

**Wireways, Inc. and International Brotherhood of
Electrical Workers, AFL-CIO, Local 637.**
Cases 11-CA-14188 and 11-RC-5739

October 15, 1992

DECISION, ORDER, AND CERTIFICATION
OF RESULTS OF ELECTION

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On March 5, 1992, Administrative Law Judge Robert A. Gritta issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found, and we affirm, that the Respondent did not threaten its employees that it would close its business if they selected the International Brotherhood of Electrical Workers, Local 637, as their collective-bargaining representative. With respect to the allegation that the Respondent, by its foreman, McCarty, also violated Section 8(a)(1) by statements made to employee Smith indicating that Smith would be discharged if the Union did not win the election and that only union stewards would receive raises if the Union did win, the judge found that these statements "could constitute violations of the Act." He did not, however,

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's discrediting of portions of alleged discriminatee McGlammary's testimony, we do not rely on the judge's comment that McGlammary had an "ulterior motive" for seeking a job with the Respondent "and this same motive was controlling his testimony." We note that the judge credited the testimony of Project Manager Peacock, the other participant in the interview McGlammary recounted, in other respects, and that the judge also provided ample analysis of McGlammary's demeanor and the content of his testimony to support discrediting him.

order a remedy because, in his view, the incident was noncoercive, having occurred at a nonworksite between a low-level foreman and a known employee union organizer. We find that the threat to discharge and of futility in selecting the Union as the collective-bargaining representative are by their very nature coercive even under the circumstances present here and, therefore, violate Section 8(a)(1) of the Act. We also find, however, that the comments were isolated and restricted to one individual, with no evidence of dissemination. For these reasons, we agree that McCarty's comments do not warrant setting aside the election.

Although the judge found that Supervisor Taylor violated Section 8(a)(1) when he denied employee Divers the right to distribute union literature during breaktime, he also found that this violation was effectively repudiated several days later when Taylor told his employees that they were free to distribute literature during breaktimes and was further repudiated a month later when the Respondent posted its rules regarding distribution of literature in the plant. Based on his finding that the violation was effectively cured, the judge found that no remedial order was required.

The General Counsel excepts, contending that because Taylor did not mention anything about union literature or union activities in this discussion, his alleged repudiation did not conform to the standards advanced in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). We find merit in the General Counsel's exceptions.

As relevant to the facts of this case, a repudiation, to be effective, must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Id.* at 138. The repudiation must also give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. *Ibid.*

Even assuming, *arguendo*, that the other conditions have been met, we find that because neither Taylor, in his discussions with the employees, nor the employee notice made specific reference to the distribution of union literature, the alleged repudiation was ambiguous and, therefore, ineffective. We shall, accordingly, issue a cease-and-desist order and require the posting of a notice to remedy the 8(a)(1) violation.²

² We note that the incident giving rise to this violation did not occur during the critical period.

Finally, although we agree with the judge's finding that the Respondent did not violate Section 8(a)(3) by refusing to hire several named electricians because of their union affiliation, we disagree with his finding that the General Counsel did not establish union animus. We find that animus is established through Taylor's prohibition against distributing union literature during an employee's breaktime and through Foreman McCarty's isolated threat of discharge uttered to employee Smith at the New Year's Eve party. We find, however, that notwithstanding any prima facie case, the case was rebutted when the Respondent demonstrated that the applicants were not hired because they all had sought, or had previously earned, wages that clearly exceeded the budgeted wages the Respondent was offering.³

ORDER

The National Labor Relations Board orders that the Respondent, Wireways, Inc., Panama City, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge for engaging in union or protected concerted activities.

(b) Informing its employees that their union organizational efforts were futile.

(c) Promulgating a no-distribution rule that prohibits its employees from distributing union literature during nonworking time.

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

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

(a) Post at its facility in Covington, Virginia, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms to be provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

³ *Wright Line*, 251 NLRB 1083 (1980), *affd.* *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

⁴ If this 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."

CERTIFICATION OF RESULTS OF ELECTION

It is certified that a majority of the valid ballots have not been cast for the International Brotherhood of Electrical Workers, AFL-CIO, Local 637 and that it is not the exclusive representative of these bargaining unit employees.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with discharge for engaging in union and/or protected concerted activities.

WE WILL NOT threaten our employees that their union organizational efforts are futile.

WE WILL NOT promulgate a no-distribution rule that prohibits our employees from distributing union literature during nonworktime.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WIREWAYS, INC.

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on May 9 and 10, 1991, in Covington, Virginia, based on a charge filed by International Brotherhood of Electrical Workers, AFL-CIO, Local 637 (the Union) on December 13, 1990, and a complaint issued by the Regional Director for Region 11 of the National Labor Relations Board on January 31, 1991.¹

The complaint alleged that Wireways, Inc. (Respondent) violated Section 8(a)(1) and (3) of the Act by threatening employees with reprisals for engaging in protected activities, promulgating a no-distribution rule prohibiting distribution of union literature during nonworktime, and refusing to hire employee applicants because they engaged in protected activities. In addition objections to the election held February 1, 1991, were filed by the Union and challenges to the voting eligibility of 13 individuals were made by the Board agent and the Union. The objections mirror several of the 8(a)(1) complaint allegations and the challenges involve unit placement of individuals based on employment classification or employee status to be determined by the complaint allegation of refusal to hire. The Regional Director's Report on Objections and Challenges resolved two of the challenges which were subsequently opened and counted. A revised tally of

¹ All dates are in 1990 unless otherwise indicated.

ballots issued April 5, 1991, showing 17 no votes and 4 yes votes. The remaining 11 challenges are not determinative and therefore need not be resolved. The objections are consolidated with the unfair labor practice case for determination.

Respondent's timely answer denied the commission of any unfair labor practices.

All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by the General Counsel and Respondent on June 28, 1991. Both briefs were duly considered.

On the entire record² in this case and from my observation of the witnesses and their demeanor on the witness stand, and on substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR

Organization—Preliminary Conclusions of Law

The complaint alleges, Respondent admits, and I find that Wireways, Inc. is a Florida corporation engaged in construction and electrical contracting work in Covington, Virginia, from its central office in Panama City, Florida. Jurisdiction is not in issue. Wireways, Inc., in the past 12 months, in the course and conduct of its business operations, purchased and received goods and materials at its Covington, Virginia job-site valued in excess of \$50,000 directly from points located outside the State of Virginia, and provided services valued in excess of \$50,000 directly to enterprises in States other than the State of Virginia.

I conclude and find that Wireways, Inc. is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I conclude and find the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ISSUES

1. Whether Respondent threatened:

(a) To close the plant if the Union were selected to represent its employees.

(b) To discharge employees for engaging in union activity.

(c) Employees with statements that union organizing efforts were futile.

2. Whether Respondent promulgated a no-distribution rule prohibiting employees from distributing union literature on nonworktime.

3. Whether Respondent discriminatorily refused to hire applicants for employment.

III. OVERVIEW³

Wireways, Inc. was formed in 1973 as an industrial contractor in the wood products industry specializing as an electrical instruments engineering contractor. Its main customers

² Although the work history resume of Alfred Long was received into the record as an addendum to Long's employment application, GCX-8, it was not contained in the original exhibits.

³ Uncontroverted and credible testimony of several witnesses.

are papermills, sawmills, plywood plants, and particle board plants within the southeastern United States. Wireways is a small company headquartered in Panama City, Florida, and as a rule subcontracts its work through bids. Its bids are usually on the lower end of the price scale.

The instant jobsite is the Westvaco Papermill in Covington, Virginia, and is considered a large project. There are 35-40 contractors constructing a large recovery boiler to generate steam for the manufacturing process. One of the principal contractors is Goterverken Boiler Systems, Incorporated. Wireways is a subcontractor to Goterverken and is charged with the installation of the electrical systems, instrumentation systems, and startup support. The usual hierarchy at larger jobsites is: project manager, superintendents, general foreman, foremen, craftsmen, helpers, and laborers.

Wireways is a nonunion contractor and competed with M & J Electric, a union contractor, for the subject work at the Covington, Virginia papermill. The project was scheduled to begin in October 1990 and be completed in August 1991.

IV. UNFAIR LABOR PRACTICES

8(a)(1)—Threats and Rule Promulgation

Several alleged threats and a no-distribution rule resulted from a confrontation between Field Superintendent Taylor and journeymen electricians Divers and Long.

Additional threats resulted from a conversation at a seasonal party in a private home.

Divers testified that he was hired November 5, 1990, after being interviewed by Taylor. During the first week of December, Divers began passing out union literature on the job, as instructed by McGlammery, financial secretary of Local Union 637. The crews usually took their breaktime in the vicinity of their work stations on the boiler. Divers usually used his 15-minute breaktime at 9 a.m. for distribution of the union literature although on the day in question he passed out literature again at 10 a.m. Several minutes after his 10 a.m. distribution, Divers' foreman told him to report to Taylor at the company trailer. When Divers entered the trailer, Taylor was reading a piece of the union literature that had been distributed. Taylor told Divers he could not distribute union literature at breaktime, but he could distribute literature before work, at lunchtime, and after work. Divers informed Taylor that the law did allow employees to distribute union literature on breaktime. Taylor said because the Company paid for the breaktime, distribution of anything was prohibited and employees could be terminated. Divers testified that Taylor also said that Wireways would never go union and if the Union won the Company would close its doors.

Taylor denied making any statements that Wireways would never go Union or if the union won the Company would close its doors. Taylor did admit that he told Divers on Wednesday of the first week in December 1990 that distribution of union literature was not allowed during breaktime and adds that he admonished Divers for taking excessive time on breaks and leaving his work station atop the boiler. Taylor stated that Divers' foreman, McCarty, had reported that Divers was in the MCC room work station at the bottom of the boiler at 9:20 a.m. distributing union literature. Work stations on the boiler are separated by a boiler height of 17-18 stories and Taylor said it would take Divers 15 minutes to get back to his work station atop the boiler. Tay-

lor explained that although each foreman did not time each employee's break it was easily policed because each crew foreman shut down his station crew at 9 a.m. and 3 p.m. for the 15-minute breaktime. Divers continued passing out union literature during his breaktime, and according to Taylor, continued to extend his 15-minute breaktime periods. Divers denied that Taylor mentioned the length of his breaks during the conversation in the trailer but admitted that he heard Taylor had told Foreman McCarty that several of his men were taking excessive time on breaks. Divers recalled also that Taylor said the men whose work station was atop the boiler should stay on top for break and those men whose work station was on the bottom of the boiler should stay at the bottom for break.

Taylor testified that on Friday of the same week he had second thoughts about what he told Divers about no distribution during breaktime and counseled with Project Manager Peacock. Peacock told Taylor the employees could do what they wanted to do during breaktime within the 15-minute limit. The following Monday, during the scheduled safety meeting of all employees, Taylor told the employees that they could indeed engage in any activities during breaktimes, lunchtime, and before and after work. Although Taylor did not single out Divers, he was present at the meeting. Shortly thereafter Taylor again admonished Divers for extending his 15-minute breaktime to 30–45 minutes. Taylor told Divers it was fine to do whatever he wanted to during break but, it had to be done within the allowable 15-minute period. Although Taylor has the authority to write up employees for rule infractions, he verbally warns employees four or five times before taking any definitive action. At some subsequent point in time, during December 1990, Taylor fired Divers for poor work quality and excessive unexcused absences. Several days later, Divers pleaded with Taylor to be rehired stating that he would show for work everyday. Taylor relented and rehired Divers. Divers worked for a short while then quit the last week in December 1990. Several weeks later, Taylor and Peacock discussed posting a notice to employees explaining that solicitations among employees are allowed during breaks, lunch periods, and other nonworking time. The notice also prohibited distribution of literature in working areas although allowing distribution in nonwork areas. The notice was posted in mid-January 1991. At the same time another notice to employees was posted stating that Wireways does not intend to close its business, whether the electricians' Union is voted in.

Alfred Long testified that on Saturday, December 29, 1990, Taylor called him to the office trailer and told him that a charge was filed against the Company claiming unfair labor practices. Taylor told Long that anyone involved in the suit or connected with it in any way would be terminated when the suit was settled. Long did not say anything in response to Taylor and Taylor added that he would make the same speech to all employees the next day. Long stated that to his knowledge Taylor did not make the statement to any other employees and Long did not report the incident to Peacock. Long, with the aid of McGlammary, was attempting to organize the Wireways' job. Long quit his employment immediately after the union election.

Taylor admitted that Long and Divers talked to him about the Union, but he denies that he ever told any employees about the unfair labor practice charge or that he threatened

to terminate any employee involved in or connected with the charge. Taylor states that he discussed the charge with Peacock who told him not to worry about it because the Company would hire an expert to handle it. Long on one occasion asked Taylor if he had anything against the Union. Taylor said he did not and told Long he respected his right to do what he thought was right. Long during the conversation told Taylor that he would like to see a Union come in. Taylor stated that the company policy was not to engage employees in union discussions as part of any election campaign. The Company chose to post literature about unions for the employees to read. Taylor recalled that many employees were passing around union literature on the job and many employees put union stickers on their work hats and lunchboxes.

Wilbert Smith testified that he was the first electrician hired by Wireways for the project. He was interviewed and hired by Peacock on October 26, 1990. Kyle McCarty was later hired as an electrician and a month later was promoted to foreman. On Monday, December 31, 1990, Smith attended a New Year's Eve party at the home of a friend, Mike Bing. Several electricians including Kyle McCarty attended the party. During the party Smith and McCarty moved their beer drinking to the back porch. While on the porch the two talked about the upcoming election. Smith recalled that McCarty said if the vote did not go for the Union that the Company would fire Smith. McCarty also said that if the vote did go for the Union there would be no raises in pay except for the shop stewards. Smith told McCarty that he was aware the Company would try to fire him because of his activity. The conversation ended and both returned to the party. Smith did not report the incident to Peacock. Smith continued to talk to employees on the jobsite about the Union at lunchtime and McCarty was usually in the group. Smith had, before applying for the job at Wireways, discussed organizing the jobsite with Union Representative McGlammary. Smith voluntarily quit Wireways following the election February 1, 1991.

Analysis

It is undisputed that Divers distributed union literature during worktime, particularly on December 5, 1990, and that Taylor told Divers he could not distribute union literature during breaktime. Although Divers denies that Taylor ever spoke to him about taking excessive breaktime, the record as a whole supports Taylor's version of the entire conversation on December 5, relative to the time of distribution of union literature. Divers knew that Taylor had knowledge of excessive breaks because he was admittedly aware that Taylor instructed McCarty to police the breaktime because several employees were extending breaks. Divers' later recall of Taylor's specific proscription, "those up stay up and those down stay down," was precipitated by the very conduct Divers admittedly engaged in and to which Taylor credibly testified. It's most reasonable to assume if Taylor admonished Divers about distribution of union literature during breaktime he certainly admonished him about distribution of the same union literature during worktime. Taylor testified without contradiction that 2 days after the incident he told all employees in a safety meeting that distribution of literature during breaktime was allowed. Although Divers denies his presence in the meeting, there is no evidence that employees' ac-

tivity, particularly Divers', was in any way stifled by Taylor's erroneous appraisal of breaktime activities. Further, the Respondent unquestionably posted a notice to all employees repudiating Taylor's previous oral denial of distribution of union literature during the employees' breaktime.

I do not credit Divers' denial that Taylor disciplined him for taking too long on breaks during the December 5 conversation. Divers was not impressive as a witness with his terse testimony and guarded responses. His testimony was more contrived than real. With regard to Divers' testimony of statements by Taylor, in the December 5 conversation, that Wireways would never go Union or, would probably close its doors if the Union won the election, it seems incongruous with the admitted context of the moment. Divers appeared to add the statements as an afterthought, with an origin in rumor, rather than any substance of truthful recall. In my view Taylor genuinely attempted to recall all the facts and Divers did not. I, therefore, discredit Divers' testimony of the violative statements attributed to Taylor and credit Taylor's denials.

Taylor's admission that he denied Divers' right to distribute union literature during breaktime constitutes conduct which is violative of Section 8(a)(1) of the Act, notwithstanding the lack of evidence in the record to evince communication to other employees. However, Taylor's retraction several days later, communicated to all employees, effectively repudiated the restriction on employees' Section 7 rights including the threat to discharge Divers which Taylor was not asked to respond to. Additionally, the management later posted a notice for all employees enforcing the retraction communication by Taylor. Based on the record evidence as a whole, I conclude and find that Taylor's promulgation of a violative no-distribution rule on December 5 was effectively corrected and, therefore, does not constitute a violation requiring a remedy. Further, the incident as evidenced in the record is one of isolation which the Board frequently finds does not require any remedial action.

Long's version of the December 29 conversation with Taylor was a bare account of statements that would substantiate the allegations of the complaint and appeared too extreme to be credible. Although Long attributed to Taylor an intent to tell all employees that anyone connected with the unfair labor practice charge would be terminated, Long admittedly had no knowledge of such nor did the General Counsel offer any evidence of communication to other employees.

In contrast Taylor admittedly spoke with Long and Divers about union organization while both were attempting to organize the employees. Taylor stated that Long and Divers initiated union conversations with him in which both stated they were desirous of the Union coming in. Respondent's undisputed election campaign policy was to post literature about unions for all employees to read and to refrain from engaging employees in any union discussion. The record as a whole clearly shows that Respondent followed its policy of nonintervention.

Taylor's entire testimony was given in a forthright and direct manner even including certain matters unfavorable to Respondent, and the General Counsel offered no rebuttal. Taylor was a trustworthy witness who endeavored to relate the facts as they occurred. I credit his testimony entirely. On the other hand, Long's testimony inspired doubts as to his

reliability and leads me to discredit his testimony of conversations with Taylor and to credit Taylor's denials.

Smith's version of his conversations with McCarty at the beer drinking party was a less than complete account of what transpired. Whether Smith's recollections were faulty due to the nature of the party or he testified to his interpretations of the event rather than accurately reporting all that occurred, I cannot determine. What I can determine is that a one-sided recall of certain facially coercive statements eliminates a context to permit fair evaluation. The unfortunate demise of the declarant (McCarty) just prior to trial only serves to increase the difficulty associated with credibility resolutions. Uncontroverted testimony is not automatically deemed credible and I cannot, based on demeanor or reasonableness, find that Smith is anything but a credible witness. However, I cannot find that the alleged statements of reprisal are based solely on the organizational efforts of Smith and other known prounion employees. Although I believe the remarks to be borderline statements in a context most favorable to the General Counsel, I must conclude and find that the statements attributable to McCarty are true and could constitute violations of the Act. I shall not, however, order a remedy because in my view the incident is noncoercive, having occurred at a nonworksites and limited to a beer influenced colloquy between a low-level foreman and a known employee union organizer. Further, in the absence of any evidence to show communication of the alleged statements to other employees by either of the principals, I conclude that the incident is isolated and does not require a remedy.

Section 8(a)(3)—Refusal to Hire

Robert Peacock testified he is project manager for Wireways at the Westvaco jobsite. He has 25 years' experience in Industrial Trades and has worked for Wireways since 1973. As project manager he supervises personnel, manages the office, buys materials, and hires electricians, instrument fitters, pipefitters, welders, helpers, and laborers. This project was his first in the Virginia area and began in October 1990 with a projected completion date of August 1991. Wireways does not require any particular training or educational standards for prospective employees. As a general rule for journeyman electrician, the Company wants a work history of electrical experience with 4 or 5 years' experience in an industrial trade environment. The Company does give preference in hiring to prior Wireways' employees. Although the qualifications differ among electricians, instrument fitters, and pipefitters, there is no formal hiring procedure for any craft. Wireways does not however hire any employee who is employed full time elsewhere.

Peacock has X number of dollars and Y number of manhours budgeted for a project, and he tries to hire qualified employees with experience fit for the project and within his budget. He does not screen applicants for union membership nor is he familiar with the union/nonunion status of contractors in the Virginia area, excepting M & J Electric, a contractor on the Westvaco jobsite engaged in similar electrical work.

At Westvaco, Peacock got quite a number of applications from the usual sources, walk-ins, and solicited the Virginia Employment Commission to help screen applicants for journeyman and helper classifications with journeyman wages of \$11 per hour. Wireways' wages are less than most nonunion

contractors and less than all union contractors. VEC forwarded the applications to Peacock. He received a total of 330–350 applications including 100–120 for journeyman electricians. Peacock's total complement for the project was 120 employees with between 22–26 journeyman electricians and instrument fitters needed. With the abundance of applications, Peacock culled out those with experience on boiler projects or work histories to fit the project and those whose desired wages or wage histories fell within his budget limits. If applicants did not list a desired wage or listed "open" or "negotiable," Peacock looked at past wages in the applicants' work histories. In Peacock's experience if he offered an employee a job at less wages than the employee was accustomed to receiving, the employee would either be less productive or would leave for the first job paying more. He, therefore, as a rule, does not call skilled applicants who list higher desired wages and offer them work at lesser wages. If the difference in wages desired and Peacock's scale is around a \$1, he compares the desired wages with the past wages in work history to determine an employee's probable acceptance of his lower wage offer. Peacock found that by making such wage determinations he could spend less time on hiring procedures and more time on his project duties. Usually Peacock does not hire craft employees on the spot, because applications precede the need for craft positions. In the case of helpers and laborers, many are hired on the spot because of the lack of need for skills and without regard to the wage determination he makes for the crafts. As the project started, Peacock needed laborer and material handler classifications to set up supply and support facilities for the later arrival of the crafts.

From October 1990 to January 1991, Peacock did all the interviewing of applicants with Taylor filling in on occasion when Peacock was out of town. When interviewing craft applicants, Peacock expanded on their work history by inquiring into the types of work they performed, where they had worked, whether the work was full time, and whether employees were safety conscious. He also assessed the applicant's individual communication skills, their appearance, and the application forms for neatness and thoroughness. Many of the craft applications were made at a time prior to actual need so few applicants were interviewed at the time of filing. Several early applicants were later interviewed and sometimes hired when they either called back or in person checked on the status of their applications. Peacock relies on an individual's tenacity to show that he wants to work.

During the course of hiring, Peacock had to make several adjustments in wage offers due to the lack of qualified applicants. The instrument fitter is a specialized journeyman electrician and must have instrument experience. In order to hire the number of instrument fitters needed, Peacock had to be more competitive in wages and finally offered \$12 per hour with a \$2-per-hour per diem to help employees stay on the job full time. The welder classification presented a more unique problem. Peacock began hiring welders based on work experience at \$11 per hour. All welders were sent, at company expense, to a trade school for certification in the various welding skills. It developed that Peacock was paying the welders \$11 per hour to fail the certification test and thus forfeit any further employment. He settled on a \$4-per-hour wage for new hired welders and on certification paid them the regular rate commensurate with their certified skills.

Some welders were certified to weld for the pipefitters and others were certified to weld for the electricians. Over time Peacock was able to outfit the crews with qualified welders.

Peacock stated that all the alleged discriminatees with the exception of Been were qualified electricians and had acceptable experience. He testified that the interviews with Redman, Gill, and Been lasted 5–6 minutes following their filing of the applications. Peacock did not ask any questions of their union membership, and none of the three stated that he would work for less than \$11 per hour. Neither did any of them check back later with Peacock. Peacock said he would not hire Been because his desired wage was not commensurate with the work experience shown and because the wages shown were outside the budget. Peacock never got a message from Gill seeking an interview following his application.

Been testified that when he, Redman, and Gill got the application on October 26, 1990, from Peacock they filled them out. Been asked Peacock if he was hiring then. Peacock said, "not now" but I may contact you later. Peacock also told them to call back if they were not contacted by the Company. Nothing was said about wages. Been did go back in person wearing an IBEW shirt and cap to check if his desired wage of \$14.25 was too high. Peacock told Been that the Company was getting ready to hire and Been said he would work for \$8 per hour. Peacock said, "Okay," and asked Been if he could do the work. Been replied that he figured he could do the work, and Peacock then asked Been if he was in the Union. Been stated that all the past employers listed on his application were union contractors, but Peacock did not ask if the employers were Union nor did Been tell Peacock they were Union. Following this conversation, Been had no further contact with the Company. Been further testified that his work history listed on his application as electrician was erroneous. His actual work history was only that of an apprentice with pay of \$9 per hour.

Redman testified that he made application for Wireways with Been and Gill in a group. Redman was wearing work clothes and Been wore an IBEW shirt and cap. The group was in the trailer about 30 minutes during which time Peacock outlined the different parts of the job and how long the job would last. Peacock said the wages would be \$11 or \$12 and commented on Redman's penmanship, asking if he had taken any mechanical drawing classes. Peacock did not ask any questions about union membership nor did he comment on wages desired by any of the three. Redman did not have any further contact with Peacock or the VEC.

Gill, the last of the trio, testified that Peacock gave all three an application which they filled out. Peacock looked at the completed applications and said he would give them a call for an interview the following week. Peacock said he had hired five employees and was in the process of setting up material and equipment. The entire conversation between Peacock and the three lasted 15 minutes, and Peacock did not ask any questions about the Union. The following week Gill phoned Peacock, but he was out on the jobsite and unavailable. Several weeks later Gill returned to the Wireways' trailer to talk to Peacock. He instead spoke with Mark, the safetyman, because Peacock was in Florida. Gill asked Mark to tell Peacock that he would like an interview. Gill had no further contact with Wireways.

Peacock recalled that McGlammary's application conversation was short. During the conversation, Peacock did not ask any questions about union membership nor did he make any statement that 5-10's can make up the difference for a low hourly wage. Peacock denied that McGlammary said he would work for \$11 per hour and any statements about Local Union 637 members being supplied to the jobsite by Business Manager Johnson.

McGlammary testified that he applied for an electrician's position at Wireways through the VEC on October 18, 1990. The VEC informed McGlammary that the starting wage was \$11 per hour. He checked back with the VEC on October 25, because he heard electricians were being hired and the VEC scheduled an interview for McGlammary at Wireways with Peacock. After discussing applying for work at Wireways with Business Representative Johnson, McGlammary on November 1, 1990, went to the Wireways' office trailer for the scheduled interview. He wore his IBEW shirt with the union insignia emblazoned on the front. Peacock gave him an application which he filled out and returned. Peacock reviewed the application and said, "[I]t looks like you've done a little of everything." McGlammary told Peacock he had worked 5 years on past projects for Westvaco. Peacock asked McGlammary if he was Union and stated that Wireways was nonunion. Peacock told McGlammary that his past wages were more money than Wireways could offer but 5-10's would make up the difference. McGlammary then ended the interview by telling Peacock that Local Union 637 had several qualified electricians and Peacock could call Johnson if he needed men. McGlammary never heard from or talked to Wireways again.

McGlammary's purpose in applying for work at Wireways was to organize the Company's employees. Although the details of his salary and expenses while working at Wireways was as yet undefined, he had worked at another nonunion company, Southern Air, intending to organize its employees. His hourly wage at Southern Air was \$9.50 per hour, and he was paid his union salary and expenses while employed there. His organizational efforts were fruitless so he quit after 2 weeks' work. Although Southern Air was McGlammary's last contractor employer he did not list it on his application to Wireways.

McGlammary began his union organizing campaign at Wireways in October 1990 by talking to prospective employees and some employees already hired. Among the working employees he talked to about union organizing were Wilbert Smith, the first electrician hired by Wireways (10/26/90) and Michael Divers hired as an electrician later (11/5/90). McGlammary also spoke to each discriminatee, Gill, Redman, Been, Bourne, Taylor, and Thompson, before he applied for work at Wireways. He recalled telling Bourne to wear his Local Union 637 jacket when applying to Wireways. McGlammary discussed the Wireways' organizing campaign with the six union members and was to monitor their efforts if they were hired.

The work applications in the record show that each discriminatee listed at least one union contractor in his work history with wages of \$14.56 per hour or more. Of the desired wages sought only two showed less than \$14.25 per hour. Bourne listed wages desired as "open" and Thompson listed "nego." In addition to the listing of union contractors in their work history, Redman, Bourne, and Taylor showed

Local Union 637 apprenticeship and/or affiliation. Taylor did not list any electrical journeyman history, but he did list welding. Been listed electrical experience as well as welding and operator skills. McGlammary listed current employment as financial secretary and assistant business manager of Local Union 637 with wages of \$14.56 per hour.

The General Counsel subpoenaed the 300 plus applications Wireways received for the Westvaco project. In addition to the applications of the discriminatees and several employees hired by Wireways, the General Counsel put 34 applications of hired employees into the record (GCX-13). Although not definitive of all employees hired by Wireways the applications show the following hiring:

October 1990 - 1 electrician helper
 November - 1 laborer, 1 material runner, 1 material supply, 2 electrician helpers.
 December - no hires
 January 1991 - 1 fire watch, 1 helper, 1 electrician, 1 electrician laborer, 3 electrician helpers, 1 welder
 February - 1 electrician helper, 1 electrician, 1 instrument fitter, 1 pipe foreman
 March - 1 pipefitter welder, 1 welder helper, 2 welders, 1 helper, 4 instrument fitters, 1 electrician helper, 1 electrician
 April - 1 pipefitter, 2 instrument fitters, 1 instrument helper

The separate application exhibits show:

October 1990 - 1 electrician
 November - 1 electrician, 2 electrician helper
 December - 0
 January 1991 - 1 electrician
 February - 1 pipewelder, 1 pipefitter leadman, 1 electrical foreman, 1 electrical helper
 April - 1 instrument fitter leadman

With regard to wages desired by applicants for all crafts relative to the starting wage when hired, the 42 exhibits show:

Nonelectrician - 1 received more, 2 received less, 4 desired wages were not specified.
Electricians - 5 received same, 4 received more, 15 received less, 4 desired wages were not specified. Of the 4 receiving more 2 were instrument fitters and 2 were helpers.
Helpers or Welder - 6 received less, 1 received same

Analysis

The General Counsel theorizes that Respondent systematically excluded from employment all applicants who were members of Local Union 637 or who worked in the past for union contractors with emphasis on M & J Electrical contractor.

The General Counsel must prove by a preponderance of the record evidence that Respondent in its failure to hire the alleged discriminatees was motivated by their union activity subject to the causation test of *Wright Line*, 251 NLRB 1083 (1980). Union activity includes affiliation, active or inactive union membership, and past employment with union contractors. His evidence must show that the alleged discriminatees

made applications for positions, that Respondent refused to hire such applicants, that Respondent knew the applicants were union members or suspected they were union members, and that Respondent harbored animus against union members or sympathizers and refused to hire the alleged discriminatees because of its animus.

Respondent admits it is a nonunion contractor and prefers to work nonunion, which is its right presuming it does not discriminate in its hiring practices. Respondent also admitted that with the exception of discriminatee Been, the subject applicants were qualified to work as an electrician among the 20 plus positions offered. Wireways did hire electricians both before and after the alleged discriminatees applied for work.

The evidence shows that each alleged discriminatee filed an application for employment with Respondent for positions to be available when the project actually got under way. However, two of the applications are less than substantial as support for the General Counsel's complaint. David Thompson's application was unsigned and undated which under usual business practices would remove him from any consideration for employment, more particularly where as here the Respondent had a wealth of applications for a limited number of positions. Charles Been although applying for a journeyman electrician's position and in support of his application listing his former positions as electrician with journeyman's pay testified that he was an apprentice electrician still in training and with past wages at M & J Electric of \$9 per hour rather than \$14.56 per hour as listed on his application. The General Counsel apparently did not consider Been's revelation material to the complaint allegation, but I do. Where the General Counsel relies on circumstantial evidence to inferentially support the complaint theory and allegations of discrimination, his evidence should not only be probative but able to withstand minimum scrutiny. This, Been's evidence does not do. The conflict between the objective evidence and Been's admissions in his testimony renders his inclusion among the discriminatees in the complaint untenable. In view of the above, I shall dismiss all allegations related to Charles Been and David Thompson with regard to Respondent's failure to hire. Although Thomas H. Taylor's application was sorely deficient in work history, particularly because he applied as a welder or electrician, it does satisfy the bare essentials of making application for work. However any applicant that did not complete the work history section of the application as did Taylor or failed to sign the application as did David Thompson, had little chance of being considered for employment within Peacock's hiring procedures due to the lack of information and the large number of applications received.

Admittedly Wireways did not hire any of the alleged discriminatees. Of the 100 to 120 employees Wireways did hire for the Westvaco project, the General Counsel offered 34 applications and Respondent offered 8 applications into the record. The 9 applications among the 34 offered by the General Counsel and 5 of the 8 offered by Respondent listed 1 or more of 10 union contractors (evidenced in the record) in their work history. There is no evidence in the record that any employee or applicant told Peacock that a contractor listed in the work histories were Union or nonunion nor did Peacock make any inquiries about the listed contractors. Although Peacock admitted that he knew sometime after the project started that M & J was working union at the

Westvaco project there is no evidence to show whether M & J was using union members pursuant to a jobsite agreement as some contractors do on certain projects or was an organized union contractor. Moreover, no evidence exists to show M & J's union or nonunion status in the State of Michigan as listed by three of the alleged discriminatees. The applications evidence further shows that two of the eight offered by Respondent were given preference in hiring as help-ers because they had worked for Wireways in the past.

The General Counsel's contention that the applications in the record evince the transparency of Respondent's budgetary defense, and more disproves it, is not supported by the record evidence. The evidence shows that Respondent did hire employees within its budget wages except for the uncontroverted circumstances of the welders and instrument fitters. With regard to Peacock's opinion and hiring rule of not offering less wages to an applicant that expresses a desire for higher wages because an employee wanting more than he gets would likely produce less and would leave for a job paying more, over and above the obvious common sense application of human nature, the record does disclose that on several occasions that very result occurred. Divers quit without explanation notwithstanding he had been rehired by Taylor following a discharge for excessive absences, Long and Smith both quit within hours after the union election, Thompson left the hospital job at \$11 per hour after only a few weeks for another job paying \$14.50 per hour, and McGlammary only worked 2 weeks at the Southern Air jobsite where wages were \$9.50 per hour. Peacock's method of separating applications by wages desired and giving first consideration to those closest to the budgeted wage, particularly those applicants who check back and show more interest in employment, is an acceptable business practice. More particularly, where as here, the applicants were told by Peacock to check back if they did not hear from the Company. On its face it is nondiscriminatory, and the General Counsel offered no evidence contrary to the practice.

The General Counsel contends that the record discloses that none of the employees hired were members of 637 or had last worked for M & J Electric, a known union contractor. One application showing union apprenticeship of the hired applicant the General Counsel disregards as not reflecting union membership; however, he included a latent apprentice among the ostensible journeymen discriminatees. Another application of a hired employee included M & J Electric, Westvaco, in the work history and the General Counsel dismissed the theoretical variance as not a serious challenge to Respondent's nonunion policy. Further the General Counsel contends that the record shows Respondent's hostility toward unions and its refusal to hire employees previously employed by union contractors. The evidence simply does not support the argued hostility or the refusal to hire. The record, in fact, affirmatively shows the opposite. Diver's admitted extension of breaktime to distribute union literature was an unauthorized use of worktime for exercising Section 7 rights which the Act does not protect. If the issue were discipline for such actions, the Respondent would be free and clear to discipline Divers for his distribution of union literature. However Respondent chose to let it pass with no more than an oral admonishment. The objective evidence in the record clearly contrasts with the argued refusal to hire employees formerly employed by union contractors.

Two instances recorded in the testimony of McGlammary and Been attribute unlawful interrogation to Peacock during the application interview although neither is alleged as an independent 8(a)(1) violation. Both witnesses testified that Peacock asked them if they were in the Union, notwithstanding that each prominently displayed IBEW shirts and caps. The other eight witnesses, none of whom displayed any union affiliation in their dress, testified that Peacock did not ask them any questions about the Union. I find it incredulous that of 10 applicants, only the 2 with obvious union affiliation were nonetheless questioned by Peacock as to whether they were affiliated. I find the testimony of McGlammary and Been suspect. McGlammary's testimony was more robotlike than a genuine recall of events and significant conversations were not related in his affidavit which more approximated the occurrence of the events than that of his testimony. McGlammary had an ulterior motive in applying for employment and this same motive was controlling of his testimony. I find that the critical substance of his testimony was more imagined than real and discredit all his testimony of conversations with Peacock unless corroborated by Peacock. I regard Been as an untrustworthy witness with strong inclination to perceive and give accounts of events most supportive of his own self-interest. Been's testimony of his second visit to Peacock contrasts with that of the two witnesses who accompanied Been to the application interview with Peacock. The substance of what Been states was his second visit is more congruous with the other applicant witnesses and Peacock's testimony of the one and only application interview. Redman testified that Been wore an IBEW shirt and cap to the application interview and no union questions were asked by Peacock. Gill substantiated that no union questions were asked at the application interview. Been stated he wore the union shirt and cap at a second interview with Peacock at which time he was asked about the Union. With the exceptions of the union shirt and cap and the union questions, there is no real inconsistency between the General Counsel's three witnesses as to the substance of their conversation with Peacock and I credit the testimony of Redman and Gill in that regard. Both impressed me as trustworthy witnesses with capacity to recollect specifics. Been counseled with McGlammary following his application interview with Peacock focusing on the inflated wages shown on his application. It is most plausible to me that Been realized Peacock saw through his stated work history and contrived to change its effect on his employment application by attempting to rehabilitate his falsified application work history and wage history by creating a conversation with Peacock about lower wages. On balance I renew my belief that their is no real inconsistency of substance between Peacock's, Gill's, and Redman's version of the conversation with Peacock and that of Been with the exception of Been's second visit. I regard Peacock's, Gill's, and Redman's as a more complete and credible account of what transpired and I discredit Been's testimony of any second visit. As stated above, I find it incredulous that the only applicants subjected to questions about the Union were the two openly displaying union affiliation in their dress. Peacock's demeanor was that of a witness making a genuine effort to relate the events as they occurred and exhibited no evasiveness. I found Peacock to be a trustworthy witness and credit his testimony entirely.

I do not find any evidence of unlawful motivation in the record. Although it might be said a portion of the evidence raises some suspicion that union affiliation played a part in the decision not to hire McGlammary, the same evidence does not support a conclusion that Respondent systematically avoided hiring those individuals who Respondent might suspect were union members based on past employment records. Further, in my opinion, the alleged unlawful expressions relied on by the General Counsel would not be sufficient to support the missing elements of the General Counsel's case. Many applications were filed and reviewed by Peacock for a limited number of positions. The uncontroverted system of hiring individuals as needed for the project and the basis for determining their qualifications and selection remain intact. There is no competent proof that any applicant hired was less suited for employment than the alleged discriminatees or the corollary that the alleged discriminatees were more suited for employment among all the applicants. Neither is there any proof in the record that Wireway's wage practice had a different impact on employees depending on their union affiliation or lack thereof. Discrimination is not to be lightly inferred and here the record evidence creates a substantial doubt as to whether Peacock had any intention of discriminating against job applicants who were either members of a union, affiliated with a union, or previously were employed by a union contractor. I therefore conclude and find that the General Counsel has not established by a preponderance of the evidence, a prima facie case of discriminatory refusal to hire the employees named in the complaint.

The Objections

Objection 5 and the Regional Director's other objections are coextensive with unlawful threat allegations in the complaint. Contrary to the General Counsel's contention an 8(a)(1) violation is not a fortiori conduct requiring the election be set aside. The Board does not apply a per se rule. Moreover conduct critical enough to be considered objectionable to an election atmosphere may be de minimus and thus not require setting the election aside. In assessing objectionable conduct as de minimis or not the Board considers, among other factors, the number of violations, their severity, the extent of dissemination, and the size of the voting unit. Applying the Board's reasoning to the instant case the alleged unfair labor practices, whether meritorious or not, do not constitute conduct sufficient to set the election results aside.

Objection 2 is bottomed on the Employer's employee handbook, specifically paragraph 28, page 14. The handbook sets forth Respondent's rule for distribution of any literature in the working area (GCX-14). Although the handbook is dated September 90, the record shows that it was not distributed to employees until sometime in January 1991. The Respondent in a further attempt to correct the prior unlawful oral rule against distribution of union literature posted a notice to employees in mid-January 1991, stating, inter alia, "employees may distribute literature in non-working areas as long as this is not done when you are supposed to be working or in a manner which would interfere with the work of other employees." Although the handbook rule does not explicitly inform employees of their right to distribute union literature in nonwork areas during nonworking time the contemporaneous posting of the notice to employees clarifies the

handbook rule for all employees. Moreover the Respondent's enforcement policy throughout the period, with the exception of Taylor's single transgression, conformed with the rule as expressed in the notice to employees. Indeed, the record evidence clearly shows that employees freely distributed union literature in nonwork areas during nonworking time, both before and after, the timely retraction of the unlawful oral rule and continued to do so until the election. Accordingly, I conclude and find that Objection 2 is without merit and the results of the election are valid.

ADDITIONAL CONCLUSIONS OF LAW

1. The General Counsel has failed to sustain his burden of proof that Respondent threatened employees with plant clo-

sure if the Union won the election, threatened employees with discharge for engaging in union activity, and threatened employees that their union organizing efforts were futile.

2. The General Counsel has failed to sustain his burden of proof that Respondent promulgated a violative no-distribution rule.

3. The General Counsel has failed to sustain his burden of proof that Respondent discriminatorily refused to hire applicants for employment.

4. The objections to the election are without merit.
[Recommended Order for dismissal omitted from publication.]