspicions are not sufficient evidence upon which to base a finding of a violation of Section 8(a)(3). As noted above, the Respondent and the Union have had a 10-year history of amicable relations and there is not a scintilla of evidence of any animus toward employees who file grievances. Moreover, the testimony as to Martin's unsatisfactory performance is refuted only by Martin's own self-serving testimony. The Respondent's contention that it customarily does not warn or discuss with probationary employees their shortcomings during the 30-day probationary period stands unrefuted and the General Counsel has made no showing that Martin in any manner received disparate treatment. Finally, as to the timing, it would appear that the only time the Respondent could have made an evaluation of the quality of Martin's performance was, when it did, at the end of his probationary period. Accordingly, in all circumstances of this case, we find that the General Counsel has failed to establish by the preponderance of the evidence that the termination of Martin was in violation of the Act. We shall order that the complaint be dismissed insofar as it alleges that he was discriminatorily discharged.

Conclusions of Law

1. Respondent is an employer with operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in conduct constituting unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor

Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

MAURICE S. BUSH, Trial Examiner: Under the pleadings, there are two issues in this case. The first is whether the Employer, Hadco-Tiffin, A Division of A-T-O, Inc., is in violation of Section 8(a)(1) of the National Labor Relations Act for threatening employee Russell Martin with reprisals after he had filed a grievance,¹ because of the Company's refusal to call him for overtime work the preceding Saturday, if he continued to process his grievance. As there is no evidence of record that any threats were made by the Employer to Martin after he had filed his grievance as alleged in the complaint, the allegations charging a violation of Section 8(a)(1) of the Act by reason of such alleged postgrievance threat will be recommended for dismissal for failure of proof.

In lieu of this first issue the parties have litigated by consent² the question of whether the Company prior to the time Martin filed his above-described grievance threatened him with reprisals through a top supervisor at a preliminary informal conference with him over his complaint about not being called for the Saturday overtime work if he persisted in carrying his complaint to his fellow employees instead of taking his complaint exclusively through the grievance procedure of the Company's collective-bargaining agreement with the Union representing its production and maintenance employees. An affirmative finding on this issue would require a finding of a violation of Section 8(a)(1) of the Act.

The second issue in the case under the pleadings is whether the Employer terminated Martin "for the reason that he had filed a grievance and continued to process it under the terms of the collective-bargaining agreement in existence between Respondent and the Union and or because he had, or Respondent believed he had, joined, assisted or favored the Union or engaged in other concerted protected activities for the purpose of collective bargaining or other mutual aid or protection."

The complaint was issued on August 17, 1971, pursuant to a charge filed by Charging Party Russell Martin on June 21, 1971. The case was tried before the Trial Examiner on October 20, 1971, at Tiffin, Ohio.

Counsel for General Counsel submitted the case on oral argument at the conclusions of the trial. Counsel for Respondent waived oral argument but filed a brief on November 30, 1971. Both presentations have been carefully reviewed and considered.

Upon the entire record and from his observation of the witnesses, the Trial Examiner makes the following:

¹ Under the Company's collective-bargaining agreement the grievance must "be in writing" and must be preceded by an informal discussion by management with the complaining employee on the subject of his

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

Respondent, Hadco-Tiffin, a Division of A-T-O, Inc., at all times here material has been a division of A-T-O, Inc., an Ohio corporation with plants located in several states of the United States. Its Tiffin, Ohio, plant, which is the only one of Respondent's plants involved in this proceeding, is engaged in the manufacture of sheet metal products and axles. The Company in the course and conduct of its business operations ships products valued in excess of \$50,000 directly from its Tiffin, Ohio, plant to points outside the State of Ohio. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

Sheet Metal Workers' International Association, Local 175, AFL-CIO, hereinafter called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The Company's Tiffin plant has been operated under a succession of collective-bargaining agreements with the Union for more than 10 years. These agreements, including the current contract, have contained grievance provisions. The record shows that there have been amicable relations between the Company and the Union over the years. The record further shows that, prior to the present proceeding, the Company has never had any complaints from any employees that it did not allow grievances to be filed. On the contrary the record shows that there has been frequent resort by the plant's employees to grievance procedure with full cooperation of management. The Union is not the Charging Party herein. The Charging Party is above-mentioned Russell Martin, a new employee who was terminated within the 30-day probationary period all new employees must go through under the terms of the collective-bargaining agreement. Under the terms of the contract, a new employee does not attain seniority rights until he has served a 30-day probationary period of 30 working days. Martin was hired on May 3, 1971, as a probationary employee and discharged some 26 or 27 days later on June 8, 1971, before he had completed his 30-day probationary period.

When Martin, a man who appears to be in his late forties, applied for employment with Respondent, he made it known that he had a heart condition and therefore sought light work. Upon receipt of a requested certification from Martin's physician that he could do light work, the Company hired him as a tow motor operator-expeditor and assigned him to work in its axel division where about 14 employees worked out of the total of approximately 68 employees throughout the plant. Martin was one of two motor operators in the axel division. He was assigned the smaller of two tow motors in the division and Brandt, a

complaint

² See pp 130-131 of transcript of testimony

senior employee, who formerly handled the small tow motor, was assigned to the larger of the tow motors. Martin's sole duty was to operate the small tow motor. Most of the men in the axel division operated machines. It was Martin's job to keep their machines supplied with steel for product production and to tow the finished products away from the machines. Brandt with his larger tow motor handled steel that was too heavy or large for the small tow motor, but in addition, unlike Martin, was called upon to perform other duties in addition to handling his tow motor.

The beginning of a squabble between Martin and his foreman, Paul Reinhardt, started on Friday, June 4, 1971, over Reinhardt's failure to ask Martin, as he had asked other employees in the axel division, to work a half day overtime the next day. When Martin learned that others in his division had been asked to work that Saturday morning, he asked Reinhardt if he could also work that half day. Reinhardt replied that the work that Saturday was not a "scheduled workday" and that he did not need his services that Saturday.

The Company has two kinds of overtime Saturday work for which the pay is time and a half. One of these is described in the collective-bargaining agreement as "scheduled Saturday work." When "scheduled Saturday work" is posted 2 days in advance as called for in the contract, all employees are required to work unless excused for reasonable cause.

The other kind of Saturday work is called "polled overtime." Polled Saturday overtime occurs when a foreman of a division desires to work some but not all of his men overtime on a Saturday. For such overtime, the foremen polls his men to see if they want the overtime and the men have the option of turning down the extra work. Although the collective-bargaining agreement does not spell out or mention polled overtime, it is a long-established practice at the plant.

The Saturday work here involved was "polled overtime" and not "scheduled Saturday work" and understood by all employees to be polled overtime. Under the collective-bargaining agreement, all employees are entitled to "be given equal opportunity to work Saturday overtime," provided they could do the work called for.³ The contract, however, expressly provides that management has the exclusive right of "assignment of work and the size and composition of the workforce." The right of the Respondent to select or poll the number of employees desired for Saturday overtime is not challenged by General Counsel.

On the Saturday here under discussion, Reinhardt asked all of the 14 employees in the axel division except Martin and one other to work that Saturday, but only 10 showed up for work. Brandt, the operator of the large tow motor, worked that Saturday morning but performed work other than operating his tow motor. The men at work at the machines used the small tow motor as needed, but only two or three of the machinists found it necessary to use the tow motor.

The grievance provisions of the collective-bargaining

³ As Martin's everyday job was to work the tow motor, he obviously met the qualifications for overtime work on the tow motor on the Saturday here in question if he had been asked to perform his usual duties, but the record fails to show that he was qualified for any other work in the axel division

agreement here involved provide for an initial informal airing of employee complaints before the employee's foreman in the presence of the employee's departmental union steward. The agreement expressly requires that such an informal discussion must take place before the employee may file a grievance with the Company and further provides that all grievances must be in writing. (Resp. Exh. 1, pp. 12 and 13.)

On Monday morning after the Friday on which he had unsuccessfully sought the Saturday overtime, Martin, still aggrieved, sought out his departmental steward, James Morrow, and complained to him about the matter. Morrow at that time had been with the Company for some 6 or 7 months and had been a union steward for only about a month. Morrow, after inquiry as to the procedure to be followed under the collective-bargaining agreement for the airing of employee complaints, arranged a conference for Martin and himself with Foreman Reinhart.

The meeting took place at Reinhart's office during a break period, starting at 2:12 p.m. that Monday. Richard E. Collins, the plant's manager of manufacturing, was present at all times during the meeting. It is Collins's alleged remark to Martin towards the end of the meeting upon which the issue hinges of whether he threatened Martin with discharge if he persisted in complaining about not having been put to work the preceding Saturday. Morrow started the conference by asking Martin to state his complaint. Martin thereupon asked Reinhart why he had not been allowed to work that preceding Saturday. Reinhart replied, as he had the previous Friday, that the antecedent Saturday was not a scheduled workday and that he could work anyone he wanted. Martin replied that he was not satisfied with that explanation. Collins, intervening, asked if Martin could get a medical certificate that he could "go full blast." Martin acknowledged that he could not because of his heart condition. Thereupon Collins made the alleged critical remark upon which the issue turns.

Each of the witnesses who testified to Collins' remark had a different version or recollection of the remark. According to Martin, Collins at that point said to him, "Russ, if you're [not] satisfied with this explanation [by Reinhart as to why he did not ask Martin to work the preceding Saturday] and you go out of here and say anything, I will get you." Martin told Collins and Reinhart that he would carry his complaint a "step further." Later that day Martin filed a grievance, more fully described below, against the Company's refusal to give him work the Saturday in question.

Steward Morrow's version of Collins' last statement to Martin is that he ordered him to return to the shop and "keep your mouth shut or you can take it a step farther, but I will get you sooner or later, that is not a threat, that is a promise."

Foreman Reinhart denied that Collins made any threats to Martin as related by Martin and Morrow but remembered Collins telling Martin to take his complaints through

On the other hand, the record shows that Brandt, the other tow motor operator who was polled for the Saturday overtime here discussed, was able to do other work in the axel division besides operating a tow motor

"proper channels" under the grievance procedure and warning him "not [to] just bring them up with anybody on the floor." He also testified that Collins told Martin that, "This is not a threat, it's just a friendly reminder that we follow . . . proper channels."

Collins under direct testimony testified that he told Martin and Morrow, after they had expressed dissatisfaction with the outcome of the meeting, that "they must follow procedures," and that he "would not tolerate no other method." Under questioning by the Trial Examiner as to whether he told Martin and Morrow what he meant by "following procedures," Collins replied, "I believe I referred [to that] they could do no good bending fellow employees' ears or guard house tactics." Elaborating on this under direct examination by the Company's counsel, Collins said that he meant by "conduct he could not tolerate" the following, "An employee's absenteeism from job or station to discuss his problems with fellow workers, and not going through proper channels provided for them; general discussion throughout the plant when a problem arises without trying to get the solution to the problem through proper channels."

Finally, we have the version of Donald Sholl, president of the Union for the past 12 years and an employee of the Company for the past 14 years, as to what Collins' final words to Martin were at the meeting. Although Sholl had not been present at the meeting and knew of what occurred there only from having talked to Martin, the Company is bound by Sholl's testimony as it called him as its witness. Sholl's testimony under direct examination shows that having heard that Martin had been threatened that afternoon at the meeting by management representatives, he looked Martin up at the plant that same afternoon and asked him if it was true. Sholl testified that Martin not only replied in the affirmative, but that Martin also reported Collins had said to him, "If I went out to start raising a lot of trouble on the floor, they'd have him back in there again."

The record shows that before the conference came to a close Martin and Morrow made it clear to Collins and Reinhart that they would take some sort of appeal, either by way of a formal grievance under the contract or by complaint to the Board, against the negative result of the conference. The record shows that this was fully understood and expected by both Reinhart and Collins.

At about 3 o'clock that afternoon, Martin was contacted by the plant's chief union steward, Tony Aiello, at whose suggestion or direction Martin clocked out for the purpose of preparing a grievance for filing with the Company against its failure to give Martin the opportunity for overtime work the preceding Saturday. Martin's testimony shows that the two of them spent the rest of the working day, or approximately an hour, preparing the grievance. Martin's testimony further shows that upon its completion the grievance was filed that afternoon and that he then went home as it was about 4 p.m., and his shift was over. The grievance bears the date of June 7, 1971, time as of 3 p.m., and reads⁴ as follows:

Employee Name—Russell Martin

Time—3:00 P.M.

Date—6/7/71

Statement of Employee

On Friday June 4 1971 Russell Martin was operating the towmotor at the end of the workshift. Overtime work was performed Sat. June 5 1971. The towmotor was operated on that day. Mr. Martin asked his foreman if he would be needed that Sat. His foreman said no, yet his job was performed by other employees

When Mr Martin went with his steward to his foreman to ask about the situation he was threatened by Mr. Collins. Mr. Collins made the statement, to Mr Martin:

If you feel that this settled now: If I hear any talk about this I will get you. This is a promise not a threat.

Employee Name—Russell Martin

Steward Name—Tony Aiello

Step 1 Date 6/8/71

Appeal Settle

Although the bottom of the grievance shows the date 6/8/71 after the printed words "Step 1 Date ," it is found based upon Martin's undisputed testimony that the grievance was actually filed on June 7, 1971, as heretofore shown.

Later that afternoon about 4 p.m., after Foreman Reinhart "had lined up" his second shift, a company management meeting took place in the office of Plant Manager McBride in which the participants were McBride, Collins, and Reinhart. The primary purpose of the meeting was to discuss tooling problems and work schedules, but before the meeting was closed, the discussion turned to the question of whether or not Martin should be retained or terminated as he was near the end of his 30-day probationary period. The decision to terminate Martin was unanimous. Reinhart recommended Martin's discharge because of "the attitude the man had." Collins under cross-examination was asked if he "was the one who initiated the question at this meeting . . . of whether or not Martin should be kept." Collins replied, "I think I may have been one of those that questioned Mr. Reinhart being knowledgeable that the end of the probationary period was drawing to a definite date." The Trial Examiner finds from the above-quoted testimony of Collins and his demeanor and from the record as a whole that Collins was the prime mover in Martin's termination. The denials of Collins and Reinhart that they had any knowledge of the grievance Martin had filed at the time of the decision in McBride's office to terminate Martin are credited, not only because there is no evidence to the contrary, but also because it appears that Martin filed his grievance during the time the management meeting was taking place. However, it is apparent that this lack of knowledge of the fact that Martin had filed a grievance at the time it was decided to terminate him does not have a necessary bearing on the true motive for Martin's discharge.

The next day, June 8, at a little before noon, Reinhart called Martin into his office and terminated him orally and by a written termination notification or slip.⁵ The slip states that Martin was being discharged because it was the

⁴ Some obviously omitted punctuation has been supplied and the original erroneous spelling of "settled" has been corrected

⁵ The collective-bargaining agreement provides that "Any employee reporting for work who has not been notified not to report shall be paid a

end of his "temporary period" and also because "Employee's growth within or beyond classification questionable. Does not fit into overall picture for dept."

At the trial Reinhart testified that Martin's services during his probationary period were unsatisfactory for a number of reasons, such as that he spent too much time talking to fellow employees when he had work to do, that he [Reinhart] had complaints from a couple of machine operators that Martin operated his towmotor wrecklessly, that Martin could not remember multiple oral instructions, and that at times he [Reinhart] had difficulty locating Martin at the plant when he wanted him. He also stated that Martin's complaint about not getting work on the preceding Saturday was a factor reflecting on Martin's "attitude" which played a part in his termination. Reinhart testified that all these factors led to Martin's discharge. However, both Reinhart and Collins under cross-examination admitted that they had never at any time during Martin's 26 or 27 days of employment with the Company told him that his work was unsatisfactory or gave him any warning or indication that his work would have to be improved or he would be discharged before the end of his 30-day probationary period.

Discussion and Conclusions

The findings above set forth four separate versions of the utterance made by Collins, the plant's manager of manufacturing, to Martin, the Charging Party, towards the end of the conference at which Martin had complained about not being called for overtime Saturday work. These statements include Collins' own version of what he said to Martin and his interpretation of what he meant by the statement. Any reading of the four different versions of the statement show that they all convey an implied threat by Collins to Martin of reprisal if Martin aired his complaint about not being polled for overtime Saturday work to his fellow employees. Of the four different versions of the threat, the most explicit is that of Collins himself. According to Collins, he himself admonished Martin against "bending [his] fellow employees' ears or guard-house tactics about his gripes for not getting Saturday work." Collins testified that he meant by this not only a warning that Martin was to desist from discussing his complaint with other employees while they were working, but also that he did not want Martin to start any "general discussion through the plant when a problem arises without trying to get the solution to the problem through proper channels."

The Trial Examiner finds and concludes that the threat, under any of its four versions, constituted an interference with, restraint, and coercion in violation of Section 8(a)(1) of the Act of the rights guaranteed in Section 7 to employees to engage in concerted activities for the purpose of mutual aid or protection. *New York Trap Rock Corporation*, 148 NLRB 374, 376. Collins' motive in making the threat appears to have been his desire and concern to have Martin's complaint funneled exclusively through the collective-bargaining agreement's grievance

procedure in order to avoid disruptions of the work at the plant by any complaining Martin might do to fellow employees about his failure to get Saturday overtime work. It is well established, however, that the test of interference, restraint, and coercion under Section 8(a)(1) does not turn upon the employer's motive. As stated by the Court of Appeals for the Seventh Circuit, "The test is whether the employer engaged in conduct which, it may be reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *N.L.R.B. v. Illinois Tool Workers*, 153 F.2d 811, 814 (C.A. 7), 1964, cited with approval by the Board in *American Freightways Co., Inc.*, 124 NLRB 146, 147. The threat here under consideration was so broad as to clearly cut off Martin's right to complain to his fellow employees about his failure to get the Saturday overtime work and to seek their aid and protection in the matter even during breakperiods or before the start of the day's work or at the end of the workday. This is manifestly an invasion of the rights guaranteed to employees under Section 7 to engage in concerted activities for the purpose of mutual aid or protection in violation of Section 8(a)(1) of the Act.

It is not difficult to understand that Collins' threat was provoked by the exasperation and wrath he felt over Martin's intransigence as a probationary employee for refusing to accept what appears to have been management's clear prerogative under the collective-bargaining agreement to select and to leave out any employees it chooses for polled Saturday overtime work, but the fact that the threat was provoked by Martin's seemingly unjustifiable intransigence does not excuse it from being a violation of Martin's right to seek the aid and protection of his fellow employees over what he deemed to be his right to overtime work under the collective-bargaining agreement, no matter how meritless his complaint might be. Section 7 is a flat and forthright guarantee to employees of the right to engage in concerted activities for their mutual aid and protection without regard to the merits or demerits of what their concerted activities are aiming for.

The remaining issue in the case as originally framed by the pleadings and set forth in the opening pages of this Decision is whether the Company terminated Martin "for the reason that he had filed a grievance and continued to process it under the terms of the collective-bargaining agreement in existence between Respondent and the Union and/or because he had, or Respondent believed he had, joined, assisted or favored the Union or engaged in other concerted protected activities for the purpose of collective-bargaining or other mutual aid or protection.

As it was found above that the Respondent had no knowledge that Martin had filed a grievance over his failure to get overtime Saturday work at or about the time it had reached a decision at a conference of its supervisors in the late afternoon of June 7, 1971, to terminate him, that portion of the complaint which alleges that Martin was terminated "for the reason that he had filed a grievance and continued to process it under the terms of the collective-bargaining agreement in existence between Respondent and the Union" will be recommended for

minimum of four (4) hours time at his regular rate per hour for reporting " This is undoubtedly the reason Martin was not terminated at the beginning

of the workday as the decision to discharge him was made the previous afternoon after Martin had clocked out for the day and left the plant

dismissal for failure of proof. Similarly, as there is no evidence that Martin was terminated "because he had, or Respondent believed he had, joined, assisted or favored the Union or engaged in other concerted protected activities for the purpose of collective bargaining," that allegation will also be dismissed for failure of proof.⁶ The record is entirely devoid of any union animus on the part of the Company as in fact it has been under successive collective-bargaining agreements for many years and appears to have had amicable relationships with the Union over the years.

With these eliminations, the issue reduces itself to the question of whether Martin was terminated "because he had . . . engaged in other concerted protected activities for the purpose of . . . other mutual aid or protection." The record compels the identification of these "other protected activities" as Martin's announced intention and notice to Supervisors Collins and Reinhart that he would carry his oral complaint about not getting overtime Saturday work "a step further." Under the contract "a step further" or the next step would be the filing of a written grievance. The findings of fact above show that both Collins and Reinhart were fully convinced at the conclusion of their June 7 conference with Martin and Union Steward Morrow that Martin would file a grievance with the Company.

The Board in *Farmers Union Cooperative Marketing Assn.*, 145 NLRB 1, 2, capsulated existing Board rulings on the legal consequences of a discharge motivated as a retaliation to an employee for the filing of a grievance as follows: ". . . where an employee files a grievance pursuant to a contractual grievance procedure, such filing is a 'concerted' activity which is protected under Section 7 of the Act, and if any employer discharges him for engaging in this activity, the discharge is unlawful." Discharges under such circumstances are violations of Section 8(a)(3) of the Act. Under the *Farmers Union* case it must similarly and necessarily follow that a discharge as a reprisal for an employee's threat to file a grievance pursuant to a contractual grievance procedure would equally be an invasion of the protected right under Section 7 of concerted activity in violation of Section 8(a)(3) of the Act.

Respondent's defense is that it terminated Martin during his 30-day probationary period of employment solely because his work was unsatisfactory and not because he had threatened to file a grievance over his failure to get overtime work the previous Saturday. The record does not support the contention that Martin's work had been unsatisfactory during the 26 or so days he was employed by the Company as a probationary employee. The evidentiary findings above show that Reinhart as Martin's foreman never at any time told him that his work was not satisfactory or gave him any warning or any reason to believe that he was not doing his job properly. Similarly, Collins, as manager of manufacturing at the plant, never had any discussions with Martin about his work and never told him that his work was not satisfactory. It is additionally significant that, at the conference Reinhart

and Collins had with Martin over Martin's complaint about not getting the involved Saturday overtime work, neither Reinhart or Collins made any complaints to Martin about the quality of his work. If his work had been truly unsatisfactory, it is a virtual certainty that either Reinhart or Collins would have thrown that accusation at Martin some time during the heated discussion that took place in the 20-minute conference. The timing of the decision to fire Martin later that same afternoon and his discharge the very next day is further proof that Martin's termination was motivated by his threat to file a grievance over his failure to get Saturday work rather than by any genuine dissatisfaction with his work. The Examiner finds and concludes that Respondent's reason for Martin's discharge on the ground of dissatisfaction with his work is pretextual and that the real reason for his discharge was that he had raised a fuss over his not getting Saturday overtime work and had threatened to file a grievance on the matter.

The Examiner finds and concludes that Respondent's discharge of Martin because of his threat to file a grievance pursuant to contractual grievance procedure was an infringement of his protected right under Section 7 to engage in concerted activities in violation of Section 8(a)(1) and (3) of the Act. *Farmers Union Cooperative Marketing Assn.*, *supra*.

Upon the basis of the basis of the foregoing findings of fact and upon the record as a whole, the Trial Examiner makes the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce, and the Union is a labor organization within the meaning of the Act.
2. For many years Sheet Metal Workers' International Association, Local 175, AFL-CIO, has represented a unit of production and maintenance employees employed at Respondent's Tiffin, Ohio, plant, for purposes of collective bargaining.
3. By interfering with, restraining, and coercing its employee Russell Martin in the exercise of his rights under Section 7 of the Act in the manner above found, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.
4. By discharging Russell Martin because of his threat to file a grievance pursuant to contractual grievance procedure, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in an independent violation of Section 8(a)(1) and in violation of Section 8(a)(3) and (1) of the Act, it will be recommended that it cease and desist therefrom and take

⁶ Counsel for General Counsel did not allude to these omissions of proof or the variance between the 8(a)(1) allegations and the proof in his oral argument to the Trial Examiner at the conclusion of the trial in lieu of a brief. Frequently issues of fact and law lurk in the record of a case that

counsel and Examiners do not become aware of until they have studied the record for purposes of briefing or decision. The instant case is a good example of this. A brief from General Counsel would have been of much assistance to the Examiner.

certain affirmative action designed to effectuate the purpose of the Act, including the offer of reinstatement of Russell Martin, with backpay computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, with

interest added thereto in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

[Recommended Order omitted from publication.]