

**Wellco Chemical Company and International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO.**  
Case 13-CA-8295

March 3, 1969

**DECISION AND ORDER**

**BY CHAIRMAN McCULLOCH AND MEMBERS  
BROWN AND JENKINS**

On September 19, 1968, Trial Examiner James V. Constantine issued his Decision in the above-entitled proceeding, finding that 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 attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision 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 powers in connection with this case to a three-member panel.

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. The Board has considered the Trial Examiner's Decision, the exceptions, the brief, and the entire record in this case, and adopts the findings,<sup>1</sup> conclusions,<sup>2</sup> and recommendations of the Trial Examiner.<sup>3</sup>

<sup>1</sup> Respondent excepts to the credibility findings of the Trial Examiner. We do not overrule a Trial Examiner's resolutions as to credibility unless a clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolutions were incorrect. Since no such conclusion is warranted in this case, we will not overrule any of the Trial Examiner's credibility resolutions, but adopt them and his findings of fact based on them. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd 188 F.2d 362 (C.A. 3).

<sup>2</sup> We note particularly that the selection of union leader Ellis over Cobb for discharge, when business was slow and the layoff of a welder became necessary about April 26, 1968, was contrary to Ellis' seniority over Cobb. In addition to Ellis' 10-year welding experience as compared to Cobb's 7 years, Ellis was admittedly a much more versatile employee capable of doing any other job in the equipment department, and unlike Cobb had even served for a period of time as foreman of the department. In recognition of his ability, Ellis was given two pay raises and was the highest paid employee in the department. Significantly, when President Wellman asked Ellis on April 4, shortly before the layoff, whether he was still for the Union and Ellis answered that he was, Wellman replied that Ellis was qualified for the work, but that he (Wellman) would now "fight (Ellis) tooth and nail all the way." And when Supervisor Neumann later told Ellis he was selected to be laid off, Neumann added, "You and I both know that this isn't fair, but I have my orders." Since Wellman's talk with Ellis on April 4, Ellis was absent 4 1/2 days. But the absence was with permission and does not support Respondent's alleged cause for Ellis' selection for layoff. On the basis of the facts disclosed by the record, including Wellman's union animus specifically directed at Ellis, we agree with the Trial Examiner's conclusion that the Respondent's asserted reasons for laying off Ellis rather than Cobb were pretexts, and that Ellis was laid off because of his union activity.

<sup>3</sup> Respondent's exceptions are not specifically directed against any of the Trial Examiner's 8(a)(1) findings nor does its brief deal with them.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that Respondent, Wellco Chemical Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

**TRIAL EXAMINER'S DECISION**

**STATEMENT OF THE CASE**

**JAMES V. CONSTANTINE, Trial Examiner:** This is an unfair labor practice case litigated under Section 10(b) of the National Labor Relations Act, herein called the Act. 29 U.S.C. 160(b). It is based on a charge and an amended charge filed by International Brotherhood of Boilermakers. The original charge was filed on February 27, 1968, and the amended charge was filed on May 13, 1968. Thereafter the General Counsel of the National Labor Relations Board, through the Director for Region 13 (Chicago, Illinois), issued against Respondent, Wellco Chemical Company, a complaint, an amended complaint, and a second amended complaint on May 7 (erroneously mentioned as May 5, in G. C. Exh 1 (s)), May 31 (by the Acting Regional Director), and July 30, 1968, respectively.

In substance the complaint as amended alleges that Respondent has violated Section 8(a)(1) and (3), and that such conduct affects commerce within the meaning of Section 2(6) and (7), of the Act. Respondent has answered admitting some facts but denying it committed any unfair labor practices.

Pursuant to due notice this case came on to be heard, and was tried, before me on July 31 and August 1, 1968, at Chicago, Illinois. All parties were represented at and participated in the hearing, and had full opportunity to adduce evidence, examine and cross-examine witnesses, file briefs, and offer oral argument. Briefs have been received from the General Counsel and Respondent. Respondent's motion to dismiss was denied at the hearing.

This case presents the issues of whether Respondent (1) Promised employees benefits in order to undermine the Boilermakers union; (2) Coercively interrogated employees concerning their union sympathies; (3) Threatened employees with reprisals if they selected the Boilermakers as their collective-bargaining agent; (4) Solicited employees to repudiate the Boilermakers as their union; (5) Created the impression of surveillance of protected activities of employees; and (6) Illegally terminated employee Billie Ellis because of his union activities.

Upon the entire record in this case, and from my observation of the witnesses, I make the following

**FINDINGS OF FACT**

**I. AS TO JURISDICTION**

Respondent, an Illinois corporation, is engaged at Maywood, Illinois, in manufacturing cleaners and chemical cleaning equipment. During the year preceding July 30, 1968, when the second amended complaint was issued, it shipped goods valued in excess of \$50,000 directly to points located outside the State of Illinois. I find that Respondent is engaged in commerce within the

meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction over Respondent in this proceeding.

## II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, herein called Boilermakers or the Union, is a labor organization within the meaning of Section 2(5) of the Act

### III. GENERAL COUNSEL'S EVIDENCE RELATING TO THE UNFAIR LABOR PRACTICES

#### A. *Interference, Restraint, and Coercion*

About February 15, 1968, Respondent's president, Glenn Wellman, called a meeting of its employees. He did so at the request of employee Foss, who stated that the employees had several grievances. Employee Foss testified that, when he asked Wellman to call the meeting, he, Foss, mentioned to Wellman that employees were trying to get the Union in the plant, and that the employees were asking for showers and ventilating fans. About a month before this Respondent had moved into a building situated at 1960 North Wilmot, Chicago, but the employees became "discontented" at this new location. Employees at this meeting expressed their individual complaints. All complained that they were not being paid enough and also demanded "some safety requirements." Employees Foss and Williams testified that Wellman at the meeting of February 15, observed that some employees were trying to bring in the Union, and asked those assembled whether they needed it. Foss received a wage increase shortly thereafter from \$2.70 to \$2.80 an hour. In fact, all employees received a raise. The "safety requirements" grievances involved a lack of (1) ventilating fans, (2) showers, (3) a first aid kit, and (4) new boots. In addition the employees wanted "more defined job classifications." Meetings of employees by Wellco had also been held before the advent of the Union.

Wellman replied that he would look into these demands. Foss wanted to represent employees in the equipment manufacturing department, while employees in the chemical department desired to elect someone else to represent them on these issues.

According to employee Billie Ellis, Wellman at the February 15 meeting of employees opened by saying, "I suppose you men have heard that a union is trying to get into the shop? I, for one, do not want a union in here . . . If the Union comes in here, I'd have to go broke." Then Wellman asked the men to voice their complaints. In other respects, Ellis corroborates Wellman's account of what was said at this meeting.

Wellman testified that he did not know that a union was organizing the employees until a few days after the meeting when he returned from a business trip. On his return Wellman was informed by Equipment Plant Superintendent Keith Neumann that union representatives had called upon Neumann. They called 2 or 3 days after February 14.

Another meeting with employees was held on February 19. Wellman told them he was granting the requests made by them at the February 15 meeting. At this February 19 meeting, equipment department employees were presented with a copy of the new reclassifications of their jobs. (See G. C. Exh. 2.) Billie Ellis received an increase of 15 cents

an hour under the new classification to which he was assigned, thus receiving a raise from \$3.50 to \$3.65 an hour. He also testified that at this February 19 meeting, Wellman asked the employees why they needed a union.

About March 1, 1968,<sup>1</sup> Respondent gave wage increases to nearly all its production and maintenance employees, including Billie Ellis. This was pursuant to a reclassification of jobs adopted to meet one of the grievances aired at the February 15 meeting. During March Respondent also supplied employees with boxes of new tools; installed showers, a ventilating fan, and a first aid kit, gave those employees needing them new protective work boots or shoes, and reclassified jobs. (See G. C. Exh. 2 for such reclassification.)

About February 21 President Wellman told his secretary to "write a letter or have Keith Neumann write the letter, and have the fellows sign it." This, according to Wellman, was to constitute "an answer to a letter we had just received from the Union," asking for recognition. Such a letter was prepared, and Wellman, Supervisor Zick, and eight employees signed it. (See G. C. Exh. 3.) Employees Billie Ellis and James Cobb signed at the request of Zick. It is addressed to the Union. In relevant part it acknowledges receipt of the Union's request for recognition and states that "the undersigned personnel, which is the majority, have voted down the opportunity presented to them by you to be their bargaining representative."

About April 4 President Wellman called to his office employees Billie Ellis and Charles Hale. Also present was Supervisor Neumann. Wellman said to the employees "I've heard there was some statements made at the Board downtown and I want to know if you and Chuck [Hale] are still for the Union or against it." Ellis had previously given a statement to the N. L. R. B. at its Chicago Regional Office. After some more talk Wellman said that if a union got in all past favors he had granted, including personal loans, would stop, and he intended to fight the union efforts of Ellis "tooth and nail all the way."

Supervisor Zick on February 21 told Ellis that since some employees had criminal records, Wellman could keep out the Union by requiring employees to be bonded, but they would be unable to obtain bonds "because of their records."

#### B. *The Termination of Billie Ellis*

##### 1. The testimony of President Wellman

According to President Wellman, who testified for the General Counsel, Billie Ellis, a welder, was laid off about April 26, "because the work had slowed down in the plant and he was one of many employees who were laid off at that time." However, the others were identified only as Mercardo, a clerk, and Miss O'Hara, an office employee, while Ellis was a production employee.

When it became necessary about April 26 to lay off a welder, a decision had to be made whether it would be Ellis or James Cobb. Ellis was selected for termination "for three specific reasons. No. 1, James Cobb was a much, much better welder than Billie Ellis, No. 2, James was more dependable . . . in his attendance . . . ; No. 3, it was a matter of economics. Mr. Cobb earned less money than Mr. Ellis." However, on February 19, new classifications were announced. Ellis was placed in the

<sup>1</sup>All dates mentioned hereafter refer to 1968 except where otherwise specifically noted.

highest, entitled "Class A — Advanced Equipment Technician" But Cobb was given a rating below that of Ellis, i.e., "Class B — Equipment Technician"

About June 19 Respondent's plant was consumed by fire Operations were resumed about a week later in a building located in Maywood, Illinois But all employees on the payroll on June 19 were retained and none was laid off Some of those retained "are working at another company" while still remaining on Wellco's payroll Since the fire Wellco has hired a welder and some "summer help, high school boys."

About 3 weeks after the fire Wellman sent a letter to all employees (See G C Exh 4) Wellman testified that the statements therein are true Among other things, said letter recites that "within 24 hours after the fire occurred, Wellco was back in business . . . orders were being taken . . . and . . . shipped . . . [Significant production is then described]. To accomplish this enormous task, Wellco people worked 16 consecutive days, averaging in excess of 12 hours a day. An enormous job still lies ahead . . ."

## 2 The version of Billie Ellis

Ellis was originally hired by Wellco in 1966. His duties then required him to "build the machines entirely, because there was no one else but" Ellis in his department Thus, he welded, wired, painted, aligned motors and pumps, and crated and prepared the machines for shipment. He also later served as foreman of the equipment department when employees were hired and worked therein.

Although he left Wellco in July 1967, Ellis was rehired about 2 weeks later He was then laid off for failing to show up one Saturday morning when it was his responsibility to open the plant Upon being rehired, he was night foreman for a while, but soon he worked days as a welder, assembler, and fitter His day rate was \$3.50 an hour, which represented a raise of 25 cents an hour. He also retained his prior seniority when he was rehired Thus he preserved seniority for purposes of layoff and vacation On February 19, when the new classifications were announced, Ellis was placed in the highest grade, i.e., "Class A — Advanced Equipment Technician."

About February 12, Ellis interested several employees in a union. Then he met with Roy Freeman of Local 1277 of the Boilermakers, who gave him some authorization or membership application cards Ellis distributed several of these cards to employees at the plant on or about February 14. He signed one himself on February 14 (See G C Exh 5) Ellis also invited employees to attend a union meeting on the evening of February 14 Many employees did attend, so did Ellis.

Although Cobb and Ellis both welded, Ellis was the higher paid of the two because he was placed in Class A Cobb was rated Class B (See G C. Exh. 2 for a description of these and other classifications.) Cobb did welding mostly. But Ellis was capable of doing every job in the equipment department.

About April 26 Supervisor Neumann called Ellis to his office and informed Ellis that he was being laid off because of lack of work Then Neumann added, "You and I both know that this isn't fair, but there's nothing I can do I have my orders" Yet there was enough work, as Ellis evaluated it, for four employees to keep working for 3 1/2 to 4 weeks

As to his absenteeism, Ellis claims he stayed out a total of 14 days, 4 1/2 of them in April, in his last 6 months of employment He was never warned about this; but he was

once reprimanded by Neumann for this. On the other hand, Cobb was absent a lot more during the same period; and, in fact, Cobb was fired for excessive absenteeism in the last year Cobb was rehired shortly after his discharge.

Since his layoff Ellis has kept in touch with Respondent about being recalled to work, but he has not been reemployed by Wellco Nevertheless, a new man was hired in this period. Supervisor Zick justified this to Ellis, who complained to Zick about it, on the ground that this new employee was taken on at lower wages than those paid to Ellis At the time of his layoff Ellis was the highest paid employee

On cross-examination Ellis testified that regarding his work on a drum washer, and on another job also, the customer complained about the welding

## IV. RESPONDENT'S EVIDENCE

Employee Foss testified as follows James Cobb was a welder at the time Billie Ellis was rehired as a welder. However, Cobb did more welding than Ellis, for the latter also performed other work Foss ground seams which both Cobb and Ellis welded However, Cobb's welds were smoother and Ellis, unlike Cobb, so welded tanks and a gas coil heater that he caused leaks therein As a result Foreman Zick assigned Cobb to seal these leaks. Cobb succeeded in doing so

According to Foss, Ellis on the average did not work about a day and a half in each week for the 6 months prior to his layoff in April On the other hand, Cobb's attendance record in December 1967, was "pretty bad," as he was absent 6 or 7 days in that month. Cobb also took off many times in October and November 1967 But since January 1968, Cobb has done "pretty good" in coming to work During this latter period, "Ellis took off more time" than Cobb

Keith Neumann is Wellco's equipment department manager I find he is a supervisor under Section 2(11) of the Act His testimony follows. Among others, Ellis and Cobb worked under him When Ellis was rehired, he not only performed welding but also "other categories" such as pipefitting and "general jobs around the shop." However, Cobb was a welder. Thus Cobb welded 90 percent of the time, whereas Ellis did this type of work 50 percent of the time The welding of Ellis developed leaks in the tanks and heater systems on which he worked In addition Ellis "had difficulty" in welding gas tube coils. On one occasion Cobb had to redo some welding which Ellis did on a gas heater or coil In Neumann's opinion Cobb is a better welder than Ellis.

About March or April a large decline in orders occurred By April "there was only enough equipment for one welder." After Neumann conferred with President Wellman and Equipment Foreman Zick, it was concluded that only one welder was needed and, since Cobb was a better welder, it was decided to retain him as a welder Nevertheless, when the new classifications were adopted (see G C. Exh 2), Neumann recommended that Ellis be placed in the highest rating, namely, "Class A — Advanced Equipment Technician," and that Cobb be classified in a lower grade, i.e., "Class B — Equipment Technician" And at the time of his layoff Billie Ellis was the highest paid employee working under Neumann's supervision, receiving \$3.65 an hour At that time Cobb was compensated at the rate of \$3 an hour

However, Neumann recommended Ellis for the highest rate for two reasons one, out of friendship, and two, because Ellis "could do a few other things than welding"

In Neumann's opinion James Cobb "would have been put in Class A in a very short time" as he was "coming along" as a pipefitter and "as far as electrical and other things" were involved.

James Zick, foreman of machine production, whom I find to be a supervisor under Section 2(11) of the Act, also testified for Wellco. His testimony follows: Zick exercised "supervisory capacity" over both Billie Ellis and James Cobb. Zick evaluated as "fair" the welding of Ellis and Cobb's as "good." From November 1967 to April 1968, the time Ellis took off totals 3 or 4 weeks, "more or less," whereas Cobb in that same interval was absent for 7 or 8 days. Nevertheless at no time was Ellis warned about his absences, whereas Cobb was so warned. In fact Cobb was discharged in December 1967, for his poor attendance record, although he was later rehired. On redirect, Zick testified that Supervisor Neumann warned Ellis about the latter's absences.

Further, Zick testified that he preferred to lay off Ellis when work became slack because "it was the condition of the welding . . . the quality of the work" of Ellis. However, as the result of a leading question, Zick added that he also considered the attendance record of Ellis in arriving at his decision.

Finally, Zick testified that he was asked by Supervisor Neumann to bring General Counsel's Exhibit 3 into the shop, have the men read it, and ask them to sign, but to compel no one to subscribe. Thereupon Zick did ask the men to sign, informing them they were free to refrain therefrom, and they did subscribe. Thereafter Zick returned it to President Wellman's secretary at Neumann's direction.

James Cobb, a welder, testified that in April 1968, there was less welding to be done than in December 1967. During this period Cobb once was "asked to go over something for a leak at the bottom of a coil that [Ellis] couldn't get." Cobb fixed this leak (However, Ellis testified that he once redid some of Cobb's work.) Cobb also testified that he was on the job more often than Ellis from November 1967 to April 1968, and that he considered himself a better welder than Ellis. This latter opinion was based on Cobb's observation of some of the welding performed by Ellis. Cobb further testified that Ellis performed "other jobs he did better than I, and I didn't know how to do some" jobs which Ellis did at Wellco (However, Ellis testified that he was a better welder than Cobb.)

As narrated above, President Glenn Wellman was put on as a witness for the General Counsel. He was also called by Respondent. In addition to his evidence for the General Counsel, Wellman gave the following testimony for Respondent. In November 1967, Wellco employed 33 to 35 employees, in January 1968, but 27 or 28, and in March 1968, only 20 to 22. Since December 1967, four employees in the equipment department were terminated prior to April 1968. At the time Ellis was laid off in April 1968, Lydia O'Hare, an office employee, and Charles Eddy, in the sales department, were laid off.

"Improvements" to the Wilmot Avenue plant began to be made in February 1968, 2 months after Wellco moved into it in December 1967. That plant was a "totally vacant building" when Wellco first occupied it.

Wellman explained Class A and Class B ratings set forth in General Counsel's Exhibit 2. Class B applies to a person with a particular or specific skill who is unable to "do too much other than that one particular task or skill." On the other hand, Class A describes a person who "has gained sufficient experience and knowledge of our

equipment where he is more rounded in terms of experience rather than as a specific task."

Ellis was fired in the summer of 1967 for failing to open the plant on a Saturday when it was his responsibility to do so. He was rehired about 2 months later on three conditions: (1) he would be more dependable in his attendance, (2) he would be more conscientious on his job, and (3) he would go back as a welder rather than as a foreman. Ellis accepted these conditions.

However, since he was rehired Ellis missed 1 to 2 days a week from work, for a total of 20 to 21 days prior to his termination. Both Wellman and Neumann warned Ellis about this. And Ellis did not do good welding, so that a drum washer he worked on had to be returned by the purchaser. However, due to a shortage of help no complaint was made to Ellis concerning this incident.

In the fall of 1967 business was good, so that five to six units were on the floor at one time and back orders for 10 or 12 more were "on hand." By January 1968, three were on the floor and back orders accounted for three or four more. But by April 1968, only one unit was on the floor and none on back orders (Ellis testified there were two units on the floor at this time.) Thus there was not enough work for two welders in April. Hence it became necessary to lay off Cobb or Ellis. After consulting with Supervisors Neumann and Zick it was decided to retain Cobb and to release Ellis "based on attendance and quality of his work." Included in "attendance" was an absence of 4 days recently taken by Ellis to attend his uncle's funeral, and "was like the straw that broke the camel's back." Respondent's Exhibit 1 shows that Cobb was not absent from work in November 1967. However, he testified that he was off more than 2 or 3 days and that he was discharged for too many absences.

About June 1968, the Wilmot Street plant completely burned. Hence there was no work for welders after that. The old plant on Armitage Street had showers and an exhaust system. And employees there were supplied with safety boots.

## V CONCLUDING FINDINGS AND DISCUSSION

### A As to the Termination of Billie Ellis

It is my opinion, and I find, that Billie Ellis was selected to be laid off on about April 26 because of his union activity, and that the reasons given by Respondent to justify said selection are a pretext to make or disguise the true reason. Cf. *Starlite Manufacturing Company*, 172 NLRB No. 2. These ultimate findings are based on the entire record and the following subsidiary findings, which I hereby find as facts:

1. Ellis was prominent in the union movement at the plant. Of course, this does not shield or immunize him from a proper layoff. *Metals Engineering Co.*, 148 NLRB 88, 90. *Mitchell Transport, Inc.*, 152 NLRB 122, 123, 358 F.2d 281 (C.A. 7). Further, being prominent in union activity in itself means nothing, but it may be considered in ascertaining the true cause for a layoff. "Obviously, the discharge of a leading union advocate is a most effective method of undermining a union." *NLRB v. Longhorn Transfer Service*, 346 F.2d 1003, 1006 (C.A. 5).

2. Respondent had knowledge of the union activity of Ellis. I do not credit Respondent's contrary evidence. Indeed Respondent's own witness, Foss, testified — and I credit him on this aspect of his testimony — that he told President Wellman about the union activity as early as

February 14, 1968, and Wellman himself testified that he had knowledge of union activity on February 21, when he signed General Counsel's Exhibit 3. Further, I credit Ellis that about April 4 Wellman, among other things, asked Ellis and Hale if they were still for the Union. In any event I find that Respondent operated a small plant and that I may infer knowledge of the union activity of Ellis by reason of the small size of the plant *Angwell Curtain Company, Inc v N.L.R.B.*, 192 F.2d 899, 903 (C.A. 7)

It is pertinent at this point to observe that "Direct evidence of a purpose to discriminate is rarely obtained, especially as employers acquire some sophistication about the rights of their employees under the Act, but such purpose may be established by circumstantial evidence" *Corrie Corporation v N.L.R.B.*, 375 F.2d 149, 152 (C.A. 4). Therefore it is not unusual for an employer to point to an employee's real or doubtful shortcomings as the reason for a discriminatory layoff

3. Respondent entertained union hostility, and also committed violations of Section 8(a)(1) of the Act, as hereinafter found. Nevertheless, antiunion animus, without more, is not sufficient to establish that a termination of employment is unlawful. *N.L.R.B. v Howard Quarries*, 362 F 2d 236 (C.A. 8) But it is a factor which may be evaluated in ascertaining the real reason for an employee's termination. *N.L.R.B v Georgia Rug Mill*, 308 F 2d 89, 91 (C A 5)

4 Timing cannot be ignored. *Arkansas-Louisiana Gas Company*, 142 NLRB 1083, 1085-86 It is significant that the layoff of Ellis coincided with the Union's organizational campaign *Texas Industries, Inc*, 156 NLRB 423, 425; *N.L.R.B v Mira-Pak, Inc*, 354 F 2d 525, 527 (C.A. 5)

5 I find that Ellis was not put on notice that his absences or his defective work prejudiced his continued employment. Respondent's contrary evidence is not credited. Failure to warn, under the circumstances, may not be ignored *Talon, Inc*, 170 NLRB No. 42, fn 1 Not only did Respondent fail to warn Ellis but it gave him a raise in pay a couple of months before his layoff, classified him in the highest category, and made him the highest paid nonsupervisory employee in the plant. Employees in disfavor are not so honored.

6. Further, I find that Ellis was able to perform tasks which Cobb in some instances could not do at all and in other cases could not do as well as Ellis. Indeed, Cobb himself so testified. Thus it would be reasonable to infer — and I do — that the employee capable of performing the greater variety of work assignments would be retained in the event one of two employees must be laid off. I do not mean to intimate that I am deciding who is the better welder, as this is a managerial prerogative which may not be overturned by the Board. *N.L.R.B. v Ogle Protection Service*, 375 F 2d 497, 505 (C A 6), cert denied 389 U S 843, *Thurston Motor Lines, Inc*, 149 NLRB 1368, 1369 But I cannot overlook the fact that Ellis was laid off when he could perform more different kinds of jobs than Cobb.

Merely because lawful cause exists, i.e., absenteeism and poor work, will not justify a layoff if the motivating, dominant, or substantial reason behind the dismissal is a discriminatory one. *N.L.R.B v Symons Mfg Co.*, 328 F 2d 835, 837 (C A 7); *Angwell Curtain Company, Inc v N.L.R.B.*, 192 F 2d 899, 902 (C.A. 7), *N.L.R.B. v Lexington Chair Co.*, 361 F 2d 283, 295 (C.A. 6); *N.L.R.B. v Whitin Machine Works*, 204 F 2d 883, 885 (C.A. 1). I find that business was slow and that layoff of a welder became necessary. But I find that union activity was a substantial reason for selecting Ellis to be laid off,

and that his shortcomings "alone would not have led to such" selection *N.L.R.B v Park Edge Sheridan Meats*, 341 F 2d 725, 728 (C A 2) In this connection, the following recent cases warrant such conclusion *Rawac Plating Company*, 172 NLRB No. 180, *Carlisle Paper Box Company v N.L.R.B.*, 398 F 2d (C.A. 3).

7 Although of minor import, I also find that President Wellman gave more reasons for the layoff of Ellis when Wellman testified for Respondent than when he testified for the General Counsel, and, also, no reason was given by Respondent to Ellis as to why Cobb, rather than Ellis, was retained. This latter has been held to constitute some indicia "that the layoff was discriminatory." *N.L.R.B v Griggs Equipment, Inc*, 307 F 2d 275, 278 (C A 5). See *N.L.R.B v. Melrose Processing Co.*, 351 F 2d 693, 699 (C.A. 8), *N.L.R.B v Plant City Steel Corp.*, 331 F 2d 511, 515 (C A 5) Cf *Rawac Plating Company*, 172 NLRB No 180

### B As to Interference, Restraint, and Coercion

#### 1. Promises of benefit

About February 15 President Wellman called a meeting of employees at the request of employee Foss. While I find that Wellman had at times in the past held such assemblies, I find that this one would not have been held at this time but for the request of Foss. And I further find that Foss told Wellman that he, Foss, wanted such a meeting because employees were trying to get a union in the plant, that they were clamoring for showers and ventilating fans, and that Wellman should have an opportunity to rebut the Union's demands.

I do not credit Wellman that he had no knowledge of union activity at this time, i.e., on about February 15. This is because I credit Foss, a witness for Respondent, that he informed Wellman of the Union's organizing attempts when he, Foss, invited Wellman to hold a meeting for employees on February 15. In addition I rely upon the Board's small plant doctrine whereby Wellman's knowledge of union activity may be inferred because Respondent operated a small plant *Angwell Curtain Company, Inc v N.L.R.B.*, 182 F 2d 899, 903 (C.A. 7)

Admittedly Wellman announced at this February 15 meeting that Respondent would install ventilating fans and showers, provide a first aid kit, furnish new tools, and issue new safety boots. Also Wellman promised a reclassification of jobs. These promises were soon fulfilled. The reclassifications resulted in wage increases to nearly all production and maintenance employees. The question is whether such promises and their effectuation violate the Act.

Ordinarily an employer may grant increased wages and other benefits to his employees, even during a union campaign, provided such conduct is not prompted by antiunion motives. *Borden Cabinet Corporation*, 148 NLRB 996, 1002, 1003 I find that Respondent had been contemplating such increases in benefits and the institution of job reclassifications, but that the plans therefor had not become formalized, definite, or crystallized on February 15. Further, I find that the announcements of such benefits and the adoption of the job reclassifications were accelerated in order to defeat the union movement, and that they would not otherwise have been instituted so soon. Hence I find that their promulgation and adoption was motivated by an attempt to counteract the Union's campaign, and that, under the circumstances, they transgress Section 8(a)(1) of the Act.

*N.L.R.B v Newman-Green, Inc.*, 401 F 2d 1 (C A 7); *Trey Packing, Inc.*, 172 NLRB No. 42 Thus I find that their timing to coincide with the union campaign was designed to thwart that campaign and, therefore, they constitute unfair labor practices Cf *Bata Shoe Company, Inc.*, 116 NLRB 1239

## 2. The alleged repudiation of the Union

About February 21 President Wellman admittedly instructed his secretary to write a letter or to have Supervisor Keith Neumann write it, and to have the employees sign it. This document was soon typed See General Counsel's Exhibit 3. And admittedly employees were asked to sign it, although no pressure or threats were used to induce them to subscribe. I find that this letter was initiated, inspired, and prepared by Respondent, that it in effect amounts to a repudiation of the Union, and that employees signed only when requested to do so. Under the circumstances, I find that this violates Section 8(a)(1) of the Act, and that it is no defense that employees voluntarily signed it Cf *Phil-Modes, Inc.*, 159 NLRB 944, 961

Further, I find that said General Counsel's Exhibit 3 is more than a request addressed to employees not to accept a union A request as such is protected free speech under Section 8(c) of the Act. But I find more than a request because the employer here did more than ask employees to renounce the Union. Thus I find that by asking employees to sign General Counsel's Exhibit 3 the employer at least conducted a poll of employee sentiment towards the Union without conforming to the safeguards established by the Board in *Struksnes Construction Co.*, *Inc.*, 165 NLRB No 102.

## 3 Other acts alleged to violate the Act

At the February 15 meeting Wellman told those there assembled that some employees were trying to bring in the Union and inquired whether they needed it Wellman's contrary testimony is not credited especially since Respondent's witness, Foss, whom I credit, testified to the foregoing statement, and Foss is confirmed by employee Billie Ellis While this statement and inquiry may reveal union animus, it does not violate Section 8(a)(1) of the Act, and I so find

At this meeting Wellman also expressed opposition to a union in the shop and predicted that "if the Union comes in here, I'd have to go broke" Wellman's contrary testimony is not credited I find nothing coercive about this utterance At most it constitutes a prediction that Respondent will be unable to pay union wages and at the same time remain in business.

About April 4 President Wellman told employees Ellis and Hale that he heard that some employees made statements to the Board This gives the impression that protected activities are under surveillance and, therefore, is coercive under Section 8(a)(1) of the Act Wellman also asked Ellis and Hale whether they were still for the Union This is coercive interrogation, and I so find Continuing, Wellman added he would abolish past favors, such as personal loans, if the Union got into the plant I find this is a threat of reprisals prohibited by Section 8(a)(1) of the Act Also, Wellman stated he would fight the Union "tooth and nail all the way" I find this is protected as an expression of opinion To denounce unions or to express a dislike for or opposition to them does not violate Section 8(a)(1) of the Act *N.L.R.B v Threads,*

*Inc.*, 308 F 2d 1, 8 (C A 4) Respondent's evidence inconsistent with the above findings of violations is not credited

Finally, about February 21 Supervisor Zick told employee Ellis that those employees with criminal records would be asked to supply surety bonds and, since their records would prevent their obtaining the same, Respondent could thus keep out the Union Respondent's evidence not consonant with this finding is not credited I find that this is a threat of reprisal which is coercive within the contemplation of Section 8(a)(1) of the Act

## VI. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section V, above, occurring in connection with its operations 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.

## VII. THE REMEDY

As Respondent has been found to have engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take specific affirmative action, as set forth below, designed to effectuate the policies of the Act

In view of the finding that Respondent discriminated against Billie Ellis in laying him off it will be recommended that it be ordered to offer him immediate and full reinstatement to his former position or one substantially equivalent thereto, without prejudice to his seniority and other rights and privileges It will further be recommended that Ellis be made whole for any loss of earnings suffered by reason of the discrimination against him In making Ellis whole Respondent shall pay to him a sum of money equal to that which he would have earned as wages from the date of his layoff to the date of reinstatement or a proper offer of reinstatement, as the case may be, less his net earnings during such period Such backpay, if any, is to be computed on a quarterly basis in the manner established by *F W Woolworth Company*, 90 NLRB 289, with interest thereon at 6 percent calculated by the formula set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 It will also be recommended that Respondent preserve and make available to the Board or its agents, upon reasonable request, all pertinent records and data necessary to aid in analyzing and determining whatever backpay may be due.

The conduct of Respondent in my opinion does not portray a general hostility to the Act It follows, and I find, that an Order is appropriate which is limited to enjoining the conduct found to be unfair labor practices and similar or like acts Since the remedy adopted should be commensurate with the violations found, relief broader in scope is not warranted. Nothing herein shall be construed to require Respondent to abolish or abrogate any benefits heretofore granted to employees

Upon the basis of the foregoing findings of fact and the entire record in this case, I make the following

## CONCLUSIONS OF LAW

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

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

3 By laying off Billie Ellis in a manner which discriminates in regard to his tenure of employment, thereby discouraging membership in a labor organization, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act

4 By engaging in the conduct found in section V,B, *supra*, to violate the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act

5. The foregoing unfair labor practices affect commerce within the purview of Section 2(6) and (7) of the Act.

6 Respondent has not committed any other unfair labor practices alleged in the complaint

## RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in this case, I recommend that the Board issue an Order requiring that Respondent, its officers, agents, successors, and assigns, shall.

1. Cease and desist from

(a) Discouraging membership in the Union, or any other labor organization, by laying off employees or otherwise discriminating in any manner in respect to their tenure of employment or any term or condition of employment.

(b) Promising or granting benefits to employees, or reclassifying jobs, for the purpose of discouraging interest or membership in the Union or any other labor organization

(c) Coercively interrogating and polling employees regarding their union sympathies and membership

(d) Requesting employees to repudiate the Union or any other labor organization.

(e) Giving employees the impression that their protected activities are under surveillance.

(f) Threatening to discontinue personal favors to employees if they select the Union as their collective-bargaining representative

(g) Threatening employees having criminal records to obtain surety bonds if the Union becomes their collective-bargaining agent

(h) In any like or similar manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

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

(a) Offer Billie Ellis immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered, with interest at the rate of 6 percent, by reason of Respondent's discrimination against him, as provided in the section above entitled "The Remedy"

(b) Notify Billie Ellis, if presently serving in the Armed Forces of the United States, of his right to reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon reasonable request, make available to the Board or its agents, for examination and copying, all payroll records and reports and all other records necessary to ascertain the amount of backpay due under the terms of this Recommended Order

(d) Post at its plant at Maywood, Illinois, copies of the attached notice marked "Appendix"<sup>2</sup> Copies of said notice, to be furnished by the Regional Director for Region 13, after being signed by a duly authorized representative of Respondent, shall be posted by it 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 displayed Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith<sup>3</sup>

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges unfair labor practices not found herein

<sup>1</sup>In the event this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order"

<sup>2</sup>In the event this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith"

## APPENDIX

## NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that

WE WILL NOT make promises of benefits, or grant benefits, in order to discourage interest or membership in International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO

WE WILL NOT coercively ask employees questions about, or poll our employees as to, their union sympathies or union membership

WE WILL NOT talk to employees about their activity in visiting National Labor Relations Board offices to make statements

WE WILL NOT threaten employees with reprisals if they select the above Boilermakers union as their collective-bargaining representative

WE WILL NOT threaten employees to obtain surety bonds in order to prevent said Boilermakers union from becoming their collective-bargaining representative.

WE WILL NOT discourage membership in said Boilermakers union, or any other labor organization, by laying off any of our employees or in any other manner discriminating against them in regard to tenure of employment or any term or condition of employment

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed to them to belong or not to belong to a union, and to engage or not to engage in protected activity, except to the extent that a valid collective-bargaining contract may require you to join a union

WE WILL offer Billie Ellis immediate and full reinstatement to his former job or one substantially equal to it, and will pay him backpay for any loss of pay he may have suffered as a result of his layoff by us. We will add 6 percent interest to any backpay due him. All our employees are free to become, remain, or refuse

to become or remain, members of said Boilermakers union, or any other labor organization

WELLCO CHEMICAL  
COMPANY  
(Employer)

Dated

By

(Representative)

(Title)

Note: We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended after discharge from the Armed Forces

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 881 U.S. Courthouse and Federal Office Building, 219 S Dearborn Street, Chicago, Illinois 60604, Telephone 353-7572