In the Matter of PORTLAND LUMBER MILLS *and* WARD WILMARTH, AN INDIVIDUAL

Case No. 19-C-1328.—Decided October 15, 1945

DECISION

AND

ORDER

On January 10, 1945, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, on February 10, 1945, the respondent filed exceptions to the Intermediate Report and a supporting brief. On the same day, Local 2880, Lumber and Sawmill Workers Union, United Brotherhood of Carpenters & Joiners of America, A. F. L., intervenor in this proceeding, filed a brief. The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

Pursuant to notice and at the request of the intervenor, the Board heard oral argument on March 1, 1945, in Washington, D. C. The intervenor appeared and participated in the argument; no other party appeared.

The Board has considered the Intermediate Report, the respondent's exceptions and brief, the intervenor's brief, the oral argument,[1] and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as hereinafter modified.

1. We agree with the Trial Examiner that, in acceding to the intervenor's request for the discharge of Ward Wilmarth under the circumstances revealed in the Intermediate Report, the respondent violated Section 8 (3) of the Act. Normally in cases in which an employer has unlawfully discriminated against an employee by discharging him, in addition to affirmative relief, we order the employer to

[1] Chairman Herzog and Mr. Reilly have read the full official transcript of the oral argument.

cease and desist from in any manner infringing upon the rights guaranteed in Section 7 of the Act. However, in the instant case, the respondent discharged Wilmarth because it believed in good faith, though mistakenly, that the terms of its closed-shop contract with the intervenor required that the respondent accede to the intervenor's demand for Wilmarth's dismissal. Under such circumstances and, in view of the absence of any evidence that danger of other unfair labor practices is to be anticipated from the respondent's conduct in the past, we shall not enjoin the respondent from the commission of any and all unfair labor practices.[2] Nevertheless, in order to effectuate the purposes of the Act, we shall order the respondent to cease and desist from the unfair labor practice found and from any like or related act or conduct interfering with the exercise of the rights guaranteed in Section 7 of the Act. In addition, like the Trial Examiner, we shall order the respondent to take certain affirmative action, including reinstatement of Wilmarth with back pay, designed to effectuate the policies of the Act.

Nothing in our order hereinafter set forth shall be taken to proscribe conduct of the respondent protected by the proviso to Section 8 (3) of the Act.

2. In the third paragraph preceding the caption "Concluding findings" in Section III of the Intermediate Report, the Trial Examiner inadvertently referred to the intervenor's letter to Wilmarth of July 12 as "the Portland District Council letter to him of August 12. . . ." We hereby correct the Intermediate Report as to the date of the letter to July 12.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Portland Lumber Mills, Portland, Oregon, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Woodworkers of America, affiliated with the CIO, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition of employment;

(b) Engaging in any like or related act or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Woodworkers of America, affiliated with the CIO, or any other labor organization, to bargain collectively through representatives of

[2] See *N. L. R. B.* v. *Express Publishing Company,* 312 U S 426.

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.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Ward Wilmarth immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority and other rights and privileges;

(b) Make whole Ward Wilmarth for any loss of pay that he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to the amount which he normally would have earned as wages during the period from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings during such period;

(c) Post at its plant in Portland, Oregon, copies of the notice attached hereto marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

APPENDIX A

Notice to All Employees

PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in International Woodworkers of America, affiliated with the CIO, or any other labor organization of our employees, by discharging or refusing to reinstate any of our employees, or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition of employment, except insofar as said conduct is protected by the proviso to Section 8 (3) of the Act.

WE WILL NOT engage in any like or related act or conduct interfering with, restraining, or coercing our employees in the

exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other 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.

WE WILL OFFER to Ward Wilmarth immediate and full reinstatment to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination.

PORTLAND LUMBER MILLS

(Employer)

Dated---------- By ----------
(Representative) (Title)

NOTE.—The above-named employee, if presently serving in the armed forces of the United States, will be offered full reinstatement upon application in accordance with the Selective Service Act after discharge from the armed forces.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT

Mr. William E. Spencer, for the Board.

Malarkey, Sabin & Herbring, by *Messrs. W L Malarkey* and *Robert L Sabin*, of Portland, Oreg., for the Respondent.

Witrick, Flood & O'Brien, by *Mr George Flood*, of Seattle, Wash, for the AFL.

STATEMENT OF THE CASE

Upon a charge filed on August 28, 1944, by Ward Wilmarth, the National Labor Relations Board, herein called the Board, by its Regional Director for the Nineteenth Region (Seattle, Washington), issued its complaint dated September 2, 1944, against Portland Lumber Mills, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3)[1] and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, the amendment to the complaint, the charge and notice of hearing were duly served upon the respondent, Ward Wilmarth, and Portland District Council of Lumber and Sawmill Workers chartered by United Brotherhood of Carpenters & Joiners of America, AFL.

With respect to the unfair labor practices, the complaint as amended alleged in substance: (1) that since about May 3, 1940, the respondent and Local 2880, Lumber and Sawmill Workers Union, United Brotherhood of Carpenters & Joiners of America, affiliated with the AFL, herein called Local 2880, have been and now are parties to a contract covering certain of the respondent's

[1] The original complaint alleged violation of 8 (1) only. On September 8 an amendment to the complaint was served upon the parties alleging violation of Section 8 (3) of the Act.

employees, which contains the following provision "— The Company agrees to release from its employ any person, upon formal demand from the Union, who fails or refuses to maintain membership in good standing in the Union"; (2) about August 16, 1944, Local 2880 suspended Ward Wilmarth as a member therein for the sole reason that he had served as an observer for the International Woodworkers of America, affiliated with the CIO, herein called IWA, in a Board election wherein Local 2880 and IWA appeared on the ballot; (3) that on or about August 21, upon formal request of Local 2880, the respondent discharged Wilmarth and has since refused to reinstate or reemploy him, for the reason that Wilmarth had served as an observer for IWA in the said election; and (4) by said act the respondent has interfered with the rights of its employees as guaranteed in Section 7 of the Act.

The respondent thereafter filed its answer wherein it admitted the existence of the contract, the holding of the Board election, and the discharge of Wilmarth. It further admitted that it had knowledge that Wilmarth had been charged by Local 2880 with being an observer for IWA at the election, but alleged that it had no knowledge as to whether that was the sole reason Wilmarth was dropped from Local 2880. The answer further alleged that at the time the contract was entered into Local 2880 was the Board's certified bargaining agency for its employees, and that the contract, among other things, provided as follows:

> It is the desire of the parties hereto that the employees covered by this Agreement shall maintain membership in good standing in the Union. In order that this desire may be effected and the Union may discipline its members for the effective operation of this Agreement, the Company agrees to release from its employ any person, upon formal demand from the Union, who fails or refuses to maintain membership in good standing in the Union. It is expressly understood and agreed that all present employee members of the Union shall maintain membership in the Union, and present employees who are not members shall secure membership in the Union within a reasonable length of time and maintain such membership.
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> * * * * * * *
>
> The Union, being the sole judge of its membership, shall have the right to give written notice to the Company that a named employee or employees have not complied with membership according to its rules, and the Company, thereupon, shall within fifteen (15) days discharge such employee.

That on or about August 18, Local 2880 gave respondent written notice that Wilmarth no longer belonged to the Union, having forfeited his membership, and demanded his discharge; that in compliance with the written notice and the terms of the contract it discharged Wilmarth on August 21 without any investigation as to the reasons for Wilmarth's loss of membership in Local 2880.

Pursuant to notice a hearing was held at Portland, Oregon, on September 14, 1944, before J. J. Fitzpatrick, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. At the opening of the hearing Portland District Council[2] and Local 2880, together herein called the intervenor, jointly moved for leave to intervene insofar as their contractual and other rights might be concerned[3] The motion was granted insofar as the intervenor's rights under

[2] The Portland District Council had jurisdiction over all locals, including Local 2880, in its district

[3] Included in intervenor's motion and in support thereof was intervenor's answer to the complaint, wherein it was denied that Wilmarth was discharged on request of Local 2880 because he served as an observer to IWA at the election. It averred that Wilmarth was expelled by intervenor "pursuant to its governing Constitution & By-Laws."

the contract were affected The intervenor also filed an answer alleging that Wilmarth was expelled from Local 2880 pursuant to its governing constitution and by-laws. The Board, the respondent, and intervenor were represented by counsel and participated in the hearing. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues. At the conclusion of the evidence the Board's counsel moved to conform the pleadings to the proof in formal matters There was no objection and the motion was granted. At that time the respondent moved to strike certain testimony relative to the conduct and activities of Local 2880. The motion was denied[4] The respondent and intervenor moved separately to dismiss the complaint. Ruling was reserved. The motions to dismiss are denied All parties argued orally on the record at the close of the hearing, and the respondent and intervenor have since filed briefs with the undersigned. After the close of the hearing, upon motion of Board's counsel, as to certain corrections, and upon his own motion as to others, the undersigned ordered certain corrections made in the transcript of the record.

Upon the record thus made and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent, Portland Lumber Mills, is an Oregon corporation engaged in the manufacture and sale of lumber and lumber products, with principal office and place of business in the city of Portland, Oregon. The materials used by the respondent in the course of its business operations, consisting mainly of logs, are obtained from points within the State of Oregon. Of its manufactured products, valued annually at $1,600,000. approximately 75 percent thereof is transported in interstate commerce to and through other States of the Union.[5]

II. THE ORGANIZATIONS INVOLVED

International Woodworkers of America, affiliated with the Congress of Industrial Organizations, and Local 2880, Lumber and Sawmill Workers Union, United Brotherhood of Carpenters & Joiners of America, affiliated with the American Federation of Labor, are labor organizations admitting to membership employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

None of the essential facts are in dispute. On May 3, 1940, following a Board election wherein the IWA and Local 2880 appeared on the ballot and which election was won by Local 2880, the respondent entered into a union-shop agreement covering all the respondent's employees, with certain exclusions, containing a clause providing for annual automatic renewal unless notice of termination or modification was given by either party to the contract prior to May 3 of each succeeding year.[6] This contract, as modified by certain supplemental agreements but still containing the union-shop provisions, was automatically renewed on May 3, 1944, for an additional year, on failure of either of the parties thereto

[4] The intervenor also made a similar motion to strike, which motion was denied

[5] At the hearing the respondent, through its attorney, stipulated that it was engaged in commerce within the meaning of the Act.

[6] The pertinent provisions of the contract relative to a union shop are set forth in detail in the respondent's answer, *supra*.

to give written notice 30 days prior to May 3, 1944, of an intention to terminate. However, on April 1, 1944, the IWA filed a petition for investigation and certification of representatives covering the employees included in the contract under Section 9 (c) of the Act. Thereafter, the Board found that the automatic renewal of the contract did not constitute a bar to an investigation and certification of representatives, in view of the timely filing of the petition, and ordered an election.[7] The election, in which Local 2880 and IWA only appeared on the ballot, was held June 23, 1944. The IWA lost the election. During the conduct of the election, at the request of an IWA official, Ward Wilmarth, a head marker employed by the respondent since 1939[8] and at the time a member in good standing of Local 2880, acted as an observer for the IWA. About July 13, Wilmarth received a letter from Portland District Council of Lumber and Sawmill Workers, which reads as follows:

PORTLAND DISTRICT COUNCIL OF LUMBER AND SAWMILL WORKERS

JULY 12, 1944

Mr. WARD WILMARTH,
Rt. 4 box 1038, Portland, Oregon

DEAR SIR & BROTHER: Enclosed herewith is a copy of the charges filed against you and approved by the Portland District Council of Lumber and Sawmill Workers.

You are hereby, notified to appear at the next regular meeting of the Council on July 25, 1944, at 8:00 p. m. in the meeting hall at, 327 S. W. Jefferson St., Portland, Oregon, at this time charges will be turned over to a trial Committee, to be selected at the meeting.

You have until this meeting to reply to these charges and can be represented by Council if you wish, however, Council representing you must be a member of the United Brotherhood of Carpenters and Joiners of America.

Failing to appear the Committee will proceed with the trial.

Fraternally yours,

PORTLAND DISTRICT COUNCIL OF
LUMBER AND SAWMILL WORKERS.

By /s/ J. S. Bown
J. S. BOWN, *Sec. Treas.*

Attached to the letter was a copy of the charge therein referred to, as follows:

JULY 11, 1944

PORTLAND DISTRICT COUNCIL OF LUMBER AND SAWMILL WORKERS

DELEGATES: I, James Whallon, Business Agent of The Portland District Council of Lumber and Sawmill Workers, HEREBY: charge Ward Wilmarth with violation of the obligation he took when becoming a member of Local No. 2880, and the United Brotherhood of Carpenters and Joiners of America, by giving aid and support to a dual organization, with the intent to disrupt our organization.

To-wit: on June 23, 1944, Ward Wilmarth acted as an observer for the IWA, Local 5-#, CIO, at an election held for the purpose of taking the

[7] In re: *Portland Lumber Mills*, 56 N. L R B 1336. (Decided June 10, 1944.)

[8] Wilmarth was first employed by the respondent about 1928 or 1929, but for sometime prior to 1939 had been on leave of absence from the respondent while he acted as District Council representative for the IWA.

collective bargaining rights away from the Lumber and Sawmill Workers Union Local No. 2880, at the Portland Lumber Mills in Portland, Oregon.

Fraternally yours,

JAMES WHALLON,
Business Agent.

Prior to August 16, when Wilmarth was tried on the above charge at a meeting of the Portland District Council, Wilmarth was in the office of G. A. Robertson, Treasurer of the respondent, and at that time Robertson was shown and read the letter and charge

On August 18 Robertson was handed the following letter by one of the members of Local 2880's Plant Committee who signed it:

PORTLAND DISTRICT COUNCIL OF LUMBER AND SAWMILL WORKERS
Portland, Oregon, AUGUST 18, 1944

Mr. G. A. ROBERTSON, *President*
PORTLAND LUMBER MILLS.
6611 N. Burlington, Portland, Oregon

DEAR SIR: This is to inform you that, one of your employees, Ward Wilmarth, no longer belongs to the Union, having forfeited his membership. We therefore, request that he be discharged in accordance with Article (1), of our Working Agreement

Very truly yours,

LUMBER & SAWMILL WORKERS UNION, LOCAL NO. 2880
By, Plant Committee,
(Sgd) EDWARD J. BILLINGS
(Sgd) JAMES W. SMITH
(Sgd) RAY WALLACE
President (Sgd) JAMES W SMITH

After the receipt of the above communication from Local 2880 and on the following Monday, August 21, just before quitting time, Robertson sent for and delivered to Wilmarth a letter to which was attached Wilmarth's wage check in full. The body of the letter read:

PORTLAND LUMBER MILLS

AUGUST 21, 1944

Mr WARD WILMARTH
Plant

DEAR SIR: This is to advise you that under date of August 18th, 1944, we received written notice from the Plant Commitee of Local Union 2880 that you had not complied with Article I of the existing union shop contract between the Local and the Portland Lumber Mills, and calling upon us to discharge you in accordance with Article I.

We are therefore paying you off at this time, August 18, 1944, and wish to advise you that you are discharged and that the relation of employer and employee is severed, all in accordance with Article I.

Yours very truly.

PORTLAND LUMBER MILLS
By /s/ G. A. ROBERTSON
Treasurer.

When he received the letter and his pay check, Wilmarth excused himself, went to the entrance of the building where he secured the Portland District

Council letter to him of August 12 as well as the written charge against him, returned to Robertson's office and had Robertson reread the letter and the charge. The respondent's Vice-President L R. Hubbard, who came into the office about this time, also read the letter and the charge. Wilmarth then left after stating that there probably would be further proceedings in the matter. He has not since been reemployed by the respondent. From May 3, 1940, the initial date of the union-shop contract to the date of the discharge of Wilmarth the respondent discharged from six to eight employees upon demand of Local 2880 for failure to maintain membership in that organization. In none of the previous cases did the respondent inquire as to the reasons why these employees were dropped from membership in the local. It made no inquiry or independent investigation in Wilmarth's case and in no way challenged Local 2880's right to discipline and control its membership, on the theory that it had no right or authority to do so.

Wilmarth's work with the respondent was satisfactory. The respondent had no reason for discharging him other than the demand of Local 2880

There is no allegation in the complaint, nor evidence to support such an allegation, that the respondent engaged in any unfair labor practices, other than the allegations relative to the discharge of Wilmarth.

Concluding findings

The question presented is whether, as the respondent and intervenor contend, the union-shop agreement is a defense to the otherwise discriminatory discharge of Wilmarth for non-membership in Local 2880.

The Board has discussed the extent of the immunity an employer is entitled to under the proviso of Section 8 (3) of the Act[9] in several decisions where the closed-shop contract was raised as a defense to alleged discriminatory discharges.

In *Wallace Corporation*,[10] an election was held between the CIO and an independent union under an agreement providing that the employer would enter into a union-shop contract with the union that won the election. The Independent was victorious and after the election demanded that the employer enter into a closed-shop contract with it "to permit elimination from the respondent's pay roll of employees unfavorable to the Independent." The employer thereafter signed a closed-shop agreement and discharged a number of employees who had supported the CIO, some of whom had applied for but had been denied membership in the Independent. The Board found the closed-shop contract invalid The U. S. Supreme Court affirmed the Fourth Circuit Court of Appeals order for enforcement.[11] In the majority decision Mr Justice Black used the following language:

> We do not construe the provision authorizing a closed shop as indicating an intention on the part of Congress to authorize a majority of workers and a

[9] Section 8 (3) of the Act provides that it shall be an unfair labor practice for an employer:

> By discrimination in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S C, Supp VII, title 15, secs. 701–712), as amended from time to time or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

[10] In re *Wallace Corporation, The*, 50 N. L. R B 38.

[11] *The Wallace Corporation* v *N L. R B*, 323 U S 248, affirming 141 F (2d) 87 (C. C A. 4)

> company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all purposes.

In the *Rutland* case,[12] certain members of an AFL union holding a valid closed-shop contract with the employer indicated their intention, shortly before the expiration date of the contract, to seek representation by a CIO union. The AFL union then persuaded the employer to discharge these employees and replace them with new employees who were required to join the contracting union. As stated by the Board the precise issue in the case was:

> whether a closed-shop agreement—made in conformity with the conditions of the proviso may operate as a defense to otherwise discriminatory discharges effected toward the end of the contract term when the employees covered by the agreement seek to change their collective bargaining representative for the next contractual period.

After noting that the legislative history shows that the proviso was inserted to avoid the interpretation of the Act which some had given to Section 7 (a) of the National Industrial Recovery Act that closed-shop contracts were outlawed under all circumstances, the Board stated: "But the mere fact that all closed shops are not unlawful, by virtue of the proviso, is no reason for holding that closed shops may be made perpetual because validly initiated —." The Board reasoned that such could not have been the intent of Congress; that the fundamental policy of the Act, in the light of which all its provisions—including the proviso to Section 8 (3) must be read, is to

> "promote industrial peace," thereby fostering commerce, through the protection of self-organization and the encouragement of collective bargaining by representatives of the employees' own choosing

that, to be meaningful, this right of the employees to select representatives must necessarily include the right "at some appropriate time" to change representatives. It noted that the contract is question was about to expire and under the Board's practice it was the appropriate time to change representatives if the employees so desired, and concluded,

> The discharge of the very employees whose representation is in issue, because they have placed their representation in question, is clearly inconsistent with the whole policy and general scheme of the Act.

The facts in the instant case clearly show that Wilmarth was discharged by the respondent on demand of the contracting union because he had at "an appropriate time" chosen to put "in issue" the question of who should represent him and the other employees The respondent and the intervenor argue, however, that there was some evidence of collusion between the employer and the contracting union in the *Rutland* case, whereas there is not the slightest proof of any collusion in the present case and that the evidence shows conclusively that the respondent simply complied with the contract terms in discharging Wilmarth after demand by Local 2880 and without making any inquiry into or giving any concern to the reason Local 2880 had for dropping his membership; that to have made such inquiry would have amounted in effect to policing Local 2880's right to run its affairs and discipline its members.

It is clear, however, that in the *Rutland* case that the Board in its findings was thinking in terms of knowledge of the reason behind the demand for the discharges rather than because it was convinced of collusive action, and it took

[12] In re *Rutland Court Owners, Inc.*, 44 N. L. R B. 587.

the broad position that the proviso in Section 8 (3) cannot be used as a device to deprive employees of their statutory right to elect representatives at appropriate times In this respect the Board used the following language in its Supplemental Decision after the Rutland case came up for reargument: [13]

> The proviso relating to the closed shop is not a severable and separate portion of the Act. It must be construed in the light of the statutory statement of policy and the general provisions of the Act, and if any seeming conflicts arise they should be resolved so as to give proper effect to the salient provisions of the Act. It is a well settled principle of statutory construction that in a remedial statute a broad effect should be given the general provisions and a narrow construction placed upon the limitations. [Citing *Fleming* v. *Hawkeye Pearl Button Co., et al.*, 113 F. (2d) 52 (C. C. A. 8)]. The expressed purpose of the Act is to insure employees of their own right of self-organization and a free choice of representatives. We cannot allow the declared intention of Congress to be evaded by permitting an employer and a union thus to combine to preclude the employees from expressing their choice The proviso in Section 8 (3) cannot therefore be considered as an instrument for depriving employees of their statutory right to select another representative for a period succeeding the term embraced by the closed-shop contract.

The undersigned is convinced that under the provisions of the Act itself, and the decisions above cited construing the proviso to Section 8 (3) thereof that the respondent was not required under the circumstances herein found to discharge Wilmarth under the terms of the union-shop contract on demand and notice by Local 2880 that he was no longer a member of the contracting union; but on the contrary, the respondent having notice of the illegal purpose behind the demand was in duty bound to refuse to comply therewith Having ordered the discharge, even though acting in entire good faith, it must be held accountable for this discriminatory act.

It is therefore found that the respondent, by its discharge of Wilmarth, discriminated in regard to hire and tenure of employment, thereby discouraging membership in the IWA and encouraging membership in Local 2880, and interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent set forth in Section III, above, occurring in connection with the operations of the respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the respondent has engaged in an unfair labor practice, it will be recommended that it cease and desist therefrom, and take certain action necessary to effectuate the policies of the Act.

It has been found that the respondent discriminatorily discharged Wilmarth. It will be recommended that the respondent reinstate him to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges, if necessary dismissing any person hired since the date of his

[13] In re *Rutland Court Owners, Inc.*, 46 N. L R B. 1040.

discharge. It will also be recommended that the respondent pay to Wilmarth an amount equal to that which he would normally have earned as wages from the date of his discharge to the date of the offer of reinstatement, less his net earnings,[14] during such period.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. International Woodworkers of America, affiliated with the Congress of Industrial Organizations, and Local 2880, Lumber and Sawmill Workers Union, United Brotherhood of Carpenters & Joiners of America, affiliated with the American Federation of Labor, are labor organizations within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Ward Wilmarth, thereby discouraging membership in International Woodworkers of America, affiliated with the Congress of Industrial Organizations, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

3. By said act the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that the Portland Lumber Mills, Portland, Oregon, its officers, agents, successors and assigns, shall:

1. Cease and desist from discouraging membership in International Woodworkers of America, affiliated with the Congress of Industrial Organizations, or any other labor organization of its employees, by discharging any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of employment.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Offer to Ward Wilmarth immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority and other rights and privileges;

(b) Make Ward Wilmarth whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to an amount determined in the manner set forth in the section above entitled "The remedy";

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[14] By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work or working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company* and *United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590*, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation* v. *N. L. R. B.*, 311 U. S 7.

(c) Post immediately in conspicuous places throughout its plant at Portland, Oregon, and maintain for a period of sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraph 1 hereof; and (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) of these recommendations;

(d) Notify the Regional Director for the Nineteenth Region in writing within ten (10) days from the receipt of this Intermediate Report what steps the respondent has taken to comply herewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 1943, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing, setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board request therefor must be made in writing to the Board within ten (10) days from the date of the order transferring the case to the Board.

J. J. FITZPATRICK,
Trial Examiner.

Dated January 10, 1945.