

**Williamsport Plumbing and Heating Co., Inc. and
Plumbing and Pipefitters Local Union No. 810.
Case 4-CA-10591**

December 19, 1980

DECISION AND ORDER

**BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND TRUESDALE**

On September 30, 1980, Administrative Law Judge Russell M. King, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer to Respondent's exceptions.

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 attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

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 Administrative Law Judge, as modified herein, and hereby orders that the Respondent, Williamsport Plumbing and Heating Co., Inc., Williamsport, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(c) and reletter the remaining paragraphs accordingly:

"(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

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² Respondent contended in its exceptions that the discharged employees were supervisors under the Act. The issue of supervisory status was raised neither in the pleadings nor at the hearing before the Administrative Law Judge. We therefore reject Respondent's contention as untimely. *California Pacific Signs, Inc.*, 233 NLRB 450 (1977). Moreover, even if the issue of the supervisory status of the individuals in question was properly before the Board, the record contains insufficient evidence on which a finding of supervisory status could be based.

the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge employees because of their union activities.

WE WILL NOT create the impression that management is engaging in surveillance of union activities of employees.

WE WILL NOT coercively interrogate employees concerning their union sentiments and activities.

WE WILL NOT tell employees that any efforts to engage in collective bargaining through a union would be futile.

WE WILL NOT threaten to discharge employees in retaliation for their union activities.

WE WILL NOT offer employees increased wages, other benefits, or an interest in the business in order to wean them away from supporting the Union.

WE WILL NOT threaten plant closure if employees select or become represented by a union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist a labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any and all such activities.

WE WILL offer Samuel D. Hardy, Joseph O'Neil, Gary Stewart, Leonard Hinton, and Philip Frederick immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and **WE WILL** make them whole for any loss of earnings or other benefits they

may have suffered as a result of the discrimination against them, with interest.

WILLIAMSPORT PLUMBING AND
HEATING CO., INC.

DECISION

RUSSELL M. KING, JR., Administrative Law Judge: This case was heard by me in Williamsport, Pennsylvania, on May 19 and 20, 1980. The charge was filed by the Charging Union (herein called the Union) on October 29, 1979,¹ and the complaint was issued on December 20 by the Regional Director of Region 4 of the National Labor Relations Board (herein called the Board) on behalf of the General Counsel. The complaint alleges numerous incidents of threats and unlawful interrogation by the Respondent in September during a union organizational campaign, and the unlawful discharge of five employees because of their union support or activities, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act).² The Williamsport Plumbing and Heating Co., Inc. (herein called the company), of the Respondent essentially denies all alleged violations of the Act.

Upon the entire record,³ including my observation of the demeanor of the witnesses,⁴ and after due consideration of the briefs filed herein filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The pleadings and admissions herein establish the following jurisdictional facts. The Respondent company is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the State of Pennsylvania with an office and place of business in Williamsport, Pennsylvania, where it is en-

¹ All dates hereafter are in 1979 unless otherwise indicated.

² The pertinent parts of the Act provide as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer— (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

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Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

³ Certain errors in the transcript are hereby noted and corrected.

⁴ The facts found herein are based on the record as a whole and upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the *entire* testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *N.L.R.B. v. Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404, 408 (1962). As to those testifying in contradiction of findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony has been reviewed and weighed in light of the *entire* record.

gaged in the business of mechanical contracting. During the 12-month period prior to the issuance of the complaint herein, the Respondent in the course and conduct of its business operations purchased goods valued in excess of \$50,000 directly from points located outside the State of Pennsylvania. Thus, and as admitted, I find and conclude that the Company is now, and has been at all time material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

As also admitted, I find and conclude that the Charging Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

In late August or early September Union Business Representative James Payne set out to organize the company's employees. The union had reduced its initiation fee from \$750 to \$150 for new members that joined from the Company, and Payne also advised employees that if they joined the union and for some reason left the Company he could obtain jobs for them with nearby union contractors or employers. On September 20, some 16 employees met and took a "straw vote" on union support. The results were 8 in favor, 7 against, and 1 undecided. No mention was made by Payne of any intention to file a representation petition with the Board for an election.

The Company's president, James Maiolo, soon found out about the union activity and commenced his own campaign against the Union. He talked individually to each of his four foremen, Sam Hardy, Joe O'Neill, Len Hinton, and Philip Frederick. These four foremen, together with employee Gary Stewart, were discharged or left the Company later in September and are the subject of the alleged unlawful discharges in this case. The testimony of the four foremen regarding Maiolo's conversations with them is also the foundation in support of the alleged unlawful threats and interrogation in this case. Maiolo, himself concedes his strong opposition, "kind of" remembered that he threatened to close, and admitted that he told all five employees that if they joined the union they could not work for him.

B. *Specific Allegations*⁵

1. Joseph O'Neill (pars. (a) through (e) and 7(a) of the complaint)

O'Neill had worked for the company since 1972. In early September at a company jobsite, Maiolo told

⁵ Some of the findings herein were testimonially denied by the Company's president, James Maiolo. The credibility determinations in this case were extremely difficult in some instances. Basically Maiolo appeared to be an honest and hardworking man trying to make a go of his business. He had recently borrowed \$100,000 to shore up his business, and the intervention of the union, he perceived, spelled potential disaster. He became close to desperate in the situation. He was hurt and felt that he had been deserted by his foremen after what he considered had been a good and close working relationship. In reality, I am certain that he hon-

Continued

O'Neill that he knew he had been contacted by the Union, that there was "no way" he would ever go union, that he would rather retire, and close the shop, and that if O'Neill did not go union he would still have a job with the Company. During this conversation Maiolo also asked O'Neill how he felt about the union and O'Neill replied that the "majority rules."

On September 21, the day following the union meeting, O'Neill was called to the shop office where he told Maiolo that if he had the opportunity he would go union and Maiolo responded that he was "quitting" as of the following Friday and to "let [his] union buddies take care of [him]."⁶ O'Neill responded that he was not quitting, that he wanted to continue to work, and left the office. The following Monday, September 24, O'Neill reported to work and on a jobsite at or about 2 p.m., Supervisor Jess Smuck "laid [him] off, more or less, and told [him he] could make arrangements for [his] new job.

2. Leonard Hinton⁷ (pars. 5(f) through (j), 5(n) through (q), and 7(a) of the complaint)

Hinton had worked for the Company since 1972. In early September, Maiolo approached him at a jobsite and ask him "what was going on," that indicating he knew the Union had contacted him, and expressed some disappointment that Hinton had not told him about the Union earlier. Maiolo asked Hinton if had made up his mind, Hinton replying that he had not. The two then discussed benefits and Hinton stated that he was "disappointed" with the wages and pension. Maiolo responded that he realized the pension plan "wasn't as good as it could be," but indicated that given a chance he could improve the plan. Maiolo also expressed hope that wages and the company's contribution to the hospitalization plan could be increased in the future. He asked Hinton if he had been contacted by the Union and if he had made up his mind if the union were to "approach" the employees. Hinton replied that the Union was going to approach them and that he had not made up his mind. As Maiolo was leaving, he told Hinton that "no matter what" he would not go union but would "just close up the doors and play golf, or whatever he wanted to do," adding that if he ever did, Hinton would not be working for him because he would hire more experienced people direct from the "[hiring] hall."

On September 21, the day after the union meeting, Maiolo called Hinton into his office, explained that he was trying to "get his foreman straightened out" so that he would know who would be remaining with the Company, and asked Hinton if he had made up his mind about the Union. Hinton replied that he had not, and Maiolo requested Hinton to let him know early Monday morning (September 24), adding that when he found out who his "loyal" employees were he could have a nice setup for them, or a piece of the business. Hinton report-

edly did not remember some of the remarks he made, yet in other denials he shaded the truth by relating that he made similar topical remarks but with other meanings or implications.

⁶ Maiolo's testimonial attitude and account of the departure of the five employees in this case was simply that since he was nonunion, and would remain so, those who chose to join the union had also chosen to quit.

⁷ Hinton's name is incorrectly spelled "Hitton" in the transcript.

ed Monday morning as instructed, told Maiolo he had decided to support the Union, but that he wanted to stay with the Company. Maiolo then instructed him to report to a jobsite, which he did, but after lunch Supervisor Schmuck came to the jobsite and told him he was "let go," explaining that it was "unfeasible" for him to remain on the job talking to other men about the union.⁸

3. Samuel D. Hardy (pars. 5(k) through (m) and 7(a) of the complaint)

Hardy had been employed by the Company since 1973. In mid-September Maiolo approached him on a jobsite and stated he had heard rumors he was joining the Union. Hardy replied that he had not joined at that time, and Maiolo then stated he had \$100,000 in the bank, that he could close doors, retire, and play golf, adding "I don't need this." Maiolo also told Hardy to make the best decision he could for his family, indicating that a lot of union people were starving. Hardy then advised Maiolo that he thought employee Gary Stewart should have a raise. Maiolo quickly decided against the raise, but then reconsidered and at that time employee Stewart walked up, whereupon Maiolo told Stewart that he would get a raise.

The day following the union meeting, September 21, Hardy himself went to Maiolo, told him he had decided to support the Union, but added that he wanted to stay with the Company and that he, thus, hoped that the Union would organize the Company. Hardy also told Maiolo that Stewart was going to support the Union. Maiolo replied that he hoped Hardy had made the right decision, indicating that he knew about the Union meeting the previous evening and felt he could sue the Union for holding an "illegal vote." Maiolo further remarked that if it did not "work out," Hardy was "free" to come back, and asked Hardy for a "final date." Hardy replied that he did not have one and Maiolo then set Friday, September 28, as his last day of work. Soon after this conversation ended Maiolo talked with O'Neill and as Maiolo and O'Neill were finishing their conversation, Hardy approached and asked Maiolo if they were being "fired or laid off or what," to which Maiolo replied, "No, you quit." At that time Maiolo also stated that Gary Stewart was also "finished" as of Friday, September 28.

The following Monday, September 24, at a jobsite Supervisor Charlie Knauff arrived, gave Hardy and Stewart their final paychecks and told them they were being laid off. Hardy asked why and Knauff replied that Maiolo "can't have any union employees on the payroll." Hardy then asked what to "put down" on the unemployment card and Knauff suggested "lack of work."

4. Philip Frederick (par. 7(b) of the complaint)

Frederick had worked for the Company for over 6 years. In mid-September on a jobsite, Maiolo talked to him and explained that there would be a decision coming up in his life and that he should make the best one for himself and his family. On September 20, 5 or 6 days

⁸ Schmuck was the company's vice president and general manager

later, he attended the union meeting and the following day Maiolo telephoned him at a jobsite and asked him what his intention was, whether he was "going to leave or stay," and Frederick replied that he had not made up his mind. On September 26, Maiolo called him at the jobsite regarding shifting an employee from one site to another, and at that time Frederick told him that he had decided to support the Union and that he would "work the week out for him or until the union came to work or whatever happened." At this time Frederick was aware that other foremen had left or "quit" because of joining the Union. Maiolo replied that he could not "legally" have a union man on the payroll and that day would be his last. Frederick related that Union Organizer Payne had told him that if he joined the union he would not necessarily stay with the company and Frederick himself indicated that there was no doubt in his mind that, by joining the union, he did "quit."

C. Concluding Analysis

Maiolo made it clear that no union member could work for the Company and that he would close his business rather than entertain or recognize union representation of his employees. However, the law grants the employees this choice, and not the employer. The legitimate choice of the employees was replaced with that of either staying without a union, or leaving. I find little or no distinction in this case between discharge, constructive or otherwise, and quitting for those who joined and supported the union. The fact that the employees knew or suspected the consequences of their union support attaches no legitimacy to their departure, nor does it exonerate responsibility for the cause of the choice. Maiolo, by his conduct and actions removed and excluded from the employees a basic right granted to them in Section 7 of the Act, the right to choose or not to choose union representation at their workplace. The essence of this case is the denial of that right. Once having made this decision and taken this position, Maiolo placed himself on a course which led almost preliminarily and inescapably to a myriad of violations of the Act regarding his longtime and valued foremen, involving improper interrogation and threats, in a effort to find out their position, and to dissuade them from union support. Maiolo, I find, discovered the union activity sometime prior to mid-September. He wanted to keep his foremen and his key people if at all possible, but ultimately not at the cost of going union. On or about September 14, he talked to all of them (Frederick by phone). After this the die was cast. He learned about the September 20 union meeting and straw vote and the following day he commenced his canvass, which proved to be highly disappointing. He had lost, and the reality of the situation became so apparent over the weekend that he accelerated the departure of O'Neill, Hinton, Hardy, and Stewart on Monday. With only one minor exception, I find and conclude that the Respondent violated the Act as alleged in the complaint.⁹

⁹ I find a lack of evidence in the record to support the allegation in par. 6 of the complaint that on or about September 21, Supervisor Knauff improperly solicited employee complaints and grievances, and promised employees improved terms and working conditions.

Upon the following foregoing findings of fact and initial conclusions and upon the entire record, I hereby make the following:

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act on or about September 14, by the following acts or actions:

(a) Creating the impression of surveillance of union activities of its employees.

(b) Threatening employees with closure of its shop or business if they selected the Union as their collective-bargaining representative.

(c) Interrogating employees about their union sympathies, activities, and support.

(d) Threatening employees with discharge if they supported the Union as their collective-bargaining representative.

(e) Promising an employee with improved benefits and higher pay if said employee and other employees did not support or select the union as their collective-bargaining representative.

(f) Promising an employee a wage increase in order to dissuade him from supporting the Union.

4. The Respondent violated Section 8(a)(1) of the Act on September 21, 1979, by the following acts or actions:

(a) Creating the impression of surveillance of the union activities of an employee.

(b) Interrogating an employee about his union sympathies, activities, and support.

(c) Threatening to discharge an employee if he supported the Union as the collective-bargaining agent of the employees.

(d) Promising an employee an interest in the business of the Respondent if said employee abandoned his support for the Union.

5. The Respondent violated Section 8(a)(3) and (1) of the act on September 24, 1979, by discharging employees Samuel D. Hardy, Joseph O'Neill, Gary Stewart, and Leonard Hinton, and on September 26 by discharging employee Philip Frederick, because of their union support.

6. The unlawful conduct concluded in paragraphs 3, 4, and 5, above, and found herein, affected commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not otherwise violated the Act, that other than the misconduct concluded in paragraphs 3, 4, and 5 above.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it be

ordered to cease and desist therefrom,¹⁰ and that it take certain affirmative action designed to effectuate the policies of the Act, including the posting of an appropriate notice. I shall also recommend that the Respondent be required to offer Samuel D. Hardy, Joseph O'Neill, Leonard Hinton, Gary Stewart, and Philip Frederick immediate reinstatement to their former positions of employment or, if those jobs no longer exist, to substantially equivalent positions of employment and to make them whole for any and all losses of wages and other benefits they may have suffered as a result of their unlawful discharges with such losses to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).¹¹

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

ORDER¹²

The Respondent, Williamsport Plumbing and Heating Co., Inc., Williamsport, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because of their union activities.

(b) Creating the impression that management is engaging in surveillance of union activities of employees.

(c) Coercively interrogating employees concerning their union sentiments and activities.

(d) Telling employees any efforts to engage in collective bargaining through a union would be futile.

(e) Threatening to discharge employees in retaliation for their union activities.

(f) Offering employees increased wages, other benefits, or an interest in the business in order to wean them away from supporting the Union.

¹⁰ Because of the seriousness of the violations found herein, including the discharges, I shall recommend that the additional "cease and desist" provision of my Order be of the broad variety, which I feel to be appropriate and necessary in this case. Cf. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

¹¹ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(g) Threatening plant closure if the employees selected or became represented by the Union.

(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist a labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any and all such activities.

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

(a) Offer Samuel D. Hardy, Joseph O'Neill, Gary Stewart, Leonard Hinton, and Philip Frederick immediate and full reinstatement to their former positions or, if such positions no longer exists, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make whole Samuel D. Hardy, Joseph O'Neill, Gary Stewart, Leonard Hinton, and Philip Frederick for any losses of pay or benefits they may have suffered by reason of the Respondent's discrimination against them in the manner provided in the Remedy section of this Decision.

(c) Post at its office and facility and shop in Williamsport, Pennsylvania, the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 4, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, in and about work areas and other areas as indicated above, including all places where notices to said employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint against the Respondent be, and it hereby is, dismissed insofar as it alleged unfair labor practices not specifically found herein.

¹³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."