

Wilco Energy Corporation and United Mine Workers of America. Case 26-CA-7454

December 6, 1979

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On August 2, 1979, Administrative Law Judge Robert A. Gritta issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering 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 attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.²

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 below, and hereby orders that the Respondent, Wilco Energy Corporation, Ozark, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It excepts particularly to his discrediting of Plant Superintendent Marlow's version of the events leading to the discharges of employees Dalton and Bjorgum on the ground that earlier in his Decision the Administrative Law Judge found Marlow to be a "sincere witness" with regard to his testimony on another issue. We note, however, that an administrative law judge is not required to credit all of a witness' testimony because he is persuaded by some of it. Nothing is more common than to believe some and not all of what a witness says. *N.L.R.B. v. Universal Camera Corporation*, 179 F.2d 749 (2d Cir. 1950). See also *Krispy Kreme Doughnut Corp.*, 245 NLRB No. 135 (1979), and *Maximum Precision Metal Products, Inc., Renault Stamping Ltd.*, 236 NLRB 1417 (1978). Furthermore, 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 In par. 1(b) of his recommended Order, the Administrative Law Judge used the broad cease-and-desist language "in any other manner." However, we have considered this case in light of the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and have concluded that a broad remedial order is inappropriate inasmuch as it has not been shown that Respondent has a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Accordingly, we have modified the recommended Order by substituting the narrow injunctive language, "in any like or related manner."

1. Substitute the following for paragraph 1(b):
 "(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act."
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 parties were given an opportunity to present evidence and argument, it has been determined that we violated the law by committing unfair labor practices. In order to remedy such conduct, we are being required to post this notice. We intend to comply with this requirement and to abide by the following commitments.

WE WILL NOT discharge, lay off, or otherwise discriminate against any employee in order to discourage membership in or support of United Mine Workers of America, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL offer to George Dalton and Jerry Bjorgum immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and **WE WILL** make them whole for any loss of earnings or benefits which they may have suffered by reason of our discrimination against them, with interest thereon as provided by the National Labor Relations Board.

WILCO ENERGY CORPORATION

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge: This case was heard on January 25, 1979, in Ozark, Arkansas, based on charges filed by United Mine Workers of America (herein referred to as Union) on October 16 and 26 and November 6, 1978, and a complaint issued by the Regional Director for Region 26 of the National Labor Relations Board on November 9, 1978.¹ The complaint alleges that Wilco Energy Corporation (herein Respondent) violated

¹ All dates herein are in 1978 unless otherwise specified.

Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by threatening employees with closure of the business if the Union was selected to represent the employees and by discharging employees for engaging in union activities. Respondent's timely answer denied the commission of any unfair labor practices.

All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by General Counsel, Respondent, and the Charging Party. All briefs were duly considered.

Upon the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, Respondent admits, and I find that Wilco Energy Corporation is an Arkansas corporation engaged in the mining and sale of coal in Ozark, Arkansas. Respondent, in the past 12 months, in the course and conduct of its business operations purchased and received at its Ozark, Arkansas, facility goods and materials valued in excess of \$50,000 directly from points located outside the State of Arkansas. In addition the Board previously asserted jurisdiction over Respondent in Case 26-RC 5854 issuing a Decision and Direction of Election on October 13, 1978. Therefore, I conclude and find that Wilco Energy Corporation is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BUSINESS OF RESPONDENT

Respondent owns and operates several strip coal mines. The only mine involved in this proceeding is the Turkey Run Mine. Respondent operated Turkey Run for several months under the management of President/General Manager Bessinger and Superintendent Leppala. On August 15 the owners replaced Bessinger with David Duplantier. Part owner, Bill Lagnion on August 18 hired William Marlow as pit boss over the mine. Marlow immediately had responsibility for the mining operation and personnel whereas Leppala retained only the responsibility for the machines and the mechanics. On August 22 Marlow eliminated the night shift, putting all three employees on the day shift. With nine employees total the mine became a one-shift operation. Leppala remained in the machine repair shop as supervisor until August 30, at which time he left Respondent's employ to work for Bessinger in another State. Marlow then became superintendent of the entire operation.²

² There is no dispute on the above facts albeit no witness could testify to chronology. However, the record does contain an exhibit with dates.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Threats of Closure

Superintendent Marlow testified that "the first time I knew the Union was going to be in the mine was when some fellow called me from Little Rock, the same fellow that we had the hearing with at Fort Smith." After the call from the Board agent and when all the employees were eating dinner they were discussing the possible advent of the Union. "I said, 'With a six inch vein of coal and the price you're getting out of it, if it goes union, there is now way any company could mine it as high as things is.' That's all that was ever said. It wasn't said to one man, it was said to the whole crowd, just talking. Further testimony of the same conversation was, 'I don't see how in the world, if it goes union, on a six inch vein of coal, and pay union wages, as high as equipment and stuff is, and tires and stuff— 'we had just paid \$6,800 for a tire'— that you can go ahead and mine, because there ain't no way.'" The conversation occurred at the mine where the employees gather daily to eat lunch.

Bankston testified that during the lunch gathering under the big tree, on one occasion, most of the mine employees were discussing the Union. Bankston stated, "Oh, we just sat there at noon and talked about if it did, if it went union, that they couldn't make it, because the coal wouldn't be thick enough for it to pay the higher wages, and the expense to operate the mine." Marlow said more or less that, if it went union, they might have to shut down on account of the coal being thin. The employees gathered each day thereafter but did not discuss the Union at the mine again. Bankston could not place the date of the single discussion of the Union at the mine during lunch.³

Discussion and Conclusions

The General Counsel made no argument in his brief on the alleged threat. The Charging Party did however argue the *Gissel* [*N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969)] rationale relative to employer predictions of dire consequences if a union is selected. Albeit, the argument is an accurate presentation of the Court's view of *Gissel* and the objective standards needed to support employer statements, the necessary elements are not present to apply such a holding. Thus, the statement made by Respondent's representative did not contain a threat of reprisal, or force or promise of benefit. The statement was not made to a captive audience as suggested by the Charging Party but rather was conversational during a voluntary lunch gathering of employees and supervision. Respondent's witness on cross did supply testimony that a threat "more or less" was made. In addition Respondent's witness corroborated the General Counsel's witness that the conversation took place on only one occasion although the group met in the same spot for lunch thereafter. I consider the statement by Marlow to be a discussion of economics rather than a threat to close the mine. The employees were all discussing the possible advent of the Union and realistically any such discus-

³ Both Marlow and Bankston impressed me as sincere witnesses attempting to recall the facts as they happened.

sion includes the influence of the Union's presence on production economics. Additionally, Marlow, neither impliedly or expressly, conditioned any closing of the mine upon the Union winning the election. The evidence, therefore, is insufficient to establish a threat on the one occasion of September 20 and nonexistent relative to any threat on September 25. Accordingly, I conclude and find that Respondent did not threaten employees with closure of the mine if it went Union.

B. *The Discharges*

George Dalton was initially hired by Respondent on July 3, 1977, at \$3.75 an hour. He was number one in seniority as of June 1978. Dalton began his employment in the King mine, but with the other employees was transferred to the Turkey Run mine after several months. During his employment at the King mine, Dalton received several periodic increases in pay and upgrading of classification culminating in Dozer operator. Upon his transfer to Turkey Run he worked days as a dozer operator at \$5 an hour. After several months at Turkey Run Respondent instituted a night shift and transferred Dalton to nights as leadman at \$6.25 an hour. Jerry Bjorgum and Darrell Chavers were the other night-shift employees comprising the night shift. The night-shift employees got their instructions from Leppala through Dalton.

On August 21 Dalton was notified by Bjorgum that he had set up a meeting with a union representative for that day in a local motel. Dalton, Bjorgum, and Ernest Hern met in the motel restaurant preparatory to meeting the union representative. After discussing unionization of Turkey Run for several minutes they were noticed by the person in the booth next to them. It was Bill Lagnion, one of the mine stockholders. Several minutes later Lagnion left and Dalton and the others met with the union representative. The next day Superintendent Marlow eliminated the night shift moving the three employees to days. At this time the former night-shift employees began receiving their instructions from Marlow. Chavers then left the employ of Respondent rather than work days. Dalton worked days, under Marlow, as a dozer operator and at times with conflicting instructions from Marlow and Leppala. On Sunday, August 27, Dalton was instructed by Marlow to work in the pit moving rock with the caterpillar dozer. The caterpillar had developed engine trouble sometime before and after an overhaul was heating up. Employees had been instructed to "watch the heat" and when it became overheated stop working to let it idle to cool off. Dalton testified that the dozer was heating up that day so he stopped pushing the rock and informed Marlow and Leppala that it was hot. Dalton was then instructed by Leppala to check oil and take samples in the machinery. Dalton finished out the day checking oil samples. The following morning as Dalton arrived at the minesite he was met by Marlow who told him he was letting him (Dalton) go because he could not get the rock out of the pit and he was going to have to get somebody else that could. Marlow then said that was all he had to say about it. Marlow then walked back towards the jobsite. Several days later Dalton went to the main office of the Company and picked up his separation slip marked as lay-off for lack of work. Dalton further testified that during his

entire employment he had not received any warnings or reprimands associated with his work or job performance.

Jerry Bjorgum was first employed in April to work in the King mine as a mechanics helper at \$3.75 an hour. After 30 days he was increased to \$4 an hour. In July the King mine was slowing so Bjorgum was laid off for a time. He was later recalled to the Turkey Run mine as a dozer operator at \$5 an hour on the night shift under Leppala's supervision.

Bjorgum initiated the union campaign at Turkey Run. He testified, "Well, the campaign started when I got ahold of a steward at a different mine, and he got ahold of some officials from the United Mine Workers, and they called me up, and made plans for a meeting." Bjorgum had previously talked to Dalton about a union and when the meeting was arranged he called Dalton.

The second meeting between the employees and the union representative was set for August 21. Bjorgum, Dalton, two Chavers boys, and Ernest Hern met at the motel restaurant. While they waited for the union representative they discussed getting cards signed for the Union among the employees at Turkey Run. During this discussion they discovered that Bill Lagnion, a known stockholder in the mine, was sitting in the booth directly behind them. During the union discussion Lagnion acknowledged their presence with a "Howdy." The employees thereupon changed the subject of their discussion and Lagnion left the restaurant.

The next day the night shift was eliminated by Marlow. Bjorgum moved to days as a dozer operator and mechanics helper. When the dozer was down or the mechanic needed help, Bjorgum was called on to give the help. Bjorgum also drove a truck and swept coal.

Bjorgum also testified that Leppala had cleared with Marlow an unrestricted use of Bjorgum whenever the mechanic needed help. The mechanic himself could seek out Bjorgum and get him to come to the shop or where the equipment was being worked on for his help.

On August 27 Marlow instructed Bjorgum to replace a glass door in a loader that was in the shop. When he started the job Leppala told him the loader was not important since it was out of use due to other mechanical troubles. Leppala then used Bjorgum for mechanic work the rest of the day. At one point in the day Marlow asked him why the glass was not installed and Bjorgum told Marlow that Leppala told him to help the mechanic. Marlow did not ask again about the glass.

The following morning Bjorgum and Dalton arrived at work but before they got on company property Marlow came to them and said he had to lay them off. Bjorgum testified: "He told me that he had to lay me off because everywhere he put me, I wasn't never there where he put me. I was someplace else." Bjorgum stated that he had not received any prior warnings or complaints about his work from Marlow and he was the second man in seniority. Bjorgum got a termination slip from the Company which showed he was laid off due to lack of work.

Superintendent Al Marlow testified that he was hired as pit boss on August 18. After only a couple of days he eliminated the night shift because the employees were not getting anything done. Although Marlow was not present on the night shift he did lay out instructions for each man at the start of the shift. Marlow stated that anyone could tell if

the men did their jobs by the shape of things the following morning. Marlow's hours were usually 7 a.m. to 5:30 p.m. and the night shift started at 5:30 p.m. but he did not know how long the shift worked.

On August 27 the crew was working at the mine. Marlow told Dalton to take the D-8 tractor and push rock in the pit. Dalton worked on the tractor for about an hour, then came out of the pit and parked it. Marlow relates the following: "I asked him myself, I said, 'Is there anything wrong with that tractor?' He said, 'No, but I hain't going down there and push any more of that rock.' He said, 'Anybody is crazy to ever put a man down there pushing that rock.' I sat there a minute and I asked him, I said, 'Are you going back?' He said, 'I told you I wasn't going back down there.' I said, 'Well, I'm going to take it down there and try it the rest of the evening and see how bad it is if you don't care.' He said, 'Go ahead because I ain't.'" Marlow also testified that Dalton just said that he was not going to push that rock any more. He did not say that he could not push it, he said he was not pushing it. Dalton said it was crazy for a man to push rock with a dozer when there were loaders to carry it. Marlow stated that at no time did Dalton mention the tractor overheating or getting hot.

Marlow took the tractor down and pushed rock for 2-1/2 hours until approximately 20 minutes to quitting time. He brought the tractor out and asked where Dalton and Bjorgum were but they had punched out and left. Marlow stated that both had punched out early that day; i.e., before 5:30 p.m. Marlow did not check the timecards of either employee to ascertain when they punched out or whether they had worked a full shift. At the time Marlow took over Dalton's dozer he had not given any further work instructions to Dalton.

Marlow testified that he had trouble keeping Bjorgum on a specific job. If he put Bjorgum on a task and turned his back for 10 minutes, Bjorgum would sneak off. Marlow considered Bjorgum a laborer and assigned him various tasks including the dozer and loader, and sweeping coal and helping the mechanics in the garage. Marlow had agreed with Leppala that the garage employees could come down and get Bjorgum whenever they needed him to help time. Marlow stated that Bjorgum would stand around the garage and not do any work, although from the pit, where Marlow was, he could not see into the garage. In the 6 or 7 days that Bjorgum worked on days Marlow would go to the garage five or six times a day to get him to do other work, such as sweep coal in the pit.

Marlow further testified that one incident caused the discharge of Bjorgum. One day he sent Bjorgum to get some glass doors for the big loader repaired and they were brought back on August 25. On the morning of August 27 Marlow told Bjorgum to install the doors on the loader which was in the garage right away because the state inspector was coming back just to sign off that loader. Just after noon he checked the loader and found that the glass had not been installed. Marlow then got another operator and the two of them installed the glass in the loader. With that, the state inspector signed the ticket on the loader and left. Marlow stated, "Bjorgum, couldn't catch him. He wasn't there." That was next to the last straw for Marlow. Marlow was later in the pit on the dozer working by a loader that was down with its universals out of commission.

Bjorgum, Dalton, and the mechanic's helper came down to the loader and spent 45 minutes taking an oil sample from the rear end. This was about 3:30 p.m. The three then went back up and Marlow did not see them until the next morning.

Marlow also testified: "I actually decided when I came out and they was gone and I couldn't talk to them and explain to them why they hadn't done something. I just waited until the next morning and when they came, I fired them both."

Marlow had not, during the 6 or 7 days he supervised Dalton and Bjorgum, issued either employee a warning or reprimand for their poor work performance. He had however discussed their work performance with the company president, David Duplantier, the evening before they were discharged. Marlow told Duplantier, "I had to get rid of them. There wasn't no ifs and none's about it. I couldn't keep them nowhere. They refused to do anything, so why should you have men like that on your payroll. They've got to go." Duplantier told Marlow to do whatever he had to do. Marlow said he did not have to discuss discharge of employees with Duplantier but he did. He testified: "We did it one time. In the case of these two, but I didn't have to. I could have fired them on the spot. I didn't have to, but I wanted to be right. I don't like to do things and botch it up."

Marlow denied any knowledge of union activity on the part of Dalton or Bjorgum and any knowledge of union activity of any kind until he was contacted by the National Labor Relations Board's Regional Office prior to the representation case hearing of September 20.

David Duplantier, president of Wilco, testified that the operation of the Company is a joint affair between him and Marlow. Marlow does not have the authority to fire any employee without the counsel of Duplantier. When any employee is under consideration for discharge he and Marlow discussed it beforehand. With regard to Dalton and Bjorgum, Marlow discussed it with him on Thursday and Friday preceding the discharge. Duplantier stated, "He told me that they wouldn't work, and he had trouble making them—he had trouble getting them to work, and I told him not to fire anybody unless he had a good reason to fire people, and he looked at me like I was crazy, and he said, 'Do you think I'm going to fire somebody if they are a good worker?' and I said, 'Well okay.'" Duplantier and Marlow discussed the specifics of Dalton pushing rocks in the pit with the dozer and stopping the work because he said he could not push anymore. The discussion included Marlow pushing rocks himself the rest of the day.

Duplantier was not aware of any warnings or reprimands for Dalton or Bjorgum and the company records did not reflect any. Neither was he aware of any union activity by any employee on behalf of any union before receiving the registered letter from the Regional Office dated August 31.

William Leppala was superintendent of the entire operation until Marlow was hired as pit boss. When Marlow was hired Lagnion told Leppala that Marlow was to have complete responsibility for the pit and was not to be interfered with in any way, manner, shape, or form. If any complaints or disputes arose Lagnion would resolve them. Leppala did not lose his title of superintendent since he was still the

responsible party for the mine and the person certified in mine safety. He did lose his authority to hire and fire mine employees when Marlow took over and assumed such authority.

Around August 25 Leppala went for a ride in a company pickup at Lagnion's request. Lagnion asked, "What do you know about them starting to organize a union and George Dalton is the ringleader." Leppala professed ignorance of the activity. Lagnion said that the mine superintendent of Arkansas Valley Coal, where Chavers went to work, called and told him that Chavers had said they were trying to organize a union at Wilco. That same night or the night after in Leppala's apartment Adrian Duplantier, David Duplantier, Lagnion, and Leppala were discussing mining.⁴ Lagnion said to David, "Hey, do you know George Dalton is trying to organize a union." David responded, "I want that man fired." Leppala said, "Hey, don't do it." Adrian stated, "Yeah, that's right. We can't do it that way." The conversation then turned back to mining.⁵

On August 27 State inspector Boatwright was at the mine and recommended that the glass needed for the loader, which was inoperative due to mechanical failure, should be installed before the machine is placed in operation. When Leppala learned that Bjorgum was told to install the glass he told Bjorgum that it was not critical and assigned him to mechanic work in the garage. Leppala did not recall if the glass was subsequently installed but he did know that Marlow did not consult with him on the glass incident. That same day Dalton was pushing rock with the dozer and it began overheating. Dalton stopped the dozer and informed Leppala that it was overheating. Although the dozer had been giving trouble on overheating and was recently overhauled, Leppala could not recall any maintenance on it after Dalton parked it to let it cool. Leppala did tell Dalton that whether the dozer was used to push rock in the pit was Marlow's area of responsibility.

Discussion and Conclusions

The issues presented are twofold: Whether Respondent had knowledge of its employees' union activity, particularly Dalton and Bjorgum, at a time prior to their discharges and whether the union activity of Dalton and Bjorgum was a consideration by Respondent in effectuating their discharges.

Dalton and Bjorgum credibly testified to initiating the organizational drive prior to August 21. The evidence of their second meeting at the motel restaurant is uncontroverted including the presence of Bill Lagnion, a part owner of Respondent. Albeit I conclude and find that Dalton, Bjorgum, and Darrell Chavers engaged in union activity cognizable by the Act, I cannot on this record find that Bill Lagnion, from the restaurant conversation, had knowledge of such activity.⁶

⁴ Leppala and Lagnion shared the apartment as local quarters.

⁵ David Duplantier admits that such a gathering in Leppala and Lagnion's apartment did in fact take place but denies any conversation relating to union activity. Neither Adrian Duplantier nor Bill Lagnion was called to testify by any party.

⁶ The other men present in the restaurant conversation were not employees of Respondent.

The evidence of Leppala's conversation with Lagnion wherein Lagnion expressed specific knowledge of Dalton's ringleading union activity is uncontroverted. However, the evidence of Leppala's conversation in the apartment is denied as it relates to Respondent's knowledge of union activity and its intent to use such knowledge as a basis for discharge. Leppala's demeanor was sincere and he impressed me with his candor, only relating what he specifically recalled. On the other hand I discredit David Duplantier's general denial that Respondent had any knowledge of union activity prior to August 31 and his specific denial that he, his father, and Lagnion discussed with Leppala the discharge of George Dalton for engaging in union organizational activities. I therefore conclude and find that as of August 25 Respondent knew that George Dalton was one of the ringleaders of the union organizational activities.

Where there is no direct proof of knowledge of union activity circumstantial evidence may supply the predicate for a finding of such knowledge. Thus Lagnion, on August 21, saw Chavers and Dalton, known union activists as of August 25, in the restaurant with Bjorgum and two recently laid-off employees. The transportation of the group's purpose to that of the known purpose of Dalton and Chavers does not require mental gymnastics of impossible degree. Lagnion is a sophisticated management and investment person who demonstrated a concern for the union activity when it was discovered. It is all together reasonable that speculation on participants would follow such discovery. Accordingly, I conclude and find that Respondent knew or had reason to know that Bjorgum was engaged in the union organizational activities with Dalton and Chavers.

The discharges of Dalton and Bjorgum cannot be found unlawful merely because each engaged in union activity. Neither does the union activity insulate the participants from discharge by the employer. Even a finding that Dalton and Bjorgum were not properly discharged for cause would not, in and of itself, establish discharges violative of the Act. In fact, the Board does not have to agree with an employer's stated cause for discharge or even find such cause to be reasonable for the discharge to stand. The test is the true motivation for the discharge. If a discharge is motivated by antiunion design, then the discharge is violative of the Act even though the employee is inefficient, irresponsible, disobedient, or insubordinate. Illegal motivation can be supported by a combination of factors such as coincidence in union activity and discharge, leadership capacity of the alleged discriminatee, hostility toward the union, and implausible explanations by the Employer for its actions. *W. T. Grant Company d/b/a Grant City*, 210 NLRB 622 (1974).

Marlow's stated reason for discharging Dalton was his refusal to do the assigned work. Marlow's own testimony shows that Dalton did not refuse to use the dozer, but rather he could not do the work with the small machine. Marlow took the dozer into the pit *to try it* if Dalton did not mind. This is hardly a colloquy in circumstances where an employee has refused to do what he was told to do and then stands his ground idly. Additionally, Dalton and Leppala credibly testified that the dozer did heat up and Dalton specifically on that occasion alerted Leppala and Marlow to

the fact. I note also that Marlow, although he stated he could have fired Dalton on the spot, did not. Neither did he reassign Dalton to another task. Marlow simply took the dozer himself into the pit. Marlow states that the absence of Dalton prior to quitting time set off the discharge until the following day. The timecards, which Marlow did not check, reflect that Dalton worked a full shift of 10 hours his last day of work. The timecards also reflect previous days of 9 and 9-1/2 hours so a full day is not necessarily 10 hours. Marlow and Duplantier both admit to having previously discussed the discharges of Dalton and Bjorgum. As I have found Duplantier to have knowledge of the union activity and to have engaged in antiunion discussions with Lagnion specifically concerning Dalton I conclude that Duplantier planned and initiated the discharges implemented by Marlow. I am not convinced by Marlow's assigned reason for Dalton's discharge but rather find his reason to be baseless and pretextual. I further conclude and find that the motivation for Dalton's discharge was the Company's knowledge of his union activity causing the discharge to be violative of the Act. *Shattuck Denn Mining Corporation (Iron King Branch) v. N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966).

In Bjorgum's case Marlow's reason for discharge was the inability of Bjorgum to remain on an assigned task to completion. Marlow cites the glass door of the loader as the next to last straw but concedes that Bjorgum was a utility employee expressly on loan to the garage without restriction. Bjorgum and Leppala credibly testified that the glass door was not installed on Leppala's instructions and Bjorgum was helping in the garage as usual. On this particular occasion Marlow installed the door himself and did not seek an explanation of Bjorgum's apparent laxity. Albeit Marlow testified that Bjorgum was not actually working in the garage he admitted he was stationed in the pit which was not within view of the garage. The evidence in the record and the inferences arising therefrom convince me that Marlow's reason for discharging Bjorgum is totally unsupported by reason and is pretextual in nature. I note particularly that on the day in question when Marlow came up out of the pit at the end of the day he was looking for both Dalton and Bjorgum. Such a search evinces a preconceived intent to deal with both employees on a single basis. The dispositive note is that the only common factor was each employee's union activity. I therefore conclude and find for the reasons above and those previously stated that Respondent discharged Bjorgum for his union activity in violation of the Act. (*Shattuck Denn Mining Corporation, supra.*)

CONCLUSIONS OF LAW

1. Respondent did not threaten employees in violation of the Act.

2. By the discharges of George Dalton and Jerry Bjorgum on August 28 Respondent engaged in discrimination in regard to tenure of employment or other terms or conditions of employment discouraging membership in or activities on behalf of a labor organization in violation of Section 8(a)(1) and (3) of the Act.

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

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged George Dalton and Jerry Bjorgum, I find it necessary to order it to offer them full reinstatement to their former positions or, if their positions no longer exist, to substantially equivalent positions, with backpay computed on a quarterly basis and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977),⁷ from August 28, 1978, the date of discharge to the date of proper offer of reinstatement.

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

ORDER⁸

The Respondent, Wilco Energy Corporation, Ozark, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, laying off, or otherwise discriminating against employees in order to discourage membership in or activities on behalf of United Mine Workers of America, or any other labor organization.

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

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

(a) Offer to George Dalton and Jerry Bjorgum, if it has not already done so, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings or benefits they may have suffered by reason of Respondent's discrimination against them as set forth in the "Remedy" section of this Decision.

(b) 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 facilitate the effectuation of the Order herein.

(c) Post at its mine office and company office in Ozark, Arkansas, copies of the attached notice marked "Appendix."⁹ Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's authorized representative, shall be posted by

⁷ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

⁸ 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.

⁹ In the event that this Order is enforced by a Judgment of the 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."

Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.