

**Wickes Lumber, A Division of the Wickes Corporation and Clerks and Lumber Handlers Union, Local 939, Laborers International Union, AFL-CIO.** Case 32-CA-792

December 29, 1978

### DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On October 5, 1978, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, the General Counsel 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 attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge<sup>1</sup> and to adopt his recommended Order, as modified herein.<sup>2</sup>

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Wickes Lumber, A Division of the Wickes Corporation, Fremont, California, 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(a) and reletter the subsequent paragraphs accordingly:

“(a) Expunge and physically remove from its records and files the disciplinary action notice issued David Alley on February 16, 1978, and any reference thereto.”

<sup>1</sup> The General Counsel 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> We have adopted the Administrative Law Judge's finding that the verbal reprimand of employee David Alley on February 16, 1978, was occasioned by Alley's union activities and was, therefore, unlawful. Consequently, as it appears from the record that Respondent placed a written reference to the reprimand in his personnel file, we shall modify the recommended Order to provide that Respondent expunge from its files and records any reference whatsoever to the unlawful reprimand.

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

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

### APPENDIX

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

WE WILL NOT issue disciplinary warnings to our employees because they have supported or engaged in activities on behalf of Clerks and Lumber Handlers Union, Local 938, Laborers International Union, AFL-CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL expunge and physically remove from our records and files the disciplinary action notice issued David Alley on February 16, 1978, and any reference thereto.

WICKES LUMBER, A DIVISION OF THE WICKES CORPORATION

### DECISION

#### STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in this case was held on July 10, 1978, and is based upon unfair labor practice charges filed by Clerks and Lumber Handlers Union, Local 939, Laborers International Union, AFL-CIO, herein called the Union, on March 15 and April 4, 1978, and a complaint issued on April 25, 1978, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, alleging that Wickes Lumber, A Division of the Wickes Corporation, herein called the Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act. Respondent filed an answer denying the commission of the alleged unfair labor practices.

Upon the entire record, from my observations of the demeanor of the witnesses, and having considered the General Counsel's and Respondent's post-hearing briefs, I make the following:

#### FINDING OF FACT

##### I. THE BUSINESS OF RESPONDENT

Respondent, Wickes Lumber, A Division of the Wickes Corporation, is a Delaware corporation with a place of

business, the one involved in this proceeding, in Fremont, California, where it is engaged in the retail sale of lumber and building supplies. During the past 12 months, Respondent received over \$500,000 in gross revenues and purchased and received goods and supplies valued over \$5,000 which originated outside the State of California.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The Union, Clerks and Lumber Handlers Union, Local 939, Laborers International Union, AFL-CIO, is admitted by a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Background and Issues

Respondent employs approximately 30 employees at its Fremont, California, facility. In approximately December 1977, the Union commenced a campaign to organize these employees. On February 14, 1978,<sup>1</sup> pursuant to a representation petition filed with the Board by the Union, a majority of the employees voted for union representation in a Board-conducted election. Respondent filed timely objections to the results of the election. These objections were still pending before the Board at the time of the instant hearing.

The ultimate issues posed by the pleadings are as follows:

(1) Whether Respondent on February 13, the day before the representation election, through its vice president of personnel, threatened employees they would not receive dental insurance benefits if they voted for the Union, thus violating Section 8(a)(1) of the Act.

(2) Whether Respondent, shortly after the election, through its facility manager, threatened employee Donald Rucker with unspecified reprisals because a majority of the employees had voted for union representation, thus violating Section 8(a)(1) of the Act.

(3) Whether Respondent, immediately following the election, strictly enforced its work rules to penalize the employees for having voted for union representation, thus violating Section 8(a)(1) of the Act.

(4) Whether Respondent on March 7 discharged employee David Alley because of his union activities, thus violating Section 8(a)(1) and (3) of the Act.

### B. The Alleged Threat That the Employees Would Not Receive Dental Benefits

Respondent was opposed to union representation and conducted a campaign designed to persuade the employees to vote against union representation. This campaign culmi-

nated on February 13, the day before the scheduled representation election, with a speech delivered to the employees by Ralph Dillon, the vice president of Respondent's lumber division. Dillon spoke with the aid of a prepared text. In substance, he asked the employees to vote against union representation, explained why union representation would be against their best interests, and described the existing employment benefits and working conditions that he said made union representation unnecessary. Then Dillon reviewed what the Company had done for the employees since the last union representation election held 12 months previously, which the Union had lost. He noted that the Company had made improvements in its medical insurance program, but on the subject of a dental insurance program, which the Company did not have, Dillon stated:

A dental plan is being reviewed but I am not going to promise you something I can't do. Only people who don't have to live up to their commitments can do that. I might add that a dental plan is not in the cards this year regardless of which way the vote goes.

The description of Dillon's comments about the dental plan is based upon the testimony of Robert Quigley, the Company's director of industrial relations, who was present when Dillon spoke. Quigley impressed me as a credible and reliable witness. In any event, his testimony was not contradicted in essential respects by employees Rucker and Pineda, who testified for the General Counsel. Rucker testified Dillon stated "there would never be a dental plan." Pineda testified Dillon stated "there would be no dental if we voted for the Union or even if we did not vote [for the Union]. . . . He just said no dental, period. That's it." There is nothing in the testimony of either Rucker or Pineda which indicates the context in which Dillon's dental benefit remark was voiced. In short, the General Counsel's witnesses did not indicate that Dillon's remarks about the dental benefits were voiced in a context calculated to cause the employees to believe that they were being denied dental benefits because of the Union's organizational campaign.

Based upon the foregoing, I find that Dillon did not, as alleged in the complaint, "threaten that employees would not receive dental benefits if they selected the Union as their collective-bargaining representative." Accordingly, I shall recommend that this allegation be dismissed.

### C. The Alleged Threat of Unspecified Reprisals

Respondent filed objections to the results of the February 14 representation election. It is undisputed that in an effort to discover evidence to support its objections, Respondent's attorney, in the presence of Manager Eichhorn, interviewed employee Donald Rucker in Eichhorn's office. In dispute is whether at the end of the interview Eichhorn told Rucker: "Now that the Union election was over, Eichhorn could take his kid gloves off and get tough." Rucker testified Eichhorn made this statement. Eichhorn specifically denies it. Eichhorn impressed me as the more convincing and trustworthy witness; accordingly, I have credited his testimony. It is for this reason that I shall recommend the dismissal of the allegation that Respondent

<sup>1</sup> All dates hereafter refer to 1978 unless otherwise specified.

violated Section 8(a)(1) of the Act by threatening an employee with unspecified reprisals in retaliation for the employees' selecting the Union as their collective-bargaining representative.

#### D. *The Alleged Stringent Enforcement of Work Rules*

On February 15, the day after the representation election, the manager of Respondent's Fremont facility, George Eichhorn, met with the employees at the end of the workday.<sup>2</sup> Eichhorn thanked them for keeping the business operating during the Union's organizational campaign and stated he knew it was a strain on the employees as well as management to conduct business as usual during a union campaign but now that it was over, management wanted business conducted without any animosity between employees on account of their prouion or antiunion sentiments. Eichhorn thanked the employees for the 100-percent voter turnout, stated it did not matter how they voted, he did not want to know how they voted, and assured them, in substance, that management did not intend to retaliate against employees because they had supported the Union. Following these opening remarks, Eichhorn stated, in substance, that during the long election campaign management had been a little lax about its work rules but that now Eichhorn wanted the employees to obey the rules. Eichhorn mentioned several rules, including those pertaining to smoking, attendance, phone calls, forklifts, and uniforms.

Regarding employees' uniforms, Eichhorn stated that the employees had gotten out of the habit of wearing their uniforms and he wanted uniforms worn by all employees and warned that anyone not wearing one might be liable to be sent home.

On the subject of smoking, Eichhorn stated employees could smoke in the breakroom or on the sales floor or in the contractor's room, but not in the yard.

On the use of the Company's telephones, Eichhorn stated that they were to be answered within a certain period of time and were to be used for business, not for personal calls such as phoning home and asking what was on the menu for dinner. Eichhorn also stated employees could use the phone for "emergency" personal calls.

Regarding the Company's forklifts, Eichhorn stated they were to be ridden by the driver only, not used to transport employees across the yard, and were to be driven with extreme caution.

On the subject of employees' attendance, Eichhorn stated that some employees were having attendance problems and would have to get "on the ball" and correct this. He read the Company's rules on attendance and asked if there were any questions about these rules.

The General Counsel, referring to this meeting, and as alleged in the complaint, contends that Respondent after the election "has imposed more stringent enforcement of work rules in retaliation for the employees selecting the

Union as their collective-bargaining representative." General Counsel argues in her post-hearing brief that the record establishes that Respondent's rules which pertain to the wearing of uniforms, smoking, personal phone calls, the operation of the forklifts, and attendance were applied by Respondent more stringently after the election because the employees voted for union representation. I disagree for these reasons:

1. Respondent furnishes its employees with uniforms. Although prior to the representation election there was an unwritten company rule that the employees should wear their uniforms, this rule was not strictly enforced. The employees worked without wearing their uniforms and were not disciplined. The circumstances surrounding Eichhorn's February 15 warning that employees must wear uniforms or be disciplined can be stated briefly. On February 15, before speaking to the employees, Eichhorn was informed that two employees had allegedly concealed equipment in the company yard for the purpose of stealing it. Eichhorn, after verifying that the equipment had been concealed as alleged, phoned John Norris, Respondent's Field Supervisor in charge of loss prevention, for advice. Norris, among other things, informed Eichhorn that he intended to employ a detective agency to keep the premises and the employees under surveillance and that to assist the detective agency in its surveillance, it was important that all of the employees wear their uniforms. Norris instructed Eichhorn to have all of the employees wear their uniforms, or at least the shirt part of the uniform. It was for this reason that Eichhorn directed the employees to wear their uniforms. In short, the record establishes that Eichhorn was motivated by a legitimate business reason when he directed the employees on February 15 to wear their uniforms.<sup>3</sup>

2. Respondent, prior to the election, had not allowed smoking in its yard; however, smoking was allowed in the store, in the employees' break area, and in the contractor's room. At the February 15 meeting, Eichhorn simply reiterated the existing rule. There is no evidence that the rule was not enforced prior to the election or that it was more stringently enforced after the election.

3. Regarding the use of the Company's telephones for personal phone calls, the only evidence in the record pertaining to the allegation that Respondent imposed more stringent terms on the employees' use of the phones is the fact that Eichhorn told the employees that the phones were to be used for business and not to make personal calls, such as phoning home about dinner, but that they could use the phones to make "emergency" personal calls. There is no evidence that previously there had not been a company policy prohibiting the employees from using the phones for personal calls or that employees had been allowed unrestricted use of the Company's phones. In short, there is no evidence that Eichhorn's announcement about the use of the Company's phones constituted a more stringent enforcement of a company work rule or otherwise constituted an onerous change in the employees' existing terms and conditions of employment.

4. On the subject of forklifts, the record reveals that be-

<sup>2</sup> The date and description of this meeting are based upon the testimony of Respondent's witnesses: Eichhorn, Bridge, and Hudson. They impressed me as more convincing and credible witnesses than General Counsel's witnesses: Alley, Pineda, and Barber.

<sup>3</sup> There is no evidence that the one employee sent home after February 15 for not wearing his uniform was sent home after the detective agency's surveillance of the premises had ceased.

fore the election one of the Company's safety rules prohibited employees, other than a forklift operator, from riding on a forklift and, in substance, also prohibited the careless use of forklifts. Eichhorn's statement on this subject, which was made at the February 15 meeting, was a reiteration of the existing rule. There is no evidence that this rule was not enforced prior to the election or that after the election it was enforced more strictly. Quite the contrary, the record reveals that prior to the election employee Pineda, when riding on a forklift, was told to get off; employee Guillard was issued a verbal warning for riding on a forklift; and employees Weikowski and Stewart were issued warnings for racing on forklifts.

5. Respondent's work rules provide for a progressive system of discipline starting with a verbal warning, which is recorded and placed in the employee's personal file; then, after a second rule violation, a written warning is issued; and if the employee violates the rules a third time he or she is discharged. The record establishes that prior to the election Respondent issued verbal disciplinary warnings to employees for excessive absences, or otherwise simply advised employees that their attendance needed to be improved,<sup>4</sup> and issued verbal and written warnings to employees for violating its written work rules, which require employees to report their absences from work by 15 minutes after their scheduled starting time; forbids unexcused absences of one or more consecutive days during any 6-months period;<sup>5</sup> and forbids three unexcused instances of tardiness during any 6-month period, treating them as an unexcused absence. Eichhorn, during the meeting of February 15, read the employees these work rules and stated that some employees were having attendance problems which would have to be corrected.

The record shows that prior to the election the employees, as required by Respondent's work rules, normally sought permission from management to be absent from work. In the several months prior to the election the record reveals only two instances, involving employees Barber and Alley, in which employees failed to request such permission without being formally disciplined. These isolated cases do not establish that Respondent, prior to the election, did not apply the applicable work rule governing unexcused absences. Indeed, it is undisputed that employees Stewart and Drennon, prior to the election, received formal disciplinary warnings for being absent without permission. The fact that after the election the number of formal disciplinary warnings issued to employees for not receiving permission to be absent from work increased does not by itself establish that the applicable work rules were being enforced more strictly. It is just as reasonable to conclude that the employees were violating the rules more frequently. There is insufficient evidence in the record to prove the contrary.<sup>6</sup> Likewise, for the same reasons, the

fact that after the election the number of formal disciplinary warnings issued employees for excessive absenteeism and tardiness increased does not establish that the applicable work rules were being enforced more strictly.

Based upon the foregoing, including the lack of any extrinsic evidence which demonstrates that Respondent was motivated by a desire to retaliate against its employees as a group because a majority had voted for union representation, I find that the General Counsel has not proven by a preponderance of the evidence the allegation that Respondent "has imposed more stringent enforcement of work rules in retaliation for the employees selecting the Union as their collective-bargaining representative." Accordingly, I shall recommend that it be dismissed.

Although the record fails to establish that Respondent applied its work rules or disciplinary procedure more strictly after the election in order to retaliate against its employees in general because a majority of them had voted for union representation, I am convinced that in one instance the evidence preponderates in favor of a finding that Respondent disciplined an employee on account of his union activities. Thus, on February 16, immediately after learning that employee David Alley was the Union's leading employee adherent, Respondent's manager, George Eichhorn, issued Alley a verbal disciplinary warning. The "disciplinary action notice" which Eichhorn issued to Alley and placed in his personnel file in support of the warning states that Alley was being disciplined because of "missing work various times, many unexcused absences." The record reveals that Alley was not absent from work on either February 14 or February 15. Prior to the February 14 election, the day Eichhorn learned about Alley's union sympathies, Alley had been absent from work once or twice during February, five or six times during January, and six times during December 1977 yet was not issued a disciplinary warning. Indeed, there is no evidence that prior to February 16 management even spoke to Alley about his absences. In addition, the February 16 disciplinary warning is completely without substance insofar as it states that "many" of Alley's absences were "unexcused." Respondent failed to rebut Alley's uncontradicted testimony that the only time prior to February 16 that he was absent from work without the Company's permission was once in December 1977, for which he was never even criticized. In sum, the timing of the issuance of the February 16 disciplinary warning, coming hard on the heels of Respondent's knowledge that Alley was the leading union adherent among the employees, Respondent's opposition to union representation, Respondent's failure to explain why Alley was not issued such a warning prior to its discovery that he was a union adherent, and the fact that part of the warning was based upon misconduct which did not occur all persuade me that the warning was issued by Respondent be-

<sup>4</sup> See the disciplinary action report issued employee O'Connor dated January 9, 1978, and the performance evaluation report for employee Quesada dated January 16, 1978.

<sup>5</sup> The work rules define an "excused absence" as "any absence in which the employee requested personal time off and was granted approval; excused illness approved by the Manager; or approved time off for funeral, jury duty, or other leave of absence."

<sup>6</sup> I recognize that Eichhorn, after the election, refused to approve the

request of employee Barber for the day off due to illness unless Barber furnished management with a doctor's excuse. This isolated instance does not, in my opinion, establish that Respondent, after the election, was applying different and more strict criteria in defining what constituted an unexcused absence. An equally reasonable inference is that under the circumstances of the request Eichhorn was suspicious, so he demanded that the employee secure a verification from the doctor. I note that General Counsel's contention that employee Pineda, like Barber, was told by management that he needed a doctor's excuse is without support in the record.

cause of Alley's union activities. By engaging in this conduct I find that Respondent violated Section 8(a)(1) of the Act.

*E. The Alleged Unlawful Discharge of Employee David Alley*

The General Counsel contends, as alleged in the complaint, that on March 7 Respondent discharged employee David Alley because of his union activities. Respondent takes the position that Alley voluntarily terminated his employment on the morning of March 7 and later that day was discharged because Respondent became convinced that he had falsified his time records. The circumstances surrounding his discharge are as follows.

Alley was employed as a yardman at Respondent's Fremont facility from June 3, 1977, until March 7. During the Union's organizational campaign he distributed union cards to approximately 24 employees and was the Union's election observer at the February 14 representation election won by the Union. Manager Eichhorn testified that before observing that Alley was the Union's election observer Eichhorn did not know he was a union adherent. There is no evidence concerning Alley's organizational activities, i.e., whether he distributed the union cards in the privacy of the employees' homes or on the Company's premises. This, plus Eichhorn's denial of any knowledge of Alley's organizational activities and the lack of direct or circumstantial evidence that Respondent knew of Alley's prounion sympathies prior to his acting as the Union's election observer, leads me to conclude that Respondent had no knowledge of Alley's union sentiments prior to the February 14 representation election.

On February 16, as I have found *supra*, Manager Eichhorn, in violation of Section 8(a)(1) of the Act, issued Alley a verbal disciplinary warning because of his union activities. As indicated *supra*, under Respondent's progressive disciplinary procedure, an employee is given a verbal disciplinary warning for a first offense, given a written warning for the second offense, and discharged for the third offense.

On Thursday, March 2, Alley arrived for work at his regular work time, 8 a.m., and worked until 10:30 a.m., when, because of illness, he went home after first getting permission from Associate Manager John Bridge.<sup>7</sup>

On Friday, March 3, Alley reported for work at his regular time, 8 a.m., and went home between 11 and 11:30 a.m., after getting permission from Associate Manager Bridge to leave because he was not feeling well.<sup>8</sup>

Respondent does not use a timeclock to keep track of its employees' worktime; instead, the employees are responsible for marking down the number of hours they work each day on a timesheet which is kept in the employees' break-

room. At the conclusion of the workweek, each employee, by initialing the timesheet beside his name, certifies that he has correctly entered the number of hours worked that week, for which he is then paid. Although Alley worked 2-1/2 hours on Thursday, March 2, he credited himself with 8 hours on the timesheet, and although he worked 3-1/2 hours on Friday, March 3, he did not give himself credit for any hours on the timesheet. In other words, for that week Alley credited himself with 2 more hours than he had actually worked.

On Friday, March 3, after Alley had gone home, Associate Manager Bridge looked at the timesheet and observed that Alley had given himself credit for 2 more hours than he had actually worked. That same day Bridge advised Manager Eichhorn about this. He informed Eichhorn that there was a difference for March 2 and March 3 between Alley's figures on the timesheet and the hours that Alley had actually worked on those dates. Eichhorn instructed Bridge to place a note in Alley's personnel file indicating his correct hours for those days. Eichhorn indicated he would straighten the matter out with Alley on Monday when Alley returned to work. Bridge wrote out a note indicating that Alley had left work on March 2 at 10:30 a.m. and on March 3 at 11:30 a.m., and placed it in Alley's personnel file.

On Monday, March 6, Alley phoned Eichhorn shortly before 8 a.m. and advised him he had to take his wife to the hospital because she was sick. Eichhorn asked how long Alley felt he would be absent from work. Alley stated he might be back to work by 10 a.m. but it was impossible to give Eichhorn an exact time. Eichhorn told him to do whatever was necessary and when he was done to come to work. Alley ended the conversation by stating he would see Eichhorn later that day.<sup>9</sup> However, Alley failed to report for work that day.

On Tuesday, March 7, when Alley reported for work, he was called into Eichhorn's office. Eichhorn asked why Alley had not come to work the previous day. Alley answered he felt there was no work for him to do. Eichhorn stated that it was not Alley's responsibility to determine whether or not there was work available and that, because of Alley's failure to come to work, Eichhorn would have to issue him a written disciplinary warning. Eichhorn wrote out a warning which stated, in substance, that Alley had missed work on March 6 without permission.<sup>10</sup> The warning notice contains a space for the employee's signature, but when Eichhorn gave the warning to Alley to read and sign, Alley refused to sign it. Alley stated he felt his absence from work on March 6 was excused. Eichhorn showed Alley a copy of the Company's work rules, which included the applicable rule dealing with excused absences, and after reading the rule, Alley stated he was not going to work under the rules and indicated he was leaving work and would return later for his paycheck. Eichhorn told him

<sup>7</sup> Based upon Bridge's testimony. Alley testified that on March 2 he worked "approximately until the afternoon. Some time before the afternoon." Alley admitted he was not sure what time he left work but testified he worked "about three or four hours" before leaving. Bridge impressed me as the more credible witness.

<sup>8</sup> Based upon Bridge's testimony. Alley testified that on March 3 he was absent from work in the morning and did not report for work until "some time in the afternoon." Bridge impressed me as the more credible witness.

<sup>9</sup> Based upon Eichhorn's testimony. Eichhorn impressed me as a more credible and convincing witness than Alley. In addition, Alley testified inconsistently concerning a significant part of this conversation. On direct examination he testified that he advised Eichhorn he "wouldn't" be in to work that day, whereas on cross-examination he testified that he advised Eichhorn he did not know whether or not he would be in to work that day.

<sup>10</sup> Respondent's work rules state in substance that an employee's unexcused absence for work is reason for discipline.

to be sure and return the Company's uniforms.<sup>11</sup> Alley left the premises.

When Alley left the office on March 7 to get his uniforms, Eichhorn informed Associate Manager Bridge, who was in charge of the yard employees, of what had taken place. Bridge reminded Eichhorn about the discrepancy between the hours actually worked by Alley the previous week and the hours which Alley had marked on the timesheet. Eichhorn then prepared Alley's final paycheck, at which time he compared the timesheet for the previous week, which included March 2 and March 3, with Bridge's note, which stated the number of hours Alley had actually worked on those days. Due to the difference between the number of hours that Alley had written on the timesheet and what Bridge had noted, Eichhorn did not make out Alley's paycheck for that week but decided to wait until he had discussed the matter with Alley.

Alley returned to Eichhorn's office later that morning with his uniforms. He advised Eichhorn that he was missing some uniforms but would look for them. Eichhorn indicated there was a much more serious problem involving Alley than his unexcused absence, as there was a discrepancy in his timesheet which appeared to be a falsification. Alley did not respond to this; rather, he continued to talk about the uniforms, stating that he was not sure if he could find all of them and that Eichhorn, if he wanted, could deduct the cost of the missing uniforms from his paycheck. Eichhorn indicated he was not concerned about the cost of the uniforms and again brought up the discrepancy between the amount of time Alley had credited for himself on the timesheet for the previous week and the hours he had actually worked. Eichhorn accused Alley of overstating the number of hours he had actually worked. Alley once again did not respond to this accusation but continued to talk about the uniforms. At this point Eichhorn felt it would be fruitless to press the matter any further. He made out Alley's final paycheck, reimbursing him for the hours that he had given himself credit for on the timesheet.<sup>12</sup>

Later that day Eichhorn, pursuant to company policy, filled out an "Employee Separation Notice" in connection with Alley's termination. In essence, Eichhorn wrote that Alley had been discharged for "dishonesty" because he had falsified his timesheets.

On March 15, 1978, the unfair labor practice charge was filed in this case. It alleged, in substance, that on March 7 Alley was illegally discharged. By letter from Respondent's director of industrial relations dated March 20, addressed to the Board's Regional Office, Respondent denied the allegations of the charge, stating, in substance, that in preparing his timesheet Alley had overstated the number of

hours he had worked and when confronted with this had refused to offer an explanation or excuse and for this reason was discharged, as Respondent believed he had falsified his time records.

The only evidence which supports the General Counsel's contention that Alley's termination violated Section 8(a)(3) is that shortly before Alley's termination Respondent issued him a verbal disciplinary warning because of his union activities, thus indicating that Respondent was extremely antagonistic toward Alley because of his leading role in the Union's organizational campaign and probably welcomed his termination. However, any inference of discrimination connected with Alley's termination which arises therefrom is certainly rebutted by the fact that on March 7 Alley voluntarily terminated his employment<sup>13</sup> and, later the same day when he returned for his pay, gave Respondent good reason to believe that he had falsified his time record. In addition, there is a lack of evidence that Respondent treated Alley disparately. In considering Alley's March 6 absence as "unexcused" and in disciplining him on account of this, there is insufficient evidence that Respondent treated Alley differently from other employees. Likewise, there is no evidence that Respondent was guilty of disparate treatment in discharging Alley for falsifying his timesheet. In short, Respondent has established a *prima facie*, legitimate, nondiscriminatory reason for Alley's termination. The General Counsel has not proved, in my opinion, by a preponderance of the evidence that the reason was a pretext and that the real reason was Alley's union activities. Accordingly, I shall recommend that this allegation be dismissed.

#### CONCLUSIONS OF LAW

1. Respondent is engaged in 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. By issuing a disciplinary warning to an employee because of his union activities, the Respondent has violated Section 8(a)(1) of the Act.

Upon the basis of 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:

<sup>11</sup> Based upon Eichhorn's testimony. Alley gave a substantially different account of what occurred on March 7 when Eichhorn called him into the office. Alley specifically denied having in effect quit his employment; rather, he testified Eichhorn in effect discharged him when he refused to sign the warning slip. Since Eichhorn impressed me as the more trustworthy witness, I have credited his testimony rather than Alley's.

<sup>12</sup> The description of the aforesaid conversation is based upon Eichhorn's testimony. Alley testified that when Eichhorn gave him his paycheck Eichhorn indicated that Alley had made a mistake in filling out the timesheet, whereupon Alley authorized Eichhorn to deduct whatever was necessary from his pay to remedy the mistake. Eichhorn impressed me as the more convincing witness; accordingly, I have credited his testimony.

<sup>13</sup> In concluding that Alley quit his employment, I have considered the fact that in reply to the Union's unfair labor practice charges herein Respondent did not contend that Alley had voluntarily terminated his employment, nor did Manager Eichhorn mention this in Alley's "Employee Separation Notice." In both instances Respondent stated Alley was fired for falsifying the timesheet. This circumstance, when viewed in the context of the whole record, does not convince me that Eichhorn, who was a credible witness, lied when he testified that Alley quit or that the matter of the timesheet falsification was simply an afterthought designed to cloak a discriminatory motive.

ORDER <sup>14</sup>

The Respondent, Wickes Lumber, A Division of the Wickes Corporation, Fremont, California, its officers, agents, successors, and assigns, shall:

## 1. Cease and desist from:

(a) Issuing disciplinary warnings to employees because of their support or activities on behalf of Clerks and Lumber Handlers Union, Local 939, Laborers International Union, AFL-CIO, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

<sup>14</sup> 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.

(a) Post at its place of business in Fremont, California, copies of the attached notice marked "Appendix." <sup>15</sup> Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by 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 said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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

<sup>15</sup> 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."