

**Wray Electric Contracting, Inc. and Wilbur A. Shreeve. Case 9-CA-8044**

May 21, 1974

**DECISION AND ORDER**

BY MEMBERS JENKINS, KENNEDY, AND  
PENELLO

On January 24, 1974, Administrative Law Judge John F. Corbley issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Wray Electric Contracting, Inc., Lancaster, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

**DECISION**

**STATEMENT OF THE CASE**

JOHN F. CORBLEY, Administrative Law Judge: A hearing was held in this case on November 29, 1973, at Lancaster, Ohio, pursuant to a charge filed by Wilbur A. Shreeve, an individual, on September 27, 1973, and served on Respondent on October 1, 1973, and a complaint and notice of hearing dated November 13, 1973, issued by the Acting Regional Director for Region 9 of the National Labor Relations Board, which was likewise duly served on Respondent. The complaint alleges essentially that Respondent has violated, and is violating, Section 8(a)(1) and (3) of the Act by discharging the Charging Party, Wilbur A. Shreeve, because the latter engaged in certain activities on behalf of Local Union No. 683, International Brother-

<sup>1</sup> At the conclusion of the hearing, I closed the record except for leaving open exh 3 for Respondent, such exhibit to be the Respondent's reply to the General Counsel's motion to strike paragraph 9 of Respondent's answer to the complaint. In said paragraph 9, Respondent had asserted a *Collyer* defense (*Collyer Insulated Wire*, 192 NLRB 837).

On December 11, 1973, I received from Respondent's counsel a copy of a letter dated December 7, 1973, from Respondent's counsel to counsel for the General Counsel wherein the former withdrew Respondent's *Collyer*

hood of Electrical Workers (sometimes hereinafter referred to as the Union), and, more particularly, for the reason that the Charging Party filed a complaint against Respondent with the United States Department of Labor alleging that certain conditions of employment at Respondent's Ralston Purina jobsite at Lancaster, Ohio, were unsafe in violation of the Occupational Safety and Health Act of 1970. In its answer, duly filed, to the complaint, Respondent denied the commission of any unfair labor practices.

For reasons, which will appear hereinafter, I find and conclude that Respondent discharged Wilbur A. Shreeve in violation of Section 8(a)(3) and (1) of the Act.

At the hearing the General Counsel and Respondent were represented by counsel. All parties were given full opportunity to examine and cross-examine witnesses, to introduce evidence, and to file briefs. The parties waived oral argument at the conclusion of the hearing and Respondent and General Counsel have filed briefs received by me on December 28, 1973, and January 2, 1974, respectively.

Upon the entire record<sup>1</sup> in the case, including the briefs, and from my observation of the witnesses, I make the following:

**FINDINGS OF FACT**

**I. THE BUSINESS OF RESPONDENT**

Respondent is an Ohio corporation which is engaged in the electrical contracting business. One of Respondent's places of business is in Lancaster, Ohio, and is the only facility of Respondent involved in this proceeding.

During the past 12 months, which is a representative period, Respondent had a direct inflow in interstate commerce of goods and products valued in excess of \$50,000 which it purchased and caused to be shipped to its place of business in Lancaster, Ohio, directly from points located outside the State of Ohio.

At all times material herein, Respondent is, and has been, an employer as defined in Section 2(2) of the Act, engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

At all times material herein, Local Union No. 683, International Brotherhood of Electrical Workers, is and has been a labor organization as defined in Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. Respondent's Supervisory Structure**

Respondent's president is Richard Wray. At the Ralston

defense and joined in General Counsel's motion to strike said defense as it appears in paragraph 9 of the answer to the complaint. General Counsel has acknowledged receipt of this letter. I hereby receive this letter into evidence as Resp Exh 3 and place said letter and its envelope in Respondent's exhibit file. The record of the hearing is hereby closed. Further, I hereby grant the motion of counsel for the General Counsel, now joined in by Respondent, to strike paragraph 9 of the answer to the complaint.

The record is also noted and corrected

Purina site in Lancaster, Ohio, here involved, Respondent's project manager was, at all times relevant hereto, William Jansen, Jr., and its general foreman, at all times relevant hereto, was Herbert Baker. Reporting to Baker were various foremen including Merrill, Knapp, and, until the morning of the Charging Party's discharge on September 7, 1973, Vargo.

Respondent admits, and I find, that Jansen and Baker are, and have been, agents of Respondent, acting on its behalf, and supervisors within the meaning of Section 2(11) of the Act.

### B. Background and Sequence of Events

Respondent has been the electrical subcontractor of the Rosendahl Corporation at the latter's Ralston Purina project in Lancaster, Ohio, since sometime before August 1, 1973. On July 23, 1973, Respondent consented in writing to be bound by the collective-bargaining agreement between the Central Ohio Chapter, National Electrical Contractors Association, and the Union and amendments thereto. This consent remains in effect until May 31, 1975. The current agreement between the Central Ohio Chapter, National Electrical Contractors Association, and the Union is effective from September 5, 1973, until May 31, 1975.

Prior to August 1, 1973, the Union had been receiving complaints from its members and its steward, Barnecut, about safety conditions at the Ralston Purina project in Lancaster, Ohio, including but more recently, conditions of employment with Respondent. These complaints as well as his own inspection of this jobsite prompted Daniel Bricker, the Union's business manager, to speak to the Charging Party, Shreeve, on August 1, 1973.

On that date Shreeve received a referral slip from the Union's assistant business manager (job dispatcher), who also told Shreeve to wait at the Union's hiring hall until Bricker arrived to give Shreeve certain instructions. Shreeve then met and spoke with Bricker in the adjacent parking lot about 8:45 a.m. that same day.

Bricker told Shreeve about the complaints received from union members about unsafe conditions at the Ralston Purina project and also advised Shreeve that he desired Shreeve to be his, Bricker's, safety representative at the job and to examine the safety situations there. Bricker advised Shreeve that, if Shreeve discerned what Shreeve considered to be safety violations, then Shreeve should file a report with the Occupational Safety and Health Administration of the Department of Labor of the United States Government (hereinafter OSHA) and that Bricker would support Shreeve's action.<sup>2</sup>

<sup>2</sup> These findings are based on the credible and corroborative testimony of Bricker and Shreeve in this regard.

<sup>3</sup> Jansen is not mentioned in Shreeve's testimony as to this incident and Jansen testified that he knew that Shreeve had been hired but that he had no conversation with Shreeve on August 1.

<sup>4</sup> This finding is based on Shreeve's testimony as corroborated by Barnecut. While Shreeve was, at times, defensive in his testimony, his overall manner was sincere and I have credited him in a number of the essential aspects of his testimony. Barnecut testified in a forthright and straightforward manner and was, in my judgment, a generally credible witness. I have discredited Baker's denial that Shreeve stated that he, Shreeve, was there to check on safety matters. Baker's tone on the stand was argumentative and his testimony was not, in my judgment, offered in as

straightforward a manner as that of Barnecut nor, generally, as that of Shreeve. While Baker testified that he was not shown a referral slip for several days after Shreeve reported for work, I find this explained by Barnecut's credible testimony that he, Barnecut, was shown the slip upon Shreeve's arrival and thereafter it may have been misplaced temporarily. Shreeve stated he showed the slip to Baker or Barnecut when he went to the jobsite on that day.

Shreeve has had a considerable amount of training in safety matters. To begin with he is a journeyman wireman of 33 years' experience. As early as 1957 or 1958 he has served on the Union's safety committee and has been its chairman. He has served on committees of the Labor Conference of the National Safety Council. He has taken safety courses from that Council, from the United States Departments of Labor and Health, Education and Welfare, and seminars at several universities. He has received a certificate from the Secretary of Labor whereby he is authorized to conduct both a 10-hour and a 30-hour construction safety program for union members and to certify those who have satisfactorily completed it. He has, in fact, conducted safety courses and has trained some 400 people in the 10-hour course and 60 in the 30-hour course.

Shreeve reported to the Ralston Purina plant in Lancaster, Ohio, about noon on August 1, 1973. After Shreeve got there he went to Respondent's office where he met with Project Manager Jansen, General Foreman Baker, and Union Steward Barnecut, but Jansen thereafter left.<sup>3</sup> Shreeve gave Barnecut his referral slip and informed Barnecut and Baker that he, Shreeve, had been sent there by Bricker to work as a journeyman wireman and to observe and report on any safety violations.<sup>4</sup> Although no request had been made to the Union for a referral of a wireman at that time Shreeve was nevertheless hired, inasmuch as there was work to do. After Shreeve was hired, foreman Vargo arrived on the scene and assigned Shreeve some work at the site.

During part of the rest of the day, Shreeve went around the project with a pad and pencil noting what he considered to be safety violations. While Shreeve was so engaged he was observed by Budgen (the project engineer of Rosendahl Corporation, the general contractor for the Ralston Purina job) who called Baker's attention to this activity. Baker then contacted Barnecut, the union steward, and Baker and Barnecut later found Shreeve going around talking to employees and making notes on a pad. Baker spoke to Barnecut about Shreeve's actions and Barnecut said he would take care of it. Baker did not, however, speak to Shreeve about the matter.<sup>5</sup>

At his home on that evening or the following evening Shreeve prepared a complaint about what he believed to be safety hazards on the Ralston Purina job. In this complaint, wherein Shreeve named Respondent as the employer, Shreeve went on to say that the complaint was directed against the prime contractor, Rosendahl Corporation, because, Shreeve stated in the complaint, the items complained of were under the control of the latter employer. On August 3, 1973, this complaint was filed with

<sup>5</sup> The findings as to this incident are based on the admissions of Baker in his testimony. Baker's awareness on this occasion that Shreeve was talking to employees and making notes and Baker's failure to press an inquiry into what Shreeve was doing nor to admonish Shreeve further suggest, contrary to Baker's denial (see previous footnote), that Baker well knew what Shreeve was doing, i.e., checking on safety violations.

the area director of OSHA at Columbus, Ohio. Shreeve stated on the complaint that he did not desire his name to be revealed.<sup>6</sup>

About a week later Jansen told Barnecut that he, Jansen, thought Shreeve had come down there to spy on the whole job.<sup>7</sup>

Thereafter, Shreeve continued to work for Respondent until his discharge on September 7, 1973. During his employment at least some of Shreeve's assignments involved working on lights for the parking lot, wiring doors in the warehouse, and installing rods and plates. On the last day of his employment, September 7, 1973, Shreeve was performing certain duties which required him to stand, at times, on a scaffold, about which more will be said, *infra*. Shreeve's performance and comments on it will be discussed later in this Decision when I consider Respondent's defenses and make my "Concluding Findings."

One aspect of Shreeve's performance, however, should be mentioned at this juncture because of its bearing on Respondent's awareness of Shreeve's knowledge of safety laws. During his 5 1/2 weeks of employment with Respondent Shreeve on a number of occasions was seen by Budgen, Baker, and Jansen walking around carrying his hard hat (protective helmet) instead of wearing it on his head.<sup>8</sup> Baker ordered Shreeve several times to wear his hat. To this Shreeve replied that under the safety act there was no need to wear a hard hat because the ceiling would not fall in on him. After a few of these experiences Baker warned Shreeve that the next time Baker caught Shreeve without a hard hat Shreeve would be fired. Shreeve persisted in this practice thereafter, despite Baker's warning and Baker was aware that Shreeve did so.<sup>9</sup>

Returning to the last day of Shreeve's employment, when he reported for work on the morning of September 7, 1973, he went to the so-called gang box, which is a locked container wherein the toolboxes of the employees and Respondent's tools were stored for safekeeping. The gang box was locked. Since Shreeve did not have keys to this container he stood there waiting for his foreman, Vargo, who did. Vargo arrived some 15 minutes later, about 7:40 or 7:45 a.m., and informed Shreeve that he, Vargo, had just been demoted by Respondent to journeyman status. Vargo also told Shreeve that he, Vargo, did not have the keys to the gang box. The two men then waited for the new foreman to arrive with the keys.

<sup>6</sup> These findings are based on the full testimony of Shreeve which I find to be credible in this regard.

<sup>7</sup> Barnecut credibly so testified I do not credit Jansen's denial. Jansen twice denied he made the comment, first in answer to a question by the General Counsel, then in answer to my repetition of the question. However, after his first denial Jansen appeared to have second thoughts and sought to obtain clarification from the General Counsel about the question, which the General Counsel refused.

<sup>8</sup> Baker credibly testified that Budgen so informed him, Baker

<sup>9</sup> These findings are based on the credible testimony of Baker and Jansen in this regard. Shreeve admitted that he did not wear his safety hat all the time on the job, explaining on the stand, as he did to Baker, that the safety law did not require it where the ceiling protected him

<sup>10</sup> These findings are based on the credible testimony of Shreeve as to this incident except for the time of Vargo's arrival on the scene. The finding as to the latter is based on the testimony of Baker as to the time he sent Vargo to the second floor to work with Shreeve and Shreeve's testimony that Vargo arrived about 15 minutes after Shreeve arrived. Shreeve's normal starting time was 7:30 and he was paid from that time on that day less a half

Sometime thereafter, about 8:30 a.m., Baker the general foreman, arrived with Merrill, the new foreman. Baker asked Vargo and Shreeve why they were standing around. Shreeve replied that they could not work because their tools were locked up and asked where the foreman was. Baker said that Merrill would be their foreman and directed them to go to work.<sup>10</sup>

On that same day, at least by lunchtime, a Mr. Maxy from the Columbus, Ohio, compliance office of OSHA arrived on the job. Also on that same day Jansen, Respondent's project manager, was given a copy of Shreeve's OSHA complaint—the copy being furnished to Jansen by Rosendahl, the general contractor. This copy did not show the name of the person who filed the complaint.

Later that day Jansen and Barnecut were talking about the job and Jansen told Barnecut he had something to show Barnecut. Jansen then withdrew a document from an envelope which had been on his desk and showed it to Barnecut. The document was the complaint filed by Shreeve with OSHA. Jansen asked Barnecut if he had any comment, but Barnecut replied that he had none. Then Jansen stated to Barnecut "We know who sent that though, don't we?" Barnecut made no reply.<sup>11</sup>

The scaffold on which Shreeve was working on the last day or two of his employment did not in fact meet safety standards. After the OSHA representative came on the jobsite Barnecut and Baker came to Shreeve and told him to put a guard rail on the scaffold, which he did.<sup>12</sup>

At 3 p.m. on September 7, 1973, Baker came to where Shreeve was working, gave Shreeve his check, and handed Shreeve a discharge slip. The normal quitting time is 4 p.m. When handing this slip to Shreeve, Baker made no comment and, for his part, Shreeve merely said thanks, shook hands with Baker, and left. The discharge slip stated that the reason for Shreeve's discharge was "Work Unsatisfactory."<sup>13</sup>

After his discharge Shreeve reported back to the office of the business manager of the Union. The business manager advised Shreeve to return to the job on Monday which Shreeve did but he was not rehired by Respondent. Shreeve also reported this to the business manager who then set up a meeting with representatives of Respondent in the union office for the following day or the next day.<sup>14</sup>

The meeting was held, as scheduled, at the Union's office

hour for lunch. I deem Shreeve's estimate of the time of Vargo's arrival—about 8 to 8:30 a.m.—as inaccurate in the above circumstances. Vargo did not testify

<sup>11</sup> These findings are based on the credible testimony of Barnecut in this regard. Jansen admitted that the incident occurred but stated that to his recollection he rather asked Barnecut the question "I wonder who this might have been?" In not crediting Jansen's version of the question I have considered not only Respondent's prior knowledge of Shreeve's safety mission at the project but also its knowledge that Shreeve went around talking to employees carrying a pad and pencil in his hand on the first day of his employment and its knowledge that Shreeve flaunted his understanding of the safety law when told to wear his hard hat. In the same vein I note that the question, as Jansen testified to it, could if stated in a sarcastic manner convey the same meaning as the question as Barnecut testified to it

<sup>12</sup> Shreeve credibly so testified.

<sup>13</sup> The findings in respect to this last incident are based on the credible testimony of Shreeve in this regard as essentially corroborated by Baker

<sup>14</sup> Shreeve credibly so testified.

in Columbus, Ohio, on the Tuesday or Wednesday following Shreeve's discharge. In attendance were Shreeve, Bricker (the union business manager), Wray (Respondent's president), Baker, Jansen, and Surnbrock (Respondent's engineer estimator). At this meeting the attendees discussed the discharge of Shreeve and the possible discharge of several other employees of Respondent.<sup>15</sup> The only reasons given at this meeting for Shreeve's discharge were his lack of productivity and, specifically, his work on the warehouse doors, previously referred to, and his standing around by the gang box, where the tools were stored, on the morning of the last day of his employment.<sup>16</sup> Bricker mentioned to Baker at this meeting that Shreeve had been sent down to the Ralston Purina project to check on safety conditions.<sup>17</sup>

Although no other employee was discharged during the 2 1/2 weeks following this meeting, Shreeve was not reinstated. After the meeting was over Shreeve told Wray in the parking lot outside the union office that he, Shreeve, was contemplating filing charges with OSHA because Respondent had discharged him for making a report to OSHA.

Shreeve filed the charge which gave rise to this proceeding on September 27, 1973, as previously noted.

### C. Respondent's Defenses

In its brief to me Respondent asserts that Shreeve was discharged because of his "poor work habits." More particularly, Respondent asserts, pointing out testimony of its witnesses, that: Budgen, the Rosendahl representative, and Baker and Jansen frequently observed Shreeve at the jobsite not working at times when he should have been; Baker observed Shreeve not wearing his hard hat at the site although rules of the jobsite required that it be worn; Shreeve took too long to do the parking lot lighting project and the warehouse door project and, at the latter, this was due to Shreeve's failure to preposition the materials with which to do his work; Shreeve stood around at the gang box for an hour on the last day of his employment; productivity tests run on Shreeve showed that his performance was lower than that of other employees and Shreeve's attendance record was poor. At the hearing testimony was also adduced that Shreeve caused an unsafe condition on the last day of his employment by leaving tools on his scaffold at times when he stepped off the scaffold during the day.

I will treat with each of these defenses, *seriatim*.

<sup>15</sup> Shreeve testified that the termination of other people was also discussed. I so find. According to Respondent's attendance records, introduced at the hearing, no other employees hired by Wray for the Ralston Purina project were discharged before September 25, 1973. I also so find. Baker admitted in his testimony that he told Barnecut on a couple of occasions that Jansen wanted Shreeve and others discharged. Jansen admitted in his testimony that there were three to five individuals besides Shreeve, whom Respondent desired to discharge at that time.

<sup>16</sup> These findings are based on the credible testimony of Shreeve in this regard and are not essentially disputed by the testimony of Baker, Jansen, or Wray.

1. The allegation that Shreeve was seen on a number of occasions not working when he should have been

Budgen (of Rosendahl), who made frequent inspections of the jobsite each day, and Baker and Jansen all observed Shreeve not working at times he should have been and Budgen frequently complained to Respondent about this fact.<sup>18</sup>

I do not, however, deem it necessary to go into extensive detail about the times when this occurred or what, if anything, Respondent's officials did about it. For Budgen also complained about other Respondent employees standing around not working and Baker and Jansen, as they both admitted, considered discharging some three to five other Respondent employees at the time Shreeve was discharged for the reason, as Jansen described it, that "they were not giving us a fair shake." Yet the only employee discharged during the period August 1 to September 25, 1973 (a date 2 1/2 weeks after Shreeve's discharge), was Shreeve.

Since other employees were not discharged for standing around idle I do not believe that this was a motivating factor in Shreeve's discharge. Moreover, this matter was not specified in Shreeve's discharge notice and was not mentioned to him at the time of his discharge. Nor was it mentioned, specifically, when Shreeve's termination and the possible termination of other Respondent employees was discussed at the meeting in the union office, previously mentioned, which took place on the Tuesday or Wednesday after Shreeve's discharge and was attended by representatives of Respondent and Bricker, Barnecut, and Shreeve.<sup>19</sup>

2. Shreeve's failure to wear a hard hat at all times

I have already found that Shreeve did not wear a hard hat at all times on the job. I find, however, that this was not a motivating factor in his discharge for, again, it was not mentioned at the aforementioned meeting in Bricker's office, which occurred after Shreeve's discharge, nor does it literally relate to the generic reason reflected on Shreeve's discharge slip; i.e., "work unsatisfactory." Moreover, Baker admitted that after warning Shreeve that Shreeve would be fired the next time he was found at the site without his hard hat on, Shreeve nonetheless continued this practice and Baker was aware of it.

3. Shreeve allegedly spent too long working on the parking lot lighting project

I reject this as being a causative factor in Shreeve's

<sup>17</sup> Baker credibly so testified.

<sup>18</sup> Budgen, Baker, and Jansen, variously, credibly so testified. Shreeve testified that no complaints were made to him by Jansen, Baker, or Respondent's foreman that his "work" was "unsatisfactory."

<sup>19</sup> Shreeve credibly testified that the only matters mentioned by officials of Respondent at this meeting were Shreeve's standing around by the gangbox on the morning of his discharge—which will be separately considered here, as it is indeed separately argued in Respondent's brief—and the length of time Shreeve took for the warehouse door job. The testimony of Respondent's witnesses does not essentially dispute Shreeve's testimony as to what was said by Respondent's officials at this meeting.

discharge. Again it was not mentioned in the postdischarge meeting at Bricker's office. Further, I note that his was the second project on which Shreeve worked (the first being a project inside the building assigned to Shreeve by Vargo on Shreeve's first day). Shreeve handled this assignment during the first week of his employment.<sup>20</sup> About the time this job was completed, Union Steward Barnecut confronted Shreeve's foremen, Vargo and Knapp, and also Baker and asked them about Shreeve's performance. None made any complaint about Shreeve at that time.<sup>21</sup>

4. Shreeve allegedly took too long installing wiring on the overhead warehouse door

In all the circumstances, I reject this as being a reason for Shreeve's discharge, although this matter was, in fact, mentioned at the instant meeting in Bricker's office and, according to Jansen, it was also made the subject of a time study by Respondent to evaluate Shreeve's performance against the normal labor cost for this type of job.

My bases for rejecting this defense are several.

Primarily, I assign no weight to the testimony in respect to this time study. The claimed time study itself, which would have been the strongest evidence of its conclusions, was not produced at the hearing thus creating the inference, which I draw, that it would not support the testimony<sup>22</sup> nor was it mentioned to Shreeve until after his discharge. Further there is no explanation in the record how Shreeve's aliquot portion of the job could be measured since he and another journeyman were carrying out the assignment together.<sup>23</sup>

Finally, I reject this as being a reason for Shreeve's discharge, in the circumstances, because there is no showing that any action was taken against Shreeve nor any warning given to him at the time, whereas he was given at least two assignments thereafter—installing rods and plates and, at the end of his employment, the job on the scaffold.

5. Shreeve's standing around the gang box for an hour on the last day of his employment

All things considered, I also reject this as being a reason for Shreeve's discharge. For Vargo likewise stood around for all but about 10 to 15 minutes of the time Shreeve stood there. Vargo, who was discharged sometime after September 25, 1973, was not terminated for this reason, as Baker admitted.<sup>24</sup> Yet, according to Baker, Vargo had a key to the gang box. Shreeve's failure to get the key from Vargo is explained by Shreeve's credible testimony that Vargo told Shreeve on that last morning that he, Vargo, did not have the key (regardless whether Vargo's statement to Shreeve may have been inaccurate). Jansen testified that all the foremen have keys to this box and that employees

<sup>20</sup> Baker so admitted

<sup>21</sup> Barnecut credibly so testified. To the extent Baker's testimony is to the contrary, I do not credit it

<sup>22</sup> Cf. *Interstate Circuit v. U.S.*, 306 U.S. 208, 226

<sup>23</sup> Jansen admitted that Shreeve and another journeyman worked on this assignment

<sup>24</sup> Baker testified that Budgen told Baker that he, Budgen, would not approve any timesheet after September 7, 1973, which had Shreeve's name on it. Budgen so informed Baker, according to Baker, when Budgen reported to Baker that he saw Shreeve standing around the gang box for an

hour on that day. In this regard, Budgen testified simply that he saw Shreeve standing at the gang box "one morning" for 1 hour and 10 minutes and that he discussed Shreeve's behavior with officials of Respondent on several occasions. However, even if Budgen gave the ultimatum, as Baker testified, this would not explain Respondent's failure to take similar action against Vargo, even though Baker was aware that both Shreeve and Vargo were standing around not working on that occasion. And, according to Baker, Budgen could not be expected to tolerate "two guys just standing there."

6. The two productivity studies which, allegedly, showed that Shreeve's performance was below standard

I likewise reject these alleged productivity studies as being a motivating factor in Shreeve's discharge. The claimed productivity study in connection with the warehouse door has already been discussed, *supra*. The other study, according to Jansen, related to Shreeve's performance installing rods and plates. I attach no significance to Jansen's testimony in connection with the latter study which, according to Jansen, was made about a week or 10 days before Shreeve's discharge, for the reasons that it was not mentioned to Shreeve at the time, was not mentioned, specifically, at the meeting in Bricker's office, and was, in any event, not produced in evidence.

7. Shreeve's claimed poor attendance record

I likewise reject this as a reason for Shreeve's discharge. It does not logically relate to "unsatisfactory work," the only reason appearing on Shreeve's discharge slip, nor was it mentioned at the meeting in Bricker's office. All absences were reported in advance by Shreeve to Barnecut or a foreman, which was the custom at the job.<sup>25</sup> Finally, a number of employees worked less than 40 hours in several weeks during the time of Shreeve's employment, and Mosley, particularly, who was still employed at the time of the hearing, had a worse attendance record than Shreeve's during the same period.

8. The claim that Shreeve left tools on the scaffold in an unsafe manner on the last day of his employment

Baker admitted that this was not a reason for Shreeve's discharge.

#### D. Concluding Findings

I have rejected each of the reasons offered by Respondent as being the motivating causation of its discharge of Shreeve. I find rather that Shreeve was discharged because he filed a complaint with OSHA, asserting that conditions of employment at the Ralston Purina project at Lancaster, Ohio, herein involved, violated Federal safety regulations.

hour on that day. In this regard, Budgen testified simply that he saw Shreeve standing at the gang box "one morning" for 1 hour and 10 minutes and that he discussed Shreeve's behavior with officials of Respondent on several occasions. However, even if Budgen gave the ultimatum, as Baker testified, this would not explain Respondent's failure to take similar action against Vargo, even though Baker was aware that both Shreeve and Vargo were standing around not working on that occasion. And, according to Baker, Budgen could not be expected to tolerate "two guys just standing there."

<sup>25</sup> Shreeve credibly so testified

The very timing of Shreeve's discharge suggests that this was the reason for it.<sup>26</sup> Thus, on that same last day a copy of Shreeve's complaint to OSHA was given to Jansen by Rosendahl. Jansen was also aware that Earl Maxy, the compliance officer from OSHA, was at the site that day and that Jansen was supposed to be available to make an inspection tour with Maxy. Action was taken by Respondent to put a railing on Shreeve's scaffold as the result of the visitation by the OSHA representative. That all this was a matter of concern to Respondent and particularly Jansen is demonstrated by Jansen's calling of Barnecut's attention to it at the time.<sup>27</sup>

Respondent defends that it did not learn that Shreeve was the author of the OSHA complaint until the Tuesday or Wednesday following Shreeve's discharge. I have rejected this defense based on testimony of Shreeve and Barnecut, which I have credited over that of Baker, that Shreeve announced his safety mission at the site to Baker on the day Shreeve was hired.

Respondent further defends, however, that if Shreeve in truth so informed Baker at the outset, there would have been no purpose in Shreeve's failure to put his name on the OSHA complaint. I likewise reject this contention. For, whatever his motives, the law gave Shreeve the right to remain anonymous and he elected to do so. But the complaint to OSHA, in any event, stated that Rosendahl (and not Respondent) was responsible for the claimed safety violations.<sup>28</sup> And it does not appear that Shreeve ever informed officials of Rosendahl of his intention to examine safety conditions at the site. Shreeve may well have had reason to fear Rosendahl, because, from the first day of Shreeve's employment, the omnipresent Budgen observed Shreeve walking around with a pad and pencil in his hand and Budgen promptly called this matter to Baker's attention before the latter had Union Steward Barnecut take care of it. Shreeve did not prepare the complaint until that night or the next. This same incident involving Shreeve's perambulation with a pad and pencil belies Respondent's claim that it did not know that Shreeve was the author of the OSHA complaint. Thus, even if Shreeve had not told Baker of Shreeve's safety mission on the first day of Shreeve's employment, Baker promptly learned, and in fact observed, that Shreeve was walking about with his pad and pencil talking to employees on that very afternoon.

Later in Shreeve's employment, whenever Baker had occasion to speak to Shreeve about the latter's failure to wear his safety hat, Shreeve told Baker that "under the safety Act" he did not have to wear a hard hat because the ceiling was not going to fall in on him. Hence Shreeve's expertise in safety matters—or claims of such expertise—were well known to Respondent before Shreeve's discharge.

In addition to the timing of Shreeve's discharge, the

<sup>26</sup> See, e.g., *Pine Products Corporation*, 153 NLRB 581, enfd 361 F.2d 480 (C.A. 9, 1966); *McCormick Longmeadow Stone, Inc.*, 155 NLRB 577, enfd. 374 F.2d 81 (C.A. 1, 1967); *N. L. R. B. v. Montgomery Ward & Co., Inc.*, 242 F.2d 497, 502 (C.A. 2, 1957), cert. denied 355 U.S. 829 (1957).

<sup>27</sup> Even if I were to accept Jansen's version of his exchange with Barnecut on this occasion—which I have not done—the facts would still remain that Jansen raised the matter with Barnecut and was interested in the identity of the individual who filed the complaint

multiplicity of other reasons now offered by Respondent to explain its motivation for terminating Shreeve—which were not mentioned to Shreeve when he was given his termination slip (which merely stated "unsatisfactory work") and some of which even likewise not mentioned at the meeting several days later in Bricker's office—further suggest that the reason for discharge was his filing of the complaint with OSHA rather than this litany of complaints against him, many belatedly offered.<sup>29</sup>

The question then becomes whether Shreeve's act in filing the complaint with OSHA is a concerted or union activity. I conclude that it is.

The OSHA complaint dealt with safety conditions affecting all of the Union's members on the job. Indeed, Shreeve's investigation of these safety conditions, which culminated in his filing of that complaint, was initiated at the request of the Union's business manager, Bricker. Bricker told Shreeve that union members had grieved to Bricker about safety conditions at the site—as in fact, they had—hence Bricker was sending Shreeve to this job as the Union's representative, with a purpose of examining these conditions. And, as I have found, Shreeve informed Baker on the first day of Shreeve's employment that Shreeve was undertaking this mission at Bricker's behest.

Bricker further told Shreeve, if Shreeve found any violations, to take action by filing a report with OSHA.<sup>30</sup> Such a report would necessarily seek to vindicate the complaints to Bricker by union members about safety conditions at the jobsite and, if these conditions were improved after investigation by OSHA, such a result would benefit all the Union's members working on the job.

I therefore conclude that Respondent discharged Shreeve because Shreeve filed a complaint with OSHA, and that Respondent thereby violated, and continues to violate, Section 8(a)(1) and (3) of the Act.<sup>31</sup>

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

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

#### V. THE REMEDY

The recommended Order will contain the conventional provisions for cases involving findings of interference, restraint, and coercion and unlawful discharge in violation of Section 8(a)(1) and (3) of the Act. This will require Respondent to cease and desist from the unfair labor practices found and to post a notice to that effect which will also state the affirmative action Respondent will be

<sup>28</sup> The complaint must have first been served on Rosendahl because Rosendahl gave Baker the copy Respondent had.

<sup>29</sup> *Fotomat Corporation*, 207 NLRB No. 65.

<sup>30</sup> The collective-bargaining agreement between Respondent and the Union acknowledges the Union's legitimate interest in the safety conditions under which its members work. See art. V, sec. 2, thereof.

<sup>31</sup> *C & I Air Conditioning, Inc., McKeon Construction*, 193 NLRB 911; cf. *Lenkurt Electric Co., Inc.*, 182 NLRB 510, enfd 459 F.2d 635 (C.A. 9, 1972).

required to take to remedy its discharge of Wilbur A. Shreeve. Thus, Respondent will be required to offer Shreeve reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges. He will be made whole for any loss of earnings he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he would have earned from the date of the offer of reinstatement, less net earnings, if any, during such period, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, with 6 percent interest thereon as prescribed by *Isis Plumbing & Heating Co.*, 138 NLRB 716.

It will also be recommended, in view of the nature of the unfair labor practices in which Respondent has engaged (see *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536), that Respondent be ordered to cease and desist from infringing in any manner upon the rights guaranteed employees by Section 7 of the Act.

#### CONCLUSIONS OF LAW

1. Respondent is engaged in commerce and the Union is a labor organization all within the meaning of the Act.

2. By discharging Wilbur A. Shreeve because of his activities on behalf of the Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

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

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

#### ORDER<sup>32</sup>

Respondent, Wray Electric Contracting, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in, or activities in behalf of, Local Union No. 683, International Brotherhood of Electrical Workers, or any other labor organization, by discriminating in regard to hire and tenure of employment or in any other manner in regard to any term or condition of employment of any of Respondent's employees in order to discourage union membership or union or other concerted activities.

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

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

(a) Offer Wilbur A. Shreeve immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and

make him whole for any loss of pay he may have suffered as the result of the discriminatory discharge in the manner set forth in The Remedy section of the Administrative Law Judge's Decision herein.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business in Lancaster, Ohio, copies of the attached notice marked "Appendix."<sup>33</sup> Copies of this notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, 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 posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days of the receipt of this Order, what steps the Respondent has taken to comply herewith.

<sup>32</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>33</sup> In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

After a trial at which all sides had the chance to give evidence, it has been decided that we, Wray Electric Contracting, Inc., have violated the National Labor Relations Act and we have been ordered to post this notice.

The National Labor Relations Act, gives you, as employees, certain rights, including the right to self-organization, to form, join, or help unions, and to bargain through a representative of your own choosing.

Accordingly, we give you these assurances:

WE WILL NOT do anything which interferes with your rights above except to the extent that said rights are affected by an agreement requiring membership in a labor organization, as authorized in Section 8(a)(3) of the Act, as amended.

WE WILL NOT discharge you or take other reprisal action against you, because you engage in legally protected concerted activities or because you join, support, or give assistance to Local Union No. 683,

## DECISIONS OF NATIONAL LABOR RELATIONS BOARD

International Brotherhood of Electrical Workers, or any other union.

WE WILL offer to reinstate Wilbur A. Shreeve to his job or, if that job no longer exists, to a substantially equivalent position, with full seniority and all other rights and privileges as the Board has found that he was discharged because he engaged in protected concerted activities on behalf of the above-named Union.

WE WILL also make up all pay Wilbur A. Shreeve lost because of his discharge with 6 percent interest.

WRAY ELECTRIC  
CONTRACTING, INC.  
(Employer)

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

This is an official notice and must not be defaced by anyone.

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.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 2407, Suite 3003, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513-684-3686.