

**Kellwood Co. and International Ladies' Garment Workers' Union, Local 451. Case 28-CA-1693**

April 25, 1969

**DECISION AND ORDER**

BY CHAIRMAN McCULLOCH AND MEMBERS  
FANNING AND ZAGORIA

On October 16, 1968, Trial Examiner George H. O'Brien issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint, and recommended dismissal of such allegations. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed cross-exceptions and supporting and answering briefs.

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 of the Trial Examiner made 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 and briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations only to the extent consistent herewith.<sup>1</sup>

1. The Trial Examiner found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by threatening employees with trouble or harm as a consequence of signing union authorization cards.

2. The Trial Examiner found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to rehire employee Mrs. Roy Nell Mass on April 29, 1968. However, we find, contrary to the Trial Examiner, that the discharge of Mrs. Mass on April 26, 1968, was also discriminatorily motivated, and hence also in violation of Section 8(a)(3) and (1) of the Act.

The record shows that Mrs. Mass began her employment with the Respondents' predecessor on

March 2, 1966. On January 31, 1968, union representatives distributed handbills at the plant entrance, and Mrs. Mass was observed receiving a union leaflet by May Shank, a supervisor, and Ford Robbins, assistant manager. On the next day, February 1, Robbins sent a memorandum to Personnel stating falsely that Mrs. Mass had been warned about her low work performance of the last 2 days. On March 19, the Respondent, in a speech to an assembled group of employees, warned of trouble or harm if they signed union cards, which, we have found, violated Section 8(a)(1) of the Act. During March and April, Mrs. Mass signed a union card, attended union meetings, and urged other employees to sign union authorization cards. In late March or early April, Mrs. Mass, hearing a rumor that she was to be fired because of her union activity, sought and obtained an interview with Mrs. Eleanor Rael, production manager. During this conversation, Mrs. Mass told Mrs. Rael of the rumor, volunteered the information that she had signed a union card, and added that the Union would be good for the Company. In response, Mrs. Rael stated to Mrs. Mass that she would not be discharged for union activity, but added that if the Company did not have the money to pay union prices, it would have to close its doors, and that the Respondent thought Mass was the Union leader.

On Monday, April 22, Mrs. Mass phoned the plant and reported that her son was ill, and that she would be in as soon as he "got well." Mrs. Mass did not again communicate with the Company during the rest of the week, and on Friday, April 26, the Company terminated her employment, classifying it as a "Resignation" under Company Rule 12, described below. At the same time management officials prepared a "Termination of Employment" form for Mrs. Mass' personnel file, in part recommending against reemployment because of her alleged poor deportment. When Mrs. Mass reported in for work on Monday, April 29, Mrs. Erline Johnson, the Respondent's personnel manager, asked her why she hadn't called in, and called her attention to Rule 12 of the Company, which reads as follows:

An employee absent for three days, without notifying the company, shall be considered as having quit voluntary (sic) and cannot return to work unless rehired as a new employee.

Mrs. Johnson took the position with Mrs. Mass that Rule 12 required an absent employee to call in every day of an absence. Because of this alleged failure to comply with Rule 12, Mrs. Mass was not permitted to work. On Tuesday, April 30, Mrs. Mass was advised that the decision was irrevocable.

Under all the circumstances of this case, including Mrs. Mass' activities on behalf of the Union, the Respondent's awareness thereof and suspicion that she was the Union leader, the Respondent's threatening remarks in connection with the signing of union cards by the employees, the timing of the

<sup>1</sup>In its brief, the Respondent requested that, if the Board affirms the Trial Examiner's finding that the Respondent violated Section 8(a)(3) by unlawfully refusing to rehire employee Mrs. Roy Nell Mass, the record should be reopened to receive certain additional evidence bearing on the Respondent's obligation to rehire Mrs. Mass. We have, as hereinafter appears, found, like the Trial Examiner, a Section 8(a)(3) discriminatory refusal to rehire Mrs. Mass, but we perceive no persuasive reason to reopen the hearing. Accordingly, the Respondent's request is denied.

discharge as well as the refusal to rehire, all of which occurred in the midst of the Union's organizational campaign, the discriminatory notations in Mrs. Mass' personnel file,<sup>2</sup> and the fact that she did notify the Respondent of her absence in apparent compliance with Rule 12,<sup>3</sup> we are convinced that both her discharge and the Respondent's refusal to rehire her on April 29, when she reported for work, were discriminatorily motivated, and in retaliation for her union activities. Accordingly, we find that by such unlawful actions, the Respondent violated Section 8(a)(3) and (1) of the Act.<sup>4</sup>

#### THE REMEDY

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

As we have found that the Respondent discriminatorily discharged employee Mrs. Roy Nell Mass on April 26, 1968, and discriminatorily refused to reemploy her on April 29, 1968, all in violation of Section 8(a)(3) and (1) of the Act, we shall order that Mrs. Mass be offered immediate and full reinstatement to her former or substantially equivalent position without prejudice to her seniority or other rights and privileges, and make her whole for any loss of pay suffered by her by reason of the discrimination against her, from the date of discharge on April 26, 1968, to the date of the offer of reinstatement. Loss of pay shall be computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and with interest on the backpay in accordance with Board policy set out in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

<sup>2</sup>The Trial Examiner found, and we agree, that the two adverse notations in Mrs. Mass' personnel file were motivated by antiunion considerations.

<sup>3</sup>As indicated, Mrs. Mass notified the Respondent, on the first day of her absence, that her young son was ill, and that she would be absent until he got well. She was absent for 5 days. It would appear that Rule 12 requires a notice for an absence of 3 days or more, and Mrs. Mass' single notice satisfied this requirement. At most, Rule 12 could be construed as requiring a notice for each 3-day period of absence, in which case Mrs. Mass' notice cleared her for the first 3 days of her absence, and she would have been required to repeat the notice only before the end of the second 3-day period if she were absent that long. In any event, Rule 12 clearly does not support Mrs. Johnson's assertion that Mrs. Mass was required to call in every day. On the contrary, such assertion can only serve as evidence that Mass' alleged violation of the Rule was utilized by Respondent as a pretext to mask the real discriminatory reason for her discharge and Respondent's refusal to rehire her.

<sup>4</sup>In this connection, we cannot overlook a course of conduct engaged in by the Respondent on a Companywide basis. The Board has, on three previous occasions, found this Respondent to have violated the Act. The violations have included threats and discriminatory discharges, as in the instant case, unlawful surveillance, unlawful interrogation, and other unfair labor practices. See *Hawthorn Company, a Division of Kellwood Company*, 166 NLRB No. 20, enfd. in part 404 F.2d 1205 (CA 8), *Kellwood Company, Ottenheimer Bros. Mfg. Division*, 170 NLRB No. 183, and *Kellwood Company, Southern Division*, 170 NLRB No. 184.

#### AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law No. 4 in the Trial Examiner's Decision and substitute in lieu thereof the following paragraph:

4. By discriminatorily discharging employee Mrs. Roy Nell Mass on April 26, 1968, and discriminatorily refusing to reemploy her on April 29, 1968, thereby discouraging membership in or activities on behalf of the Union and interfering with rights guaranteed by Section 7 of the Act, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

#### 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 Trial Examiner, as modified below, and hereby orders that the Respondent, Kellwood Co., Mesa, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. In paragraph 1(a) of the Recommended Order, delete the words "by refusing to rehire" and substitute in lieu thereof the words "by unlawfully discharging or refusing to rehire."

2. Delete paragraph 1(c) of the Recommended Order, relettering present paragraph 1(d) as 1(c), and delete the counterpart third indented paragraph of the notice attached to the Trial Examiner's Decision.<sup>5</sup>

3. In paragraph 2(a), delete the word "employment" and substitute in lieu thereof the words "and full reinstatement."

4. Add [reference to fn.] 11 at the end of paragraph 2(d), deleting same from the last paragraph of the Recommended Order.

5. Delete the fourth indented paragraph of the Appendix and substitute in lieu thereof the following:

WE WILL offer Mrs. Roy Nell Mass immediate and full reinstatement to her former or a substantially equivalent position, without prejudice to her seniority and other rights and privileges previously enjoyed, and will make her whole for any loss of earnings she may have suffered as a result of the discrimination against her.

6. Renumber present paragraphs 2(c) and (d) as 2(d) and (e), respectively, and insert the following as

<sup>5</sup>The Trial Examiner did not find that the Respondent misrepresented to employees the circumstances under which union authorization cards may be made public, in violation of Section 8(a)(1). As we construe the Trial Examiner's findings, he found only that the Respondent made threats of reprisal in its speeches to employees, in violation of Section 8(a)(1), and he utilized the Respondent's statements with respect to union authorization cards being made public only as part of the context in which said threats were made. Accordingly, we do not adopt these gratuitous additions to the Trial Examiner's Recommended Order and Notice to Employees.

paragraph 2(c):

Expunge from the Respondent's record of Roy Nell Mass the two adverse notations in her personnel file found to have been motivated by antiunion considerations.

7. Add the following as the last indented paragraph in the Appendix (Notice to All Employees):

WE WILL expunge from the records of Roy Nell Mass the two adverse notations in her personnel file found to have been motivated by antiunion considerations.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

GEORGE H O'BRIEN, Trial Examiner: This matter was heard by me in Phoenix, Arizona, on July 30 and 31, 1968. The complaint issued June 3, 1968, based upon a charge filed May 2, 1968 and an amended charge filed May 29, 1968.

The complaint, as amended at the hearing, alleges in substance that Respondent in speeches by its Plant Manager, Garrett, on March 4 and March 19, 1968, restrained and coerced employees in violation of Section 8(a)(1) of the Act and by discharging, and thereafter failing and refusing to reinstate or to recall Roy Nell Mass, discriminated against employees in violation of Section 8(a)(3) of the Act. Pursuant to a pretrial order of the Associate Chief Trial Examiner, the General Counsel advised the Respondent that Roy Nell Mass "did not make application for reinstatement." Respondent's answer denies the commission of any unfair labor practices.

Upon the entire record,<sup>1</sup> including consideration of briefs filed by counsel for the General Counsel and counsel for Respondent, and upon my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I THE BUSINESS OF RESPONDENT

Kellwood Co., herein called Respondent, is a Delaware corporation. It employs approximately 400 persons in the manufacture of women's garments in its factory in Mesa, Arizona, from which it annually ships products valued in excess of \$50,000 directly to points located outside the State of Arizona. I find that Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Ladies' Garment Workers' Union, Local 451, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

1. Whether Mr Garrett's speeches exceeded the permissive bounds of Section 8(c) of the Act

<sup>1</sup>The General Counsel has moved to correct the stenographic transcript in certain particulars. There being no opposition, the motion is granted

2. Whether the discharge of Roy Nell Mass on Friday, April 26, 1968, was caused solely by the fact that she had not reported for 3 consecutive days or whether it was motivated, at least in part, by Respondent's intent to discourage union activity.

3. Whether Respondent's failure to rehire Roy Nell Mass on Monday, April 29, was motivated, at least in part, by the intent to discourage union activity or whether it was based on some other consideration.

B The Speeches

On Tuesday, January 30, 1968, two agents of the Union stationed themselves at the entrance gate to Respondent's plant, and, in plain view of persons in Respondent's office (some 40 to 50 feet away), distributed handbills with authorization cards attached. Other handbills were distributed on Tuesday, February 6; Thursday, February 15; Monday, February 26; Wednesday, March 6, Monday, March 11; Monday, March 18, Monday, March 25; Tuesday, April 2, Monday, April 15; Tuesday, April 23; Monday, May 6; Monday, May 20; and Tuesday, June 18.

On Monday, March 4, 1968, following the afternoon break, employees were assembled in the sewing room. A public address system was used. Plant Manager Garrett read a prepared speech. Mr. Garrett testified under direct examination that when he delivered his speech he added nothing and deleted nothing from the typewritten text with its handwritten notations, listing existing benefits. On cross-examination he testified that he did interpolate words in the speech to the extent of asking one of the employees to go into the office to obtain a union authorization card, and by describing in some detail existing company benefits. In this speech he stated:

We have had some events recently which could have serious and far reaching effects on you, your job, and your future

\* \* \* \* \*

Four times since January 30 outside agitators have been to the plant, and each time they have distributed some propaganda to you. . . . Along with their propaganda they are handing out union membership cards, [at this point in his talk Mr. Garrett asked an employee, Dave, to obtain a card for him and held it up for all to see] like this one. . . . They make it sound simple — all you do is sign it and mail it, and then they will take care of you.

Well it's not that simple. If enough of you make the mistake of signing one of these cards, things won't be simple — the troubles will be just beginning then. . . . I want all of you to understand our position, and it is the same as it always has been: WE DO NOT WANT A UNION IN THIS PLANT, and we will take every legal step we know of to keep the union out of this plant!

Some of you already know this, but all of you should be aware of the facts. We want you to know the facts so that you won't make any mistakes.

\* \* \* \* \*

Even if the Union got in here, the law requires only that we bargain with the union. But, *under the law we have no obligation to make any concessions to the union*

Therefore, the only means which the union has to even try to keep its promises to you if we did not agree to its demands would be to call *you* out on strike, and make you go *without work* and *without pay*, while you walk a picket line.

If that happened, not only would you go without pay, but you could lose your job. Under the law, the company is perfectly free to *permanently* replace economic strikers with *new* employees. I would hate to see any of you lose your jobs that way, *but we intend to keep this plant operating*, and if we have to replace anyone because of a union strike, we will do so.

\* \* \* \* \*

I want you to understand, also, that you do not have to talk or listen to any of the agitators. You are free, of choice, to do as you please, but regardless of what anyone may say, you are free to tell those people to go away and leave you alone. And don't make the mistake of signing one of those cards, just to see what will happen or to get rid of the agitators. Stand up for your rights and think for yourself. I am sure that if you do that you will follow our advice and not sign one of their cards.

The Union in its handbill distributed on Monday, March 11, "challenges" Mr. Garrett to "debate the issues," and in its handbill distributed on Monday, March 18, states:

## 2. WILL THE BOSS KNOW WHO SIGNED A CARD?

Nobody knows. All cards are locked up. The only purpose of these cards is to show the United States Government that a majority of the employees in your shop want the Union to be legally formed in your shop. . . .

### YOUR BOSS NEVER SEES THE CARDS

On Tuesday, March 19, Mr. Garrett delivered his second speech under identical circumstances. In this speech he stated:

I have called you together because I feel it is important that you be reminded how your Company feels about the Union. I have told you before and I want to be sure there are no mistakes about it. We do not want a Union in this plant and we will use every legal means at our disposal to keep it out of here.

The matter is, of course, of serious concern to the Company. However, it is a matter of *more* serious concern to *you*. It is our sincere belief that if this Union were to come into this plant, it would not work to your benefit, but could be harmful to you.

\* \* \* \* \*

They will also tell you that the Company will never see the card you sign and they only want to show it to the Federal Government. Well, let me make this clear: Under the law no Union can get in here without an election or without a full trial before the National Labor Relations Board. If that should ever become necessary all those cards will be made public — not just

to me and the Company but *anyone* who wants to read the public records.

\* \* \* \* \*

So don't be deceived and *don't let yourself* be pushed *around*. Stand up for *yourself* and say *no* when asked to sign a card.

Four present and three former employees testified to their recollections of what Mr. Garrett said in his speeches. All freely acknowledged that their memories were hazy and that they could not separate statements made in one speech from statements made in the other. Five of the seven witnesses recalled that Mr. Garrett stated that the company would do everything in its power to keep the Union out. Four recalled him saying that it would be a mistake to sign a union card, one recalled the statement as being "Don't sign or you'll be out of a job. He said and we sign the card we lose our job so you can replace us" and one recalled the statement as being: "you better think twice before you sign this" (holding up the union authorization card). Four recalled him stating that the company would know who signed the cards for the Union. Six of the seven recalled that he said something about employees being discharged or replaced or out of a job, but no two had the same recollection in this area.

### C. Roy Nell Mass

Mrs. Roy Nell Mass is a sensitive, personable young woman. She was hired without prior experience by Respondent's predecessor company on March 2, 1966, and worked continuously at Respondent's Mesa plant through April 19, 1968. She was a piece worker. On June 21, 1966, her then supervisor, Eleanor Rael, filed a written progress report stating that Mass' work was satisfactory, that she liked her work, that she got along well with others and would make a good employee. On April 6, 1967, Respondent replied to an inquiry from the Credit Bureau of Phoenix that Mass was a "Good Steady Worker."

Her only difficulty with any supervisor occurred probably in early January 1968. The only testimony on the subject is that of Mrs. Mass, as follows:

Q. [By Mr. Stout] You said something about some bad work, in fact, you were warned by Mr. Robbins<sup>2</sup> in relation to quality?

A. You misunderstand about the work.<sup>3</sup>

Q. He did speak to you about it?

A. Yes, but they were my repairs because of the machine.

Q. All right. When was this conversation with Eleanor Rael?<sup>4</sup>

A. Well, this was sometime after Mr. Robbins had the fuss.

Q. When was that?

A. This was before the Union guys came.

Q. That Mr. Robbins spoke to you?

A. Yes.

Q. How long before this week that you were out with the boy sick?

A. That was three or four months later.

Q. This week was three or four months after the conversation with Eleanor?

<sup>2</sup>Ford Robbins, assistant manager

<sup>3</sup>Mrs. Mass had testified that after she engaged in union activities she received bad work assignments from her supervisor.

<sup>4</sup>Production manager

A. No, I would say two months.

As noted above, the Union distributed its first handbill on January 30. Mrs. Mass, seeing two men just outside the entrance gate in front of the plant passing out circulars and thinking they were salesmen, walked up and accepted a union leaflet. At the same time she noted that she was being observed by May Shank, a supervisor, and Ford Robbins, assistant manager, who were standing at a large window inside the plant about 40 or 50 feet from the gate. On the next day, February 1, Robbins sent a memo to Personnel, "Subject — Warning to Operator" reciting: "Roy Nell Mass Clock was warned about her performance (Low Earnings) for last two days — She had plenty work available for her —"<sup>5</sup>

Mass signed a union card, attended union meetings, tried to get other women to sign and tried to get other women to attend meetings. Noting a difference in the attitude of her supervisor, Mrs. Butram, the absence of the friendly greeting, the increase in bad work, and shorter hours, and noting that Mr. Garrett had ceased his practice of stopping by her machine with a friendly word,<sup>6</sup> and hearing a rumor that she was to be fired because of her union activities, she sought and obtained an interview with Eleanor Rael.

Mrs. Mass told Mrs. Rael that she had heard she was going to be fired because of her activities on behalf of the Union and volunteered the information that she had signed a union card. Rael recalled her question as being "Will the company fire me because I signed a Union card?" and testified that her answer was a categorical "No." Rael did not reply to Mass' question as to whether or not she had heard the rumor. In response to Mass' statement that she thought the Union would be good for the company, Rael replied that the company was already doing all it could for the employees, that 60 percent of its business was with Sears, and 40 percent with Deena, that these were big companies with many suppliers, and if the company did not have the money to pay union prices it would have to close its doors. Rael told Mass that she had a right if it was her conviction to sign anything she wished, and told Mass that she thought Mass was a strong personality over the girls, and thought Mass was the leader and that they would be more apt to follow Mass if Mass said vote for the Union.

On Sunday night, April 21, Mrs. Mass' son became ill, and after emergency treatment at the hospital, she brought him back home and stayed with him until he recovered a week later.

On Monday morning, April 22, Mrs. Mass phoned the plant and asked for the personnel manager, Mrs. Johnson. Upon being informed that Mrs. Johnson was out, she spoke to the personnel clerk, Sonya Cloud. Mrs. Mass told Mrs. Cloud that her little boy was sick, and that she would be in as soon as her little boy got well and asked Mrs. Cloud to inform Mrs. Mass' supervisor, Norma Butram. Mrs. Cloud told Mrs. Butram only that Mrs. Mass was sick.<sup>7</sup> Mrs. Butram wrote the word "sick" on Mrs. Mass' timecard and on the absence report form which each supervisor must submit daily to the personnel office. There were then about 400 employees in the plant, and about 35 employees in the department supervised by Mrs. Butram. Mrs. Mass did not attempt in any way to communicate with any person in authority at the company after this initial telephone call until she reported for work

on Monday morning, April 29. Meanwhile, on Tuesday, Wednesday, Thursday, and Friday, Mrs. Butram wrote the words "not notified" on Mass' timecard and on the daily absence report to Personnel listed Mass as absent "reason unknown."

Also on Friday, April 26, Mrs. Butram filled out a "TERMINATION OF EMPLOYMENT" form checking under "reason" the word "Discharged," stating in longhand under "Details of Reason": "Has not notified reason for being absent for 4 consecutive days - Plant Rule 12 states that an employee absent for three days without notifying the company shall be considered as having quit voluntarily." Under the question "Recommend for reemployment" Mrs. Butram on the portion of the form entitled "rating" checked the highest box for "skill," the highest box for "producer" and the lowest box for "deportment." Mrs. Butram signed the form, obtained the signature of the production manager, Eleanor Rael, and the two women presented the form to the personnel director, Erlene Johnson, as their recommendation. (The same three had conferred on the day preceding, i.e., Thursday, April 25, and agreed that Mass would have to be terminated). When Mrs. Johnson received the termination form, she, using red ink in a pen, crossed out the checkmark after the word "discharged" and placed a checkmark after the word "resignation." She also pulled Mrs. Mass' timecard "so I could talk to her before she did clock in."

On Monday morning, April 29, Mrs. Mass reported for work and, finding her timecard missing, went to Mrs. Johnson's office. Mrs. Johnson testified:

Well, I asked Roy Nell into the office and asked her why she didn't call in, and also asked her whether she knew the rule and she stated to me she did. I asked her if she had gotten the rules when they were passed out, and she said, yes, she knew the rule that she was supposed to call in, and so I asked her what was wrong, and she said she was upset, she had to take her child to the Emergency Room on Sunday night, but she did not leave him there, she brought him home. . . . So I asked her if she knew the rule, and she said she did, and I stated the rule to her, and the part that Mr. Garrett had said he presumed she had quit, and the rule was voluntarily quit.

After her recollection was refreshed, Mrs. Johnson testified further: ". . . she told me that she had decided that she was going to call in on Friday and quit, but — and go back to her mother's. But in thinking it over, she decided on attending school."

Mrs. Mass testified:

She asked me if I knew I was supposed to call in every day and I told her, well, I suppose so, but I have never done it before and I didn't see any reason why I had to. She told me to go home and she was going to speak to Mr. Garrett and see if I could come back to work.

Mr. Garrett testified that Mrs. Johnson came to him on Monday afternoon and:

Well Erlene reported Roy Nell's absence without reporting, and said she had come in on Monday, the 29th, to talk to her, and that Roy Nell had told her she had thought about calling in Friday and quitting, and that was in violation of Rule 12, and you know, what was my opinion on it. I told her from the information that I didn't see any way we could deviate from Rule 12, and Roy Nell actually showed a lack of interest in

<sup>5</sup>There is no explanation of this memorandum in this record

<sup>6</sup>Mr. Garrett testified that he personally did not treat Mass differently before and after the appearance of the Union

<sup>7</sup>English is not the native language of Mrs. Cloud and she may have misunderstood the soft accents of Mrs. Mass

her job, and I felt we had to stick to the rule.

On Tuesday morning Mrs. Johnson advised Mrs. Mass by telephone of Mr. Garrett's decision.

In her application for unemployment insurance filed May 10, 1968, Mrs. Mass stated that she had been discharged because "I didn't call in every day."

#### D. Respondent's Rule on Reporting

Shortly after Mrs. Johnson became personnel manager in October of 1967, she caused plant rules to be posted and in early November distributed copies of the rules to all employees. Rule 12, which had been in effect prior thereto and which is still in effect, reads:

An employee absent for three days, without notifying the company, shall be considered as having quit voluntary (sic) and cannot return to work unless rehired as a new employee.

It is the responsibility of the individual supervisor to prepare a termination notice in every case in which an employee is absent without excuse and without notice to the company. Personnel maintains a check by requiring each supervisor to submit daily on a prescribed form the name of each absent employee with the reason for the absence. When these reports show that an employee has been absent for 3 days without calling in, Personnel requests the supervisor to prepare a termination form. Since Mrs. Johnson has occupied her present position, this practice has been followed without exception. Company records show that Mrs. Mass had never been absent for 3 consecutive workdays without calling in, or without prior excuse until the occasion which led to her termination.

#### E. Concluding Findings

##### 1. Interference, restraint, coercion

I find that Mr. Garrett read both speeches exactly as they appear in this record with only the emendations described in his testimony. In so doing, I do not discredit any of the testimony of his hearers. The vague inchoate threats in Garrett's skillfully drawn talks took different concrete forms in the minds of his untutored listeners, and each hearer testified truthfully to her individual recollection of the impression which the talks made on her mind.

Even under the broad scope given to Section 8(c) of the Act by the Court of Appeals for the Ninth Circuit in *N.L.R.B. v. Semiconductors Inc.*, 385 F.2d 753, the speeches of Garrett constituted restraint and coercion. The thrust of the first speech was that it would be a mistake to sign a union authorization card, because the employer would take every legal step it knew of to keep the Union out of the plant, and if enough employees made the mistake of signing cards, the troubles would just be beginning. The words: "We will take every legal step we know of to keep the Union out of this plant" when used in juxtaposition with the words "mistake" and "troubles" carry a strong connotation of dire consequences. Where the borders of the law are as ill-defined as they are in the National Labor Relations Act, I am unable to give any controlling significance to the word, "legal."

In his second speech Garrett repeated: "We do not want a Union in this plant and we will use every legal means at our disposal to keep it out of here," and so that there might be no doubt that a threat was intended, added: "It is our sincere belief that if this union were to come into this plant, it would not work to your benefit

but would be harmful to you."<sup>8</sup> With that warning still ringing in their ears, the law was again invoked with the words "Under the law, no union can get in here without an election, or without a full trial before the National Labor Relations Board. If that should ever become necessary all those cards will be made public — not just to me and the company, but *anyone* who wants to read the public records."

I find that the speeches delivered by Mr. Garrett restrained and coerced employees in the exercise of Section 7 rights and are not protected by Section 8(c) of the Act.

##### 2. The discrimination against Mass

Respondent has a practice, from which it has never consciously deviated, of terminating employees immediately and automatically following the third consecutive day of unexplained absence. Responsibility for initiating the termination is in the immediate supervisor, and it is part of the responsibility of the personnel department to see that this policy is followed.

Mass was terminated on Friday in the normal course of business. Her supervisor on the Monday attendance report showed Mass as sick. The attendance reports for Tuesday, Wednesday and Thursday showed Mass absent, reason unknown. On Thursday the supervisor checked with the production manager and with the personnel manager and her clerk to ascertain whether there had been some message that she had missed. On Friday, which was the fourth day of unexplained absences, the supervisor executed the document which effected Mass' termination. The supervisor stated that the action was "discharged" This was corrected by the personnel manager to read "voluntary quit."

This policy is charitable and humane and to be commended. There may be any number of reasons why an employee may be absent without reporting, and the word "discharged" is a blot on the record of any person.

To this point, applying the "but for" test, there was no discrimination against Mass. "But for" her unexplained absence, she would not have been terminated on Friday. The allegation of discriminatory discharge must, therefore, be dismissed.

There remains the question, Why was Mass not returned to work as a new employee when she reported for work at her usual time on Monday morning? Rule 12 contemplates rehiring and Johnson testified employees "voluntarily resigned" under Rule 12 would be rehired absent information in their personnel file indicating an unsatisfactory employee. There were two such matters in the personnel file of Mass.

The first is the termination paper itself on which Bertram and Rael had graded Mass poor on deportment. Unless, by "deportment" they meant "union activity," their rating has been demonstrated conclusively on this record to be false. Garrett testified that there was no question about her deportment in her department, that she did not fight with the girls and was civil to her superiors. Johnson testified that poor deportment meant poor attendance, a definition clearly at odds with that of the dictionary and common usage. The persons directly

<sup>8</sup>For a sampling of the cases in this area and illustrations of the narrow line between "legal" and "illegal" see *Southwire Company v. N.L.R.B.*, 383 F.2d 235 (C.A. 5), *J. P. Stevens*, 167 NLRB 37, *Aerovox Corp. of Myrtle Beach, S.C.*, 172 NLRB No. 97, *Harvey Aluminum*, 156 NLRB 1353

responsible for the rating, Bertram and Rael, were not interrogated on the point. I conclude that Mass was rated poor in department because she insisted to Rael that the Union would be good for the company, and attempted to persuade her fellow workers to her point of view.

The second is the February 1 memorandum of Assistant Manager Robbins. I have concluded from the fact that Mass was unaware that the persons handing out circulars at the exist gate were union organizers, but thought they were handing our advertising circulars, on the occasion when she was observed by Robbins, that this must have occurred on the day of the first distribution, i.e., January 31. I have concluded on the basis of Mass' uncontradicted testimony that her sole difficulty with Robbins occurred some time before January 31, and did not involve in any way any failure or refusal to work when work was available. Not only is the Robbins memorandum implausible on its face (since Mass was a piece worker), the company records show that during the period encompassed by the Robbins memorandum, Mass' hourly earnings were well above her average for the year.<sup>9</sup> I conclude and find that Robbins caused the memorandum to be entered in Mass' personnel file to provide a "legal" basis for her termination or other discipline should the suspicion evoked by her acceptance of union literature be confirmed.

I find that when Mass presented herself for work on Monday morning, Respondent, had it followed its usual practice, would have permitted her to return to work as a new employee, but for the fact that she had been active on behalf of the Union, had not been persuaded by Respondent's arguments to abandon her allegiance to the Union and because of the Respondent's determination to do everything legally in its power to keep the Union out of the plant.

Garrett, in his conversation with Johnson, was not concerned with whether Mass had been a good employee, was not concerned with any matter in her personnel file, was not concerned with the reason for her absence or whether good attendance and work performance might be expected in the future. His only concern was with the "legality" of the initial discharge, i.e., had there been any

deviation from the policy of terminating employees on the fourth day of any unexplained absence. I find that in failing to reemploy Mass on Monday, April 29, Respondent was wholly motivated by the fact that she had been and was still an open and avowed union advocate and by Respondent's belief that denying reemployment to her was a legal means of keeping the Union out of the plant.

I further find that any application, other than presenting herself for work on Monday morning, would have been a completely futile act.

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

The activities of the Respondent as set forth in Section III, above, occurring in connection with the operations of the Respondent set forth 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 Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It will be recommended that Respondent be required to offer immediate reemployment to Roy Nell Mass, displacing, if necessary, any employee hired on or after April 29, 1968, and make her whole for any loss of pay she may have suffered by reason of the discrimination against her. Backpay shall be computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and with interest on the backpay due in accordance with Board policy set out in *Isis Plumbing and Heating Co.*, 138 NLRB 716.

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

#### CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce and in a business affecting 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 engaging in the conduct set forth in the section entitled "Interference, restraint and coercion," the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. By denying employment to Roy Nell Mass on April 29, 1968, thereby discouraging membership in or activities on behalf of the Union and interfering with rights guaranteed by Section 7 of the Act, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

<sup>9</sup>Company records of average hourly earnings for Mass in 1968 show:

January	First week	\$1.60
	2d	1.83
	3d	1.84
February	4th	2.00
	1st	2.18
	2d	2.21
	3d	2.39
March	4th	2.19
	5th	1.65
	1st	1.91
	2d	1.93
	3d	2.01
April	4th	2.13
	5th	2.40
	1st	2.66
	2d	2.35

On the form in which Respondent's records are maintained, the 2 days specified in Robbins' memorandum would be included in the period shown as February 1st week. Mass' mean average earnings for the year were \$2.08 per hour and her median average was \$2.07.

## RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that Respondent, Kellwood Co., its officers, agents, successors, and assigns, shall:

## 1. Cease and desist from:

(a) Discouraging membership in, or activities on behalf of, International Ladies' Garment Workers' Union, Local 451, or any other labor organization of its employees, by refusing to rehire or otherwise discriminating against employees in regard to their hire or tenure of employment, or any term or condition of employment.

(b) Threatening employees with trouble or harm as a consequence of signing union authorization cards.

(c) Misrepresenting to its employees the circumstances under which union authorization cards may be made public.

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

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

(a) Offer immediate employment to Roy Nell Mass and make her whole for any loss of pay suffered by reason of the discrimination against her in the manner set forth in this Decision under the heading "The Remedy."

(b) Preserve and, upon request, make available to the Board, or its agents, for inspection and reproduction, all payroll records, social security reports, timecards, personnel files, and other records necessary to analyze, compute and determine the amount of backpay to which Roy Nell Mass may be entitled under the terms of this Decision.

(c) Post at its plant in Mesa, Arizona, copies of the attached notice marked "Appendix."<sup>10</sup> Copies of said notice on forms to be provided by the Regional Director for Region 28, shall, after being duly signed by Respondent's representative, be posted by the Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices 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.

<sup>10</sup>In the event that this Recommended Order be 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>11</sup>In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify the Regional Director for Region 28, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

(d) Notify the Regional Director for Region 28, in writing, within 20 days from the date of the receipt of this Trial Examiner's Decision what steps the Respondent has taken to comply with the foregoing Recommended Order.

IT IS FURTHER RECOMMENDED that unless within 20 days from the date of the receipt of this Trial Examiner's Decision the Respondent shall notify said Regional Director in writing, it will comply with the foregoing Recommended Order,<sup>11</sup> the National Labor Relations Board issue an Order requiring Respondent to take the aforesaid action.

## 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 discourage membership in or activities on behalf of International Ladies' Garment Workers' Union, Local 451, by refusing to rehire or otherwise discriminating against employees with regard to their hire or tenure of employment, or any term or condition of employment.

WE WILL NOT threaten employees with trouble or harm as a consequence of signing union authorization cards.

WE WILL NOT misrepresent the circumstances under which union authorization cards may be made public.

WE WILL offer immediate employment to Roy Nell Mass and make her whole for any loss of pay she may have suffered by reason of the discrimination against her.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of the above-named Union or any other labor organization.

KELLWOOD CO.  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_ (Representative) \_\_\_\_\_ (Title)

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, Federal Bldg. and US Court House, 500 Gold Avenue, Room 7011, P.O. Box 2146, Albuquerque, New Mexico 87101, Telephone 247-0311, Ext. 2556.