Wood Transformers, Inc. *and* Alumimum Workers International Union, AFL–CIO. Cases 21–CA–14125, 21–CA–14240, and 21–RC–14330

November 23, 1976

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS JENKINS, PENELLO, AND WALTHER

On August 20, 1976, Administrative Law Judge George Christensen issued the attached Decision in this proceeding. Thereafter, the 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,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

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 the Respondent, Wood Transformers, Inc., Orange, California, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

IT IS FURTHER ORDERED that the election conducted in Case 21–RC–14330 on October 31, 1975, be, and it hereby is, set aside.

[1] In sec II,B,1, of his Decision the Administrative Law Judge states that Smith first became involved in union activities on September 30, 1975, whereas the record discloses that the date referred to should be August 30, 1975

[2] As no exceptions have been filed to the principal finding on the 8(a)(1) allegations, Member Walther adopts them He does not adopt, however, the Administrative Law Judge's conclusion, to which Respondent does except, that President Woods' statement to employees on October 11, 1975, was an implied threat of job loss Woods gave the employees a candid picture of the Company's economic situation and a true comparison of its wages with that of its competitors Member Walther views the statement as in no way "a threat of retaliatory action" within the principles enunciated in *N L R B* v *Gissel Packing Co , Inc ,* 395 U S 575, 617–619 (1969) He holds that *Honeywell, Inc ,* 225 NLRB No 79 (1976) (Chairman Murphy and Member Walther dissenting), on which the Administrative Law Judge relied, is inapposite In that case the employer's statements were tied into the nonrecall of laid-off employees and so likely subject to interpretation that unionization would prevent recall He does not see Woods' frank statement as constituting a threat of unlawful reprisal

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge: On March 16, 17, and 18, 1976, I conducted a hearing at Santa Ana, California, to try issues raised by the objections of Aluminum Workers, International Union, AFL–CIO [1] to alleged company conduct by Wood Transformers, Inc.[2] affecting the election in Case 21–RC–14330 and companion issues raised by a consolidated complaint issued on December 31, 1975,[3] on the basis of a charge filed by the Union in Case 21–CA–14125 on November 5 and a charge filed by the Union in Case 21–CA–14240 on December 12.

With regard to the representation proceeding, on January 7, 1976, the Regional Director issued a report on the Union's objections to the election in which he consolidated those objections with the alleged unfair labor practices set forth in the consolidated complaint for hearing and directed that I issue credibility resolutions, findings of fact, and recommendations to the Board concerning both the objections to the election and the issues raised by the consolidated complaint.

The consolidated complaint and election objections alleged that the Company violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, and prevented a fair election by:

1. Issuing warning notices to and discharging an employee for engaging in union or other protected, concerted activities.

2. Creating the impression that the Company was engaging in surveillance of its employees' union or other protected, concerted activities.

3. Interrogating employees concerning their and other employees' union or other protected, concerted activities.

4. Threatening employees with discharge or other reprisals if they supported the Union and promising employees economic benefits for refraining from support of the Union

5. Threatening plant closure or other reprisals to discourage employees from supporting the Union.

6. Refusing to bargain with the Union as the representative of a majority of the Company's employees within an appropriate unit

With one exception,[4] the Union's objections to the election paralleled the unfair labor practice allegations.

At the outset of the hearing I granted the General Counsel's motion to withdraw those portions of the complaint asserting at times material the Union represented a

[1] Hereafter called the Union

[2] Hereafter called the Company

[3] Read 1975 after all further date references omitting the year

[4] The Union alleged that the presence and feared operation of a closed-circuit TV camera near the voting area on the date of the election prevented a free election The evidence produced at the hearing disclosed there was a closed-circuit TV camera covering the production area but it was not focused on the voting area nor in operation on the date of the election I recommend this objection be dismissed

majority of the Company's employees within an appropriate unit, the Union requested the Company bargain with it concerning the wages, hours, and working conditions of the Company's employees within that unit, and the Company violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union at its request.

During the course of the hearing the Company reiterated its prehearing motion to dismiss the complaint on the ground the General Counsel failed to comply with the Company's request for the prehearing affidavits of the witnesses the General Counsel interviewed prior to issuance of the complaint and the authorization cards the Union submitted in support of its petition for certification. That motion was denied by Administrative Law Judge Barker prior to the hearing. I see no basis for disturbing that denial and reaffirm it.

The Company denied committing the acts alleged in the consolidated complaint and objections to the election; the issues are whether the Company committed the alleged acts and, if so, whether by such commission the Company violated the Act and prevented a fair election.

The parties appeared by counsel at the hearing and were afforded full opportunity to produce evidence, examine and cross-examine witnesses, argue, and file briefs. Briefs have been received from the General Counsel and the Company.

Based upon my review of the entire record, observation of the witnesses, perusal of the briefs and research, I enter the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer admitted, and I find at times material the Company was a California corporation engaged in the manufacture and sale of transformers; the Company maintained a facility located at 810 North Lemon Street, Orange, California, for conducting its operations; and in the last 12 months the Company sold and shipped goods and products valued in excess of $50,000 directly to customers located outside of California.

On the basis of the foregoing, I find and conclude at all pertinent times the Company was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization, as those terms are defined in Section 2(2), (5), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES AND ELECTION MISCONDUCT

A. *Facts*

William R. Wood, Sr., at all times pertinent was the owner-president of the Company,[5] which he started in 1970. In 1972, the International Union of Electrical Workers was certified as the collective-bargaining representative of the Company's production and maintenance employees. A contract was executed between the Company and the IUE for a period extending from 1973 to 1974. At the end of the contract term (mid-1974), Patricia Smith, the alleged discriminatory dischargee in this case, secured the signatures of a majority of the employees to a petition seeking to decertify the IUE as the employees' collective-bargaining representative and filed that petition with the Regional Office. The IUE subsequently filed a disclaimer which the Regional Office accepted, revoking the IUE's certification. When Smith notified Wood of her success in securing the decertification, Wood gave her some money. In the period between the date the IUE was decertified (mid-1974) and Smith resigned (May 8, 1975), Smith received favored treatment from Wood.[6]

Smith returned to the Company's employ on July 1. At that time the Company did not employ a production foreman.[7] Many employees reported late and at times worked beyond the end of the shift to complete 8 hours. There was much fraternization among the employees, talk on the job, and inattention to work. Wood was an easygoing, indulgent employer, on a first-name basis with his employees.[8]

Since Wood was unable to be on the production floor much of the time,[9] he decided to install a closed-circuit TV to monitor the production floor from his office. The TV system was installed on July 10–11.

The employees were disturbed over the TV surveillance and dissatisfied with their wage scales. They complained to Smith about them Smith carried their complaints to Wood, commenting he would have better spent his money on wage increases instead of a TV system. Wood was unresponsive to the complaints.

The plant was shut down for vacation between July 19 and August 4.

On August 18, a production foreman interviewed and hired by Wood prior to the vacation shutdown, Anton Echiels,[10] commenced work. Wood instructed Echiels to increase production, tighten up operations, and stop the absenteeism and tardiness. Echiels soon began to require explanations from chronic absentees and late-reporting employees and to issue verbal warnings for repeated or unexcused absences and tardiness. He also stopped the employee practice of making up tardiness by working past the end of the regular shift hours.[11]

Smith was consistently late and absent after her July 1 rehire. She was absent on Monday, August 25, and late on Thursday, August 28. On the latter date, Echiels questioned Smith regarding her tardiness and accepted Smith's explanation of an alarm clock problem. He informed

[5] All further references to Wood refer to Wood, Sr The complaint alleged, the answer admitted, and I find at all times pertinent Wood was a supervisor and agent of the Company acting on its behalf

[6] Wood made several loans to Smith and waived repayment, he granted Smith leave to start and quit at times other than normal shift hours, etc

[7] The Company previously employed a succession of foremen

[8] Approximately 40 in number

[9] Wood handled design, sales, and office functions as well as production control

[10] The complaint alleged, the answer admitted, and I find at all times material that Echiels was a supervisor and agent of the Company acting on its behalf

[11] Echiels continued to work for the Company as production foreman through December, during that period he issued a number of written warning notices and discharged one employee for refusal to comply with his instructions and admonitions Four employees quit on receiving written warning notices from him

Smith, however, to report to him if late again and explain why she was late.

Smith was late again on Friday, August 29. She did not see Echiels to explain why she was late. Later on that same day, Echiels reprimanded employee Nita Ashworth for passing notes during working time. Smith subsequently approached Echiels and demanded that Echiels apologize to Ashworth because she and not Ashworth passed the note. Echiels stated both Ashworth and Smith passed the note and therefore no apology was warranted. Echiels asked Smith why she had not reported to him as instructed to explain why she was late that morning. Smith stated that since Echiels refused to apologize to Ashworth, she was not going to give any explanation to him for her tardiness Echiels saw Wood and requested permission to discharge Smith for her repeated tardiness, refusal to report and explain her second tardiness as instructed, and insubordinate attitude. Wood refused to authorize Smith's discharge and instructed Echiels to give her a written warning notice. He told Echiels it was his policy to first issue two written warning notices and then, if an employee's conduct still did not improve, to take discharge action. Echiels prepared a written warning notice and gave it to Smith. The notice read as follows: "She [Smith] was late today and for the past two days. When asked why, she said she didn't feel she owed me any explanation." Under the heading "Nature of Violation" Echiels checked two boxes marked "lateness" and "attitude."

On Saturday, August 30, Smith and Ashworth met with fellow employees Diane Kelley and Larry White to discuss the employee unrest and dissatisfaction over the TV surveillance, Echiels' crackdown, wage scales, fringe benefits, and other working conditions. They decided to seek union representation to secure changes and improvements in their wages, hours, and working conditions, and designated Smith to contact the Union.

Monday, September 1, was a holiday. On that date, Smith contacted Union Representative David Taliani, signed an authorization card, gave it to Taliani, and secured additional cards to distribute to other employees for signatures.

On Tuesday, September 2, Smith was again late for work. She again did not report to Echiels to explain her tardiness. Later on that day, she contacted 11 or 12 employees on a break in the Company's parking lot and solicited their signatures to authorization cards.[12] While Smith was soliciting signatures on the parking lot, William Wood, Jr., son of the president-owner of the Company, drove by in a vehicle and glanced at the group.

Echiels waited all day to see if Smith was going to report to him and explain her tardiness as instructed. She did not do so. On the morning of Wednesday, September 3, Echiels gave Smith a second written warning notice, reading as follows: "Late 9/2/75. Late 3 times last week and absent one day. If excessive lateness and absence continues you may be disciplined or discharged." Under the heading "Nature of Violation" Echiels checked boxes labeled "Lateness" and "Absent."

On Thursday, September 4, after working hours, employees Smith, Kelley, White, Lee Ann Hansen, Debbie Hart, James (Kent) Linsalto, and a few other employees met with Union Representative Taliani and another union representative at a local restaurant and turned over some signed authorization cards to them. In the course of the meeting, Hansen commented that Wood was telling employees he couldn't give a 10-cent wage increase but was able to take his family on a vacation costing thousands of dollars. Shortly thereafter, the petition in the representation case was filed by the Union.

On Friday, September 5, Smith asked Echiels for permission to take the morning off on Monday, September 8, to take her daughter to school for registration. Echiels granted the requested permission.

Over the weekend (September 6–7), Smith's infant son was hospitalized with a severed toe.

On Monday, September 8, Smith stayed at the hospital with her injured son. At 12:30 p.m., Smith's husband telephoned the Company, spoke to the receptionist, and stated Smith would not be in because their son had been injured and she was with him at the hospital. The receptionist told Smith's husband to have Smith call and tell the Company when she expected to return to work. Smith did not telephone the Company that day.

On Tuesday, September 9, Smith again stayed with her son at the hospital. At approximately 9 a.m., Smith's sister telephoned the company receptionist and stated Smith would not be in that day. The receptionist asked Smith's sister why Smith had not called in as requested and asked when she was going to return to work. Smith's sister said she did not know the answer to either question. The receptionist repeated her instructions of the previous day, to have Smith call the Company and tell the Company when she was going to return to work. Smith did not telephone the Company that day. The receptionist advised Wood and Echiels of her conversations with Smith's husband and sister, and Smith's failure to comply with her instructions. Wood instructed Echiels to discharge Smith for her continued ignoring of company instructions. Echiels prepared and mailed a letter to Smith stating as follows: "You have been given several warnings concerning your absenteeism and lateness. Despite this, your record continues to be poor. You have not personally called in the past two days nor does the Company know when you intend to return to work. Accordingly, your employment is hereby terminated."

On that same day (Tuesday, September 9), Echiels told Ashworth he was unable to understand why the employees wanted a union in such a small shop and asked Ashworth if she could answer his questions concerning the Union.[13] Ashworth replied Kelley could better answer any questions about the Union

On Wednesday, September 10, Smith reported for work and, not finding her timecard in the rack, went to see Echiels. Echiels told her she was discharged the previous day and a letter so informing her was in the mail.

Later that same day, Ashworth and Kelley came to

[12] She also gave cards to other employees to secure signatures

[13] Echiels testified it was well known in the shop that Ashworth, Kelley, and White were the "union clique"

Echiels' office. Kelley stated she understood Echiels had some questions concerning the Union. Echiels replied he did not understand why the employees wanted a union in such a small shop and why the employees thought they needed it, since Wood was a good employer.

Kelley stated Wood was unfair to some of the employees and mentioned Smith's discharge. She asked if it was true Smith was discharged over her union activities. Echiels replied the Smith case was closed and he did not wish to discuss it. Kelley complained Wood was not paying several long-term employees a fair wage; she and Echiels then got into a discussion of company hiring and promotion practices, job classifications, etc., with Echiels relating his plans for revising company practice in those areas.

On September 11 or 12, White entered Echiels' office to discuss mistakes he made on the job. After discussing the mistakes, Echiels commented there was too much union talk in the shop; he was receiving complaints from employees that White was hassling them to support the Union in the lunchroom during the lunchbreak; he wanted White to stop hassling the employees and, if White would stop doing so, he would give White the raise he had been seeking White agreed to Echiels' proposal.

About September 15, Hansen was in Wood's office to discuss a production problem (Hansen was a leadwoman). After discussing the production problem, Wood said he didn't appreciate Hansen's disparaging remarks of September 4 [14] regarding his reluctance to grant wage increases while taking an expensive vacation trip and offered to show Hansen bills covering his vacation costs. Hansen asked Wood how he knew of her remarks. Wood replied Kent (James Linsalto) told him. Hansen remarked she thought Wood was unfair in firing Smith, since she had an injured child in the hospital and needed a job. Wood replied that Smith was for the Union and a troublemaker, that he could have discharged her sooner, that her ignored instructions to call in gave him an easy way to get rid of her.

About September 17, Echiels called Kelley and Ashworth to his office. He stated he had received complaints from a number of employees about Ashworth and Kelley hassling them about the Union. He informed them the TV camera was on, observing them, even when it was not moving; they had been observed passing notes and talking when they should be working; they had better stop these practices or they risked discharge; they were there to work and not to solicit for the Union; they should solicit on their own time. Kelley admitted passing notes and talking and stated in the future she would solicit on the company parking lot on breaktime. Echiels replied the parking lot was company property and the employees should not do any soliciting at any time during their work shift on company property, including the parking lot.

About October 11, Wood called Echiels, White, and Hansen into his office. Wood upbraided White and Hansen over the large number of production errors he had observed, pointed out that White's production mistakes (not putting in shields) were obvious omissions and stated he believed the production errors were deliberate Wood also stated there was too much union talk and talk critical of him in the shop He stated he had received complaints White and Hansen were hassling employees regarding the Union and reports of what was said about him. White turned to Echiels and asked whether Echiels thought he was behind the Union Echiels replied he seemed to know all the answers about the Union and the union activities seemed to center around him. Wood then stated the Company could not afford a union; its competitors were nonunion, if the Union got in and secured increases in wages, fringe benefits, and the like, the Company's costs would increase; with an increase in costs, the Company would have to increase its prices; a price increase would make it noncompetitive and require layoffs and possible plant closure. Wood also cited wage rates paid by his competitors and stated his current wage rates were comparable. Hansen replied by stating it was not the employees' intent to cause the plant to close, they just wanted to improve wages and working conditions.

In the October 31 election, 38 of the 40 employees eligible to vote cast ballots, 8 cast ballots for the Union and 29 cast ballots against the Union.

B. *Analysis and Conclusions*

1. The August 29 Smith warning notice

The General Counsel and the Union allege Echiels issued Smith a written warning notice on August 29 because of her union activities.

It is undisputed Smith first became involved in union activities on *September 30,* when she met with three other employees and the four decided to seek union representation to resolve employee complaints over wages, hours, and working conditions. It is likewise undisputed Smith was late on August 28 and 29.

On the basis of the foregoing, I find and conclude Smith was not disciplined on August 29 because of her union activities, since her union activities had not yet begun. Rather, I find she was disciplined because she was tardy on August 28 and 29.

I therefore shall recommend those portions of the complaint and union objections so alleging be dismissed.

2. The September 3 Smith warning notice

The General Counsel and the Union allege the Company gave Smith a second warning on September 3 because of her union activities. It is undisputed Smith was late on September 2, the next working day after receiving her first warning notice and that this was the third workday in a row Smith reported late. It is likewise undisputed Smith failed to report to Echiels and explain her tardiness on September 2, despite instructions to do so.

Smith's first union activity at the plant occurred after she reported late on September 2.[15] The only evidence purporting to establish company knowledge of this activity consist-

[14] The meeting between a group of employees and two union representatives described earlier

[15] She solicited signatures to authorization cards in the company parking lot at breaktime on September 2

ed of testimony that Wood, Jr., glanced at the group in the parking lot from his vehicle while Smith was soliciting signatures. I cannot find this observation by Wood, Jr., a rank-and-file employee, is sufficient basis for finding that the Company knew, prior to Echiels' issuance of the second warning notice on September 3, that Smith was engaging in union activities. A person glancing at a group standing in a parking lot from a moving vehicle would hardly be able to ascertain documents were being distributed, much less what those documents were or who was distributing them.

It is clear Smith was tardy on September 2 for the third consecutive day, that Echiels was watching her attendance, and that Smith for the second time ignored his instructions to report to him and explain her tardiness.

I therefore find and conclude the General Counsel and the Union failed to establish Echiels had any knowledge of Smith's union activities prior to his issuance of the September 3 warning notice over her undisputed tardiness for the third consecutive day, or that such notice was issued for any reason other than Smith's continued tardiness.

I therefore shall recommend those portions of the complaint and union objections alleging the September 3 warning notice violated Section 8(a)(1) of the Act and interfered with the election be dismissed.

3. The September 9 Smith discharge

The record establishes Smith's record for absenteeism and tardiness was poor after her July 1 rehire, that she was absent on August 25, late on August 28, and 29 and September 2, absent on September 8 and 9, and failed to comply with instructions to explain her tardiness and advise when she was going to return to work.

The General Counsel contends, nevertheless, Smith was not discharged for her tardiness, absenteeism, and failure to comply with company instructions but, rather, because of her union activities.

Smith was a leader, if not the leader, in the Union's organizational campaign. It was Smith who went to the Union at the request of her fellow employees and secured authorization cards. She solicited signatures to those authorization cards and aggressively presented her fellow employees' complaints to Wood and Echiels as they arose.[16]

While I have entered findings that the General Counsel failed to establish company knowledge of Smith's union leadership role prior to Echiels' issuance of the September 3 warning notice to Smith, I find by September 10 that role was known to both Echiels and Wood. Echiels demonstrated his awareness of who the Union's leaders were prior to that date when he testified he knew Ashworth, Kelley, and White were union ringleaders when he questioned the former two regarding the employees' reasons for seeking union representation.[17]

There is no question Smith was tardy on August 28 and 29 and September 2 and received two written warning notices because of that tardiness; it is undisputed she was absent from work on August 25, September 8 and 9; and I have entered findings she ignored Echiels' instructions to report to him and explain her tardiness on August 29 and September 2, and ignored the company receptionist's request that she personally telephone and advise when she was going to return to work on September 8 and 9.

It is also clear that Smith was a known leader of the prounion group among the employees, whose reversal from an earlier antiunion to a prounion role would have considerable influence among her fellow employees and that her discharge in the midst of the union campaign would have a chilling effect on her fellow employees' support of the Union

Only one other employee was discharged during Echiels' tenure as a foreman by him and she was discharged for grossly insubordinate conduct; there is no evidence any employee was ever discharged for absenteeism or tardiness, or for having a relative call in an absence.[18]

On the basis of the foregoing, I find that the Company discharged Smith for mixed motives, i.e., both over Wood's displeasure with Smith's leadership role in the Union (which must have seemed to him somewhat of a betrayal in view of her preceding role in the IUE decertification) and his anger at her failure to personally call in concerning her absence on September 8 and 9.[19]

The Board has generally held that, when a discharge is motivated in part by the union activities of an employee, such discharge violates Section 8(a)(1) and (3) of the Act.[20]

I therefore find and conclude the Company violated Section 8(a)(1) and (3) of the Act by discharging Smith, in part, because of her union activities and prevented a free and fair election.

4. The September 10 interrogation

This complaint allegation and election objection is based on a September 9 or 10 exchange between Echiels, Ashworth, and Kelley, wherein Echiels asked Ashworth if she could answer some questions he had about the Union and she and Kelley came to his office the next day to discuss his questions.

It is clear Echiels asked Kelley on the latter day why the employees wanted the Union, listened to her recital of alleged misclassification and/or mistreatment of several

[16] This role evolved naturally from Smith's earlier conduct—securing the decertification of the IUE—and her closeness with Wood thereafter Her continued leadership of the employees is evidenced by her carrying employee complaints over installation of the closed-circuit TV to Wood in early July and her demand that Echiels apologize to Ashworth in August She also carried employee complaints against Echiels to Wood

[17] While Echiels did not name Smith as one of the ringleaders, I find in a shop of such a small size, with his admitted knowledge of the union role of the other three, he knew of Smith's leadership role but deliberately refrained from naming Smith because of his participation in her discharge I also find Wood was also aware of Smith's union role, in view of the small size of the shop, his October 11 statement to Hansen and White that various employees had informed him of who and what was being said about him and the Union in the shop, and his admitted knowledge he knew of the union campaign as early as September 4

[18] Despite uncontradicted evidence that many other employees were chronically late, sporadic in attendance, and regularly had members of their families call to report their absences

[19] Witness Wood's September 15 comments to Hansen

[20] *N L R B* v *Hotel Conquistador, Inc, d/b/a Hotel Tropicana,* 398 F 2d 430 (C A 9, 1968), *Burns International Security Service, Inc*, 216 NLRB 11 (1975), *Florida Steel Corp*, 224 NLRB 587 (1976)

long-term employees, and launched into a discussion of his plans for improving the job classification structure, working conditions, etc.

It is apparent from the testimony of all three participants in the conversation neither Echiels nor the two employees considered it an interrogation concerning their union views, sentiments, or that it was in any way intimidating; it was a full and free discussion of various aspects of working conditions which disturbed the two employees and Echiels' plans for attempting to improve working conditions in the plant.

I do not find the conversation sufficient to sustain a finding by the conversation the Company either violated Section 8(a)(1) of the Act or committed misconduct affecting the election.

I therefore shall recommend these allegations of the complaint and election objections be dismissed.

5. The September 12 interrogation, threat, and promise

Echiels substantially corroborated White's testimony that on or about September 12, after they discussed a production mistake made by White, Echiels threatened White with discipline if he continued to solicit or harangue employees on behalf of the Union during lunchbreaks at the plant lunchroom and promised White a raise if he desisted from doing so.

It is well established employees have the right on their own time (lunchbreaks) on plant premises to freely engage in union discussion and that it is a violation of Section 8(a)(1) for a company to threaten an employee with discipline therefor, and promise him a benefit for desisting therefrom.[21]

I therefore find and conclude, by Echiels' September 12 threat to discipline White if he continued to try to persuade employees to support the Union on his and their lunch breaks, and by Echiels' promise of a wage increase for desisting therefrom, the Company violated Section 8(a)(1) of the Act and prevented a free and fair election.

6. The September 15 impression of surveillance

This complaint allegation and election objection are based on undisputed evidence that on or about September 15, in the course of a discussion between Wood and Hansen over a production problem, Wood complained to Hansen concerning her September 4 comments at a meeting attended by employees and union representatives.

Wood was informed of Hansen's comments by Linsalto when Linsalto came to the plant on approximately September 13 to pick up his final paycheck (he quit the week before). Wood testified Linsalto's report was unsolicited, and his testimony is credited. Both Wood and Hansen testified Wood identified Linsalto as his source when Hansen asked how he knew of her remarks.

I cannot find Linsalto's unsolicited report to Wood and Wood's free divulgence of Linsalto as the source can support a finding that Wood, by his statement to Hansen, gave Hansen the impression that Wood was maintaining a surveillance over her and other employees' union activities.

I therefore shall recommend the allegations of the complaint and union objections to the election so alleging be dismissed.

7. The September 17 impression of surveillance, unlawful prohibition of union solicitation, and discharge threat

Echiels substantially corroborated the testimony of Ashworth and Kelley that, on or about September 17, Echiels informed Ashworth and Kelley they had been observed passing notes and talking when they should be working, that they were there to work and not to solicit for the Union, and that they risked discharge or other discipline if they continued in such activity during worktime. Echiels also substantially corroborated Ashworth and Kelley testimony or volunteered that he stated employees were barred from union solicitation on company property at any time during their work shift, including breaktime, and including solicitations on the company parking lot during breaktime.

It is well established an employer violates Section 8(a)(1) of the Act when it threatens its employees with discipline for engaging in union activities on their free time on company premises.[22]

I therefore find and conclude that, on or about September 17, the Company, by Echiels, violated Section 8(a)(1) of the Act by threatening Ashworth and Kelley and other employees with discharge or other discipline if they carried on union activities during their free time on company premises, including its parking lot, and thereby prevented a free and fair election.

8. The October 11 impression of surveillance, threats of layoff, and plant closure

Wood, Echiels, White, and Hansen substantially corroborate one another in testifying that, in a conference in Wood's office on or about October 11, Wood accused White of deliberately sabotaging work in the plant, stated employees had informed him what employees were saying about the Union and about him, and informed White and Hansen if the Union was successful in organizing the employees and in securing improvements in their wages, hours, and working conditions, he would undoubtedly have to raise his prices, and this would make him noncompetitive and force him to lay off employees and possibly close the plant, to which Hansen rejoined the employees did not wish to cause Wood to cease business, but only to improve their wages and working conditions.

I do not find Wood's comment he had received reports concerning comments made about the Union and about him as creating an impression he was maintaining a surveillance of union activities and I recommend those portions of the complaint and election objections so alleging be dismissed.

The balance of Wood's comments raise the constantly recurring issue of whether they constitute privileged comments under Section 8(c) of the Act, i.e., predictions as to

[21] *Delta Sportswear, Inc*, 160 NLRB 300 (1966)

[22] See fn 21

possible consequences of union organization, or whether they constitute an implied threat of layoff and plant closure in the event the union organizational campaign was successful.

In a recent case, a Board majority found similar comments constitute a threat rather than a prediction, inasmuch as the employer failed to demonstrate objective considerations formed the basis for his prediction, citing *N.L.R.B.* v. *Gissel Packing Co., Inc*, 395 U.S. 575 (1969).[23]

The Company failed to adduce any objective evidence to support Wood's predictions of layoff or plant closure in the event the employees chose union representation; and it does not necessarily follow that the Union would secure higher wages and working conditions than those which would enable Wood to meet his competition; Wood might very well institute production improvements and otherwise make his operation more economical and efficient and remain in competition whether or not his employees were union represented.

It is further clear that Hansen considered Wood's remark a threat and not a prediction—and her reaction was that of a typical employee.

I therefore find and conclude that, by telling White and Hansen on or about October 11 that in the event the employees chose to be represented by the Union, the Company would have to lay off employees and possibly go out of business, Wood made an implied threat in derogation of his employees' Section 7 rights, thereby violating Section 8(a)(1) of the Act and inhibiting a fair election.

Conclusions of Law

1. The Company at all times pertinent was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization, as those terms are defined in Section 2(2), (5), (6), and (7) of the Act.

2. At all times pertinent Wood and Echiels were supervisors and agents of the Company acting on its behalf.

3. The Company violated Section 8(a)(1) and (3) of the Act by its September 9 discharge of Smith in part because of her union activities.

4. The Company violated Section 8(a)(1) of the Act by Echiels' September 12 interrogation of White concerning his union activities on his own time, by his threat to discipline White for his union activities on his own time on company premises, and by his promise to give White a wage increase if he desisted from engaging in union activities on his own time on company premises.

5. The Company violated Section 8(a)(1) of the Act by Echiels' September 17 threat to discipline Ashworth and Kelley for engaging in union activities on their own time on company premises and by prohibiting Ashworth, Kelley, and other employees from engaging in union activities on their own time on company premises.

6. The Company violated Section 8(a)(1) by Wood's October 11 threats to White and Hansen that the Company would lay off employees and close the plant in the event a majority of the employees chose the Union as their collective-bargaining representative.

7. The Company prevented a free and fair election on October 31 by its September 10 discharge of Smith in part because of her union activities; by its September 12 interrogation of White concerning his union activities, threatening him with discharge for engaging in union activities on his free time on company premises and promising him an economic benefit for desisting from union activities on his own time on company premises; by its September 17 threat to discipline Ashworth and Kelley for engaging in union activities on their own time on company premises and prohibition of any employee engaging in union activities on their own time on company premises; and by its October 11 threat to lay off employees and close the plant in the event a majority of the employees chose to be represented by the Union for the purpose of bargaining collectively with the Company concerning their wages, hours, and working conditions.

8. The Company did not otherwise violate the Act or prevent a free and fair election from being held among its employees on October 31.

The Remedy

Having found the Company engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act and in misconduct which prevented a free and fair election, I recommend the objections to the election be sustained and a new election be directed at a time when the results of the election misconduct have been dissipated, that the Company cease and desist from its unfair labor practices, and that the Company be directed to take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Smith was discharged on September 9 for engaging in concerted activities protected under the Act, I shall recommend Smith be offered full and immediate reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority rights and other rights and privileges, and that she be made whole for any wage losses she may have suffered by payment to her of the sum of money she would have earned from the date she was discharged to the date she is reinstated, less any net earnings she has received in the interim. Her lost wages shall be computed in accordance with the formula described in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest at 6 percent per annum, computed in accordance with the formula described in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). I shall also recommend the Company post notices directed to its employees advising them of its compliance with the foregoing and that it will not discharge its employees for engaging in union activities, interrogate them concerning their union activities, threaten them with discharge for engaging in union activities on their own time on company premises, promise them a benefit for refraining from engaging in union activities on their own time on company premises, or threatening them with layoffs or plant closure in the event they choose to be represented by a union.

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

[23] *Honeywell, Inc*, 225 NLRB No. 79 (1976).

ORDER [24]

Respondent Wood Transformers, Inc., Orange, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise disciplining its employees for seeking to form or supporting an organization existing or created for the purpose of bargaining collectively with the Company concerning its employees' rates of pay, wages, hours, and working conditions.

(b) Interrogating its employees concerning their union activities, threatening them with discharge for engaging in union activities on their own time on company premises, promising its employees economic benefits for refraining from union activities on their own time on company premises, prohibiting its employees from engaging in union activities on their own time on company premises, and threatening its employees with layoff or plant closure in the event they select a union as their collective-bargaining representative.

(c) In any other manner interfering with its employees' rights under Section 7 of the Act to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.

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

(a) Offer Patricia Smith reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges.

(b) Make Smith whole for any loss of earnings she may have suffered as a result of her discriminatory discharge in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll and other records necessary to compute the backpay due to Patricia Smith in the manner set forth in The Remedy section of this Decision.

(d) Post at its Santa Ana facilities copies of the attached notice marked "Appendix." [25] Copies of said notice, on forms provided by the Regional Director for Region 21, shall be signed by an authorized representative of the Company and posted immediately upon receipt thereof, and shall be maintained for at least 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Company has taken to comply herewith.

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[24] In the event no exceptions are filed as provided by Sec 102 46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Sec 102 48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes

[25] 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

WE WILL NOT discharge or otherwise discipline our employees for seeking to form or assist any labor organization, for seeking to bargain collectively through a representative of their choosing, or for engaging in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.

WE WILL NOT interrogate our employees concerning their union activities, threaten them with discharge for engaging in union activities on their own time on company premises, promise them economic benefits for refraining from union activities on their own time on company premises, or threaten them with layoff or plant closure in the event they choose union representation.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to engage in the activities enumerated above

Since the Board has determined we discharged Patricia Smith because she sought to assist a labor organization in securing the right to represent our employees for the purpose of bargaining collectively with us concerning their rates of pay, wages, hours, and working conditions, WE WILL offer Patricia Smith immediate and full reinstatement to her former job, without prejudice to her seniority and other rights and privileges, and WE WILL make Patricia Smith whole for any loss of wages or any benefits she may have suffered by reason of her discriminatory discharge.

WOOD TRANSFORMERS, INC.