

Steel Industries, Incorporated and International Union, Allied Industrial Workers of America, AFL-CIO and Factory Committee (Safety and Grievance Committee), Party of Interest.
Case No. 25-CA-1445. September 28, 1962

DECISION AND ORDER

On March 14, 1962, Trial Examiner Lloyd Buchanan issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. He also found that the Respondent had not engaged in certain other unfair labor practices as alleged in the complaint and recommended dismissal of these allegations. Thereafter, the General Counsel and Respondent filed exceptions to the Intermediate Report and supporting briefs.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Leedom, Fanning, and Brown].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and adopts the findings,¹ conclusions, and recommendations² of the Trial Examiner with the additions and modifications noted herein.

We agree with the Trial Examiner's conclusion that Respondent violated Section 8(a) (1) (2) and (3) of the Act. In concluding that Respondent contributed support to and interfered with the administration of the Factory Committee in violation of Section 8(a) (2), we have considered for background purposes, elucidating events and circumstances antedating the 10(b) period, such as: The Factory Committee was organized as a successor to the Safety and Grievance Committee, which was formed and sponsored, and provided with financial and other support, by Respondent. Concurrently with the Union's efforts to organize Respondent's employees, the members of the Factory Committee were told by Respondent's vice president that Respondent did not need or want a union and that the Committee could help keep

¹ We do not rely upon the remarks of the Trial Examiner at footnote 1 of the Intermediate Report.

² For the reasons given in *Isis Plumbing & Heating Co.*, 138 NLRB 716, and in the manner therein described, we adopt the Trial Examiner's recommendation, as requested by the General Counsel, that the Respondent's backpay obligation herein include the payment of 6-percent interest on the backpay due White. Member Leedom, however, for the reasons stated in the dissent in the aforementioned case, would not grant such interest

it out. He instructed the Factory Committee as to how it should function, explaining that it could provide the services of a union if it collected grievances from the employees and obtained answers for their grievances. As found by the Trial Examiner, Factory Committee members were paid by Respondent for time spent in committee work and Foreman Hartle was designated by Respondent as its representative in the first step of grievance processing and he also served as a member of the Factory Committee, which processed grievances with Respondent.

ORDER

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent:

1. Cease and desist from:

(a) Discouraging membership in International Union, Allied Industrial Workers of America, AFL-CIO, or in any other labor organization, by discriminatorily transferring any of its employees or discriminating in any other manner in respect to their hire and tenure of employment, or any term or condition of employment.

(b) Contributing support to or interfering with the administration of Factory Committee or any other labor organization of its employees.

(c) Recognizing Factory Committee, or any successor thereto, as the representative of its employees for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms or conditions of employment, unless and until such labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of such employees.

(d) Coercively interrogating employees concerning their union activities or desires.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Ella Jean White immediate reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other rights and privileges.

(b) Make said Ella Jean White whole for any loss of pay she may have suffered by reason of the discrimination against her, in the manner set forth in "The Remedy" section of the Intermediate Report and in the decision above.

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

(d) Withdraw and withhold recognition from Factory Committee as the exclusive bargaining representative of its employees, unless and until the said labor organization shall have been duly certified by the National Labor Relations Board as the exclusive representative of such employees.

(e) Post at its place of business in Crawfordsville, Indiana, copies of the notice attached hereto marked "Appendix."³ Copies of said notice, to be furnished by the Regional Director for the Twenty-fifth Region, shall, after being duly signed by the Company's representative, be posted by the Company immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for the Twenty-fifth Region, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

³In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order"

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in International Union, Allied Industrial Workers of America, AFL-CIO, or any other labor organization by discriminatorily transferring any of our employees or discriminating in any other manner in respect to their hire and tenure of employment, or any term or condition of employment.

WE WILL NOT contribute support to or interfere with the administration of Factory Committee or any other labor organization of our employees.

WE WILL NOT recognize Factory Committee, or any successor thereto, as the representative of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, rates

of pay, hours of employment, or other terms or conditions of employment, unless and until such labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of our employees.

WE WILL NOT coercively interrogate employees concerning their union activities or desires.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Union, Allied Industrial Workers of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities.

WE WILL offer to Ella Jean White immediate reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of pay suffered as a result of the interference, restraint, coercion, and discrimination against her.

STEEL INDUSTRIES, INCORPORATED,
Employer.

Dated----- By-----
(Representative) (Title)

NOTE.—We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

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

Employees may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis 4, Indiana, Telephone Number, Melrose 2-1551, if they have any question concerning this notice or compliance with its provisions.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

The complaint herein (issued November 3, 1961; charge filed September 6, 1961) alleges that the Company has violated Section 8(a)(3) of the National Labor Relations Act, as amended, 73 Stat. 519, by downgrading AIW adherents, terminating Georgia A. Wagner on or about August 4, 1961, and constructively discharging Ella Jean White on or about August 11, 1961 because said employees engaged in concerted activities;¹ Section 8(a)(2) of the Act by said alleged acts, by permitting

¹ The analysis of the evidence, in addition to its overall aspects, is necessarily and properly on a "fragment by fragment basis," particularly where testimony is in part rejected and in part credited, and where one cannot indulge in the luxury of total reliance. See *Dobbs Houses, Inc.*, 135 NLRB 885. Whatever might be said concerning an analysis, there is and can be no proper charge of fragmentation of what has necessarily been

committee representatives to conduct committee business at the plant, paying such representatives for time spent on committee business and meetings, furnishing supplies and performing clerical services for the Committee, and by the additional acts herein set forth; and Section 8(a)(1) of the Act by said alleged acts and by interrogating employees concerning their union activities and desires, threatening to discharge and otherwise discriminate against employees because of their membership in or activities in support of the AIW, and by maintaining close surveillance over the activities of union adherents. The allegation of discriminatory downgrading was dismissed at the hearing on motion of the General Counsel. The Company's answer admits the termination of Wagner and a notice of transfer to White, but denies the allegations of violation. The Committee admitted company sponsorship and support but in lay terms denied that the Committee is a labor organization and that it has been interfered with or dominated.

A hearing was held before Trial Examiner Lloyd Buchanan at Crawfordsville, Indiana, from January 16 to 19, 1962, inclusive. Pursuant to leave granted to all parties, briefs have been filed by the General Counsel and the Company, the time to do so having been extended. On March 1, 1962, there was filed with me a stipulation to correct the record. The stipulation is received as Trial Examiner's Exhibit No. 1, and the record is hereby corrected as noted in said stipulation.

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

FINDINGS OF FACT (WITH REASONS THEREFOR)

I. THE COMPANY'S BUSINESS AND THE LABOR ORGANIZATIONS INVOLVED

It was admitted and I find that the Company, an Indiana corporation with place of business at Crawfordsville, Indiana, is engaged in the manufacture of cold extrusions, stampings, screw products, and brazed assemblies; that during the 12 months preceding issuance of the complaint it manufactured, sold, and shipped from said plant to points outside the State of Indiana products valued at more than \$50,000; and that the Company is engaged in commerce within the meaning of the Act.

It was stipulated and I find that the AIW is a labor organization within the meaning of the Act.

It was stipulated and I find that the Factory Committee, hereinafter called Committee, deals with the Company concerning working conditions, safety matters, wages, hours, holiday and vacation pay, personal grievances, housekeeping matters, etc., of the Company's hourly paid employees. I find that the Committee is a labor organization within the meaning of the Act.

II. THE UNFAIR LABOR PRACTICES

A. The alleged independent violation of Section 8(a)(1)

Wagner testified that on June 13, 1961, Phelps, the Company's manager of quality control, personnel, and training, asked her what she wanted with the Union and whether she would do the next year what she had been doing the year then ending; and he explained thereafter that, because of her support of the AIW, he deemed her a bad apple. Phelps testified that the conversation was at Wagner's request and that she apparently just wanted to talk over her troubles. Phelps did not remember details of the conversation, and his version was different from Wagner's. But he did not deny the details which she related. I find that this interrogation, with Phelps' characterization of Wagner, constituted interference, especially in the context of the other violations found *infra*.

Wagner testified further that on or about June 29 Vice President Oshry told her that because of what she had done he had been kept from his job too much

offered in fragments. It may be redundant to speak of a fragment-by-fragment analysis; no other is worthy of the designation "analysis" in these cases where statute and regulations require that reasons be given. Cf. *Funkhouser Mills*, 135 NLRB 518 (Supp IR, Appendix A); 132 NLRB 245. What cannot stand up under immediate analysis cannot properly be made a refuge for a general or overall conclusion so-called. Received on a fragment-by-fragment basis as properly offered by counsel for the parties, rather than in the form of generalities and conclusions, the evidence has necessarily been considered in similar detail to do justice to the parties. This is not to say that an overall view is not taken. The conclusions, *infra*, will indicate the generalizations. Regardless of which parties may be pleased or how reviewers may react, the findings and conclusions are based on the evidence received, do not go beyond that evidence, and do not include any determination in favor of any party which is contrary to its position taken at the hearing.

with the result that the Company had been compelled to reduce the workweek from 6 days to 5. This presumably relates to the allegation of threat to discriminate unless an employee terminated her membership in or support of the AIW. Oshry explained a reference to misunderstandings as being connected with an alleged conversation with a doctor, of which more *infra*. His statement that he would allow her 2 or 3 misunderstandings, but not 10 or 12 is not violative. Nor is the allegation of threat of discrimination supported by Oshry's reference to the shorter workweek. Even as Wagner testified, it was clear that Oshry was referring to what had already occurred, and was not calling for termination of Wagner's AIW activity. He explained credibly that the effect or drop in sales was manifest sometime after the election campaign and resulted from his inability to devote himself to sales, of which he accounted for 95 percent, while he presented "the company's side of the forthcoming election." (There is no claim of interference in connection with such presentation nor is the change to a 5-day week alleged as discriminatory.) This remark to Wagner was made more than a month after the AIW lost the election.

Also alleged as interference is a watch or surveillance by the Company on the intraplant movements of AIW adherents because of their concerted activities. Wagner testified that about March 9 Lith, the night shift superintendent, told her that Oshry and Production Manager Feldman had told him to speak to her about going to the restroom too much, talking to others, and being away from her press; her setup man, Remley, told her that he had been told to keep records on how long she, White, and Wethington, another AIW supporter, were in the restroom and away from their machines, and later that she and White were still going to the restroom too much.

According to White, the orders to note these absences from the machine allegedly came from Oshry, Feldman, and Phelps. Oshry explained that he thought it was about February that he instructed Feldman to keep records of absences from the machines, and the word was thereafter passed down the line so that the Company could develop a rule to govern such time. According to Oshry, the records were to be kept on 13 or 14 employees in various departments (Lith testified that there were 11 or 12), and steps were taken to find out what was done at other plants in the community. Whether employees other than Wagner, White, and Wethington in their department were members or active in behalf of the AIW was not shown so that selection of any others might have exposed the Company to the same charge of interference; nor does it appear that any of the approximately 10 others in other departments (5 of them were named by Lith) were AIW supporters. The fact that the survey was initiated at about the time or shortly after the commencement of organizational activities in February may arouse suspicion, but it does not warrant a finding of unlawful interference in the attempt to develop a reasonable working rule; and this is especially so in the absence of evidence of discriminatory selection of employees to be observed.

Although the exact dates of the surveillance will not determine the issue before us, it would appear to have begun in March, or as alleged in the complaint and also testified, in March or April. Remley, although apparently honest, was mistaken² in several instances. In addition to the finding on the record with respect to his error concerning the time of commencement of the alleged surveillance (it would not have taken these employees a month or more to realize that such observation was taking place), we need cite here only Remley's departure from the uniform and credible testimony that only two preliminary drafts were made of employees' ratings, and that Feldman's or the third and final rating was prepared after consultation among the setup man, the shift supervisor, and Feldman.

Further on the question of credibility, a "background" incident cited by the General Counsel, so far from supporting his case, serves to indicate Wagner's unreliability. Her testimony at first was that Oshry said early in February that he would not push "any more" his attempts to obtain the release of a relative of Wagner's from the penitentiary since he did not want to ask for favors "right now." Pressed on this, Wagner modified it to Oshry's alleged statement that he would not push it "right now." There was no basis in fact for Wagner's declaration to the prisoner's mother-in-law that Oshry had dropped the case; and Wagner was less than frank in her failure to confess this last declaration when she was asked and she denied that she had so informed the father-in-law. Characterized by Oshry

² The testimony throughout the hearing indicates not so much willful contradictions or contrary statements of fact by the various witnesses as claims for different interpretations. In several cases where contradictions occur they appear, considering the overall impression given by a given witness, to be the result of honest error rather than intentional falsehood.

as malicious, such a statement might have warranted Wagner's discharge. Oshry spoke to her about that case in April, but at that time apparently did not know that the statement had been hers.

Also reflecting on Wagner's credibility is her testimony that two doctors who had treated her and recommended that she take some time off from work told her that the Company had suggested such absence. It is clear from the testimony of both doctors that the idea was not the Company's but that they had themselves made the recommendation, and further that they had not told Wagner that the Company had suggested it to them.

In this connection, and without undertaking to cite all such instances indicated with respect to various witnesses on the record, we can note White's careless but hardly crucial (with respect to either the principal issues or her credibility) statement that she remembered writing "nights" on her job application form in 1958; she did not so indicate on the form. Also reflecting on White's credibility is the credited and uncontradicted testimony of a former employee that she had spoken to him in the first aid room concerning the Union, but that she noted his visit as due to headache. But this does not sufficiently affect the credible testimony and the facts in connection with her discriminatory transfer, *infra*.

White testified that, when Lith told her that she was to work on the day shift thereafter and she remarked that he had worked hard to get rid of her, he replied that she had worked hard for the Union and that they were now even. According to Lith, his reply was, "I never worked hard at anything." I do not believe that he would have or that he did here declare an antiunion purpose. But in any event if this testimony was offered to prove the allegation that Lith threatened to discharge employees because of their union activities, it does not.

B. The alleged violation of Section 8(a)(3)

1. Wagner

Whether Wagner and White were female counterparts of Boanerges need not be considered: no issue has been raised, and it is clear, that the Company had knowledge that both Wagner and White actively supported the AIW throughout this period. Neither is there any issue concerning the general termination of employees on August 4, 1961, or the economic need therefor; what is in issue in that connection is whether the selection of Wagner for termination was discriminatory.

No more than with respect to rating reports of AIW adherents generally, the allegation with respect to which was dismissed on the General Counsel's motion, does it appear that Wagner's report or her performance was discriminatorily downgraded. Furthermore there is no proof nor are we warranted in assuming that the system adopted by the Company for rating the employees, and Wagner's position very near the bottom of the list of 59, were discriminatorily contrived to eliminate her. As for absences, whatever may be argued concerning consistency, fairness, or any other angle from which the General Counsel may approach the question as he points to a different method in dealing with absences according to the Company's rules, our concern is whether the method and overall formula for rating employees were discriminatorily adopted to terminate Wagner, she being the only one of the 13 terminated on August 4 with respect to whom discrimination is claimed; and there being no suggestion of improper motivation with respect to the other 12. I find no discrimination in adoption or execution of the three-factor comparative rating plan. If any would complain that the plan reflects an engineer's or mathematician's predilection, it is still not shown to be discriminatory.

I have not overlooked the variance between Personnel Supervisor Runge's and Remley's oral appraisal of White's work stated to her immediately before the rating interview of March 1961, and the score which she received at that time. Whether this reflected error in their general impression, the very factor against which the Company warned those who made ratings, that they be not swayed by last minute improvement to the exclusion of the record throughout the rating period; or whatever the reason, only error at that time but no discrimination could at most be found. I cannot base a finding that those who prepared the ratings acted discriminatorily on a comparison with their contemporary oral statements. In any event, the rating list which was used for termination of the 13 lowest employees on August 4 shows White at approximately the middle of the list, many places removed from termination possibility.

In Wagner's case, it was her high absentee factor, as in the case of others at the bottom of the list, which most caused her low overall rating and determined her selection for layoff. While the element of "attitude" was repeatedly referred to with the suggestion that a subjective, nebulous, and pretextual basis was relied

on in making these ratings, it became clear that attitude is one of the factors listed on the National Metal Trades Association rating sheets which were here used to construct each employee's rating; such rating in turn being one of the three factors noted, and the third being seniority. The attitude to be rated is not the employee's attitude with respect to concerted activities, but his attitude and cooperation with respect to his work; and it does not appear that the rating factors were improperly applied. Neither does it appear that the NMTA rating system was adopted or applied discriminatorily.

The factors employed are not nearly so involved as some of the discussion concerning them on the record; it may be helpful to explain the factor of absenteeism somewhat. Absences which the Company here considered were those which had not been approved in advance generally on a leave of absence form. For this purpose no distinction was made in the case of absences not so approved whether they were for so-called good reasons or not although such distinction was considered in the shop rules and procedures. While the rules applied for purposes of discipline are thus different from the consideration given to absences and the computation based thereon for rating purposes (as specifically noted on the June 15, 1961, notice for inclusion in its Procedure Manual), such latter consideration and computation are without discrimination among the employees. Precise mathematical details of the various items and the formula employed appear on the record but need not now be described. Suffice it to say that there is no showing that differences in rules and differences in application of data for different purposes are themselves discriminatory. If repetition will clarify, one can repeat that there is no evidence of discriminatory application of the formula with respect to absences or of any portion of the three-factor formula which was employed in making the reductions of August 4. (In the case of new employees, a modification was made in the absenteeism factor, but this was nondiscriminatory and did not affect Wagner.) Wagner's discharge was based on the nondiscriminatory application of a nonviolative formula, and was not in violation of the Act.

2. White

Since her employment in 1958, White had worked on the night shift with very occasional exceptions when she asked to exchange places with a day shift employee because of her special and immediate need. Without accepting Lith's obviously too opportune admission that he knew that White could not work on the day shift, we can reconstruct the conversation between them on August 11, 1961. He told her that word had come from Feldman that she was to work on the day shift, the order effective Monday, August 14; she replied that she could not and would not work days, and she thereupon telephoned her husband and then punched her card out, handed it to Lith, and left the plant although her shift had not yet ended. White went to where her husband was working, then to Wagner's home and, although it was approximately 11 p.m., she telephoned Feldman at home, waking him, and checked on his order that she be transferred. He told her that it was necessary, that she had no choice; and she replied that she had always worked nights and could not work on the day shift.

White then called Phelps, who also told her that she would have to work on the day shift. White told him that that was "impossible" since she had illness in the family, and also pointed to three women who had just been transferred from the day shift to nights, indicating that she could replace or trade places with one of these. But, as Feldman had, Phelps told her that she had better come in on the day shift on the 14th.

Despite her apparent "quitting" earlier, Feldman testified that White now asked him whether she would be fired if she did not appear on Monday for work on the day shift, and he told her that he wanted her there on Monday. Then, after this was repeated, she said, "I quit," and hung up. Phelps testified that White informed him that she had turned in her card and "quit," and then asked whether she would be fired if she did not report for work; and that he then told her to come in and they would talk. It is clear that to this point the Company did not regard White as having quit.

The Company points out that before she handed her card to Lith and left on August 11, White did not speak to any supervisor with authority to retain her on the night shift. It is not clear that an employee must personally appeal beyond the representative whom the employer has designated to deal with her. But she did thereafter call both Feldman and Phelps as we have just seen; the matter was not yet closed at least as far as her continued employment was concerned, and these officials had full opportunity to inform her that she would not have to work on

the day shift. In this connection we should note White's uncontradicted testimony that she remonstrated with Feldman on August 11 that she had always worked nights and could not work days. Further and without reliance on any statement made by White in 1958 to a former personnel supervisor, she had more recently told Feldman, who was the man who now directed her transfer, that she had to work nights. This had occurred when she applied for a leave of absence and Feldman asked whether she preferred days or nights when she returned. Feldman denied generally that he had before August 11 ever discussed with White her alleged availability for the night shift only. But without denying any specific prior discussion, he testified only that he did not recall speaking with her concerning the shift on which she wanted to work.

Not overlooking the reflections noted on White's credibility, I credit her testimony of several such talks with Feldman during the previous fall or winter. Her continued employment on the night shift through the years except for occasional changes, noted *supra*, which were made to suit her immediate and temporary convenience, is consistent with her testimony that her limited availability had been discussed and recognized by the Company. These conversations and White's long-standing employment on the night shift are not to be ignored for a claim that the Company, before the announcement of White's transfer and the refusal to put employee Brady to work on the day shift, did not know that White would not work on the day shift. Certainly both earlier and on August 11 the Company and its responsible officials knew that White would work on the night shift only.

There were three elements in White's transfer, only two of which were explained, leaving the third and the most salient one before us. The change from large presses to small was dictated by economic need; White had worked satisfactorily on small presses before, and she would suffer no loss in pay; but there is no explanation for the decision to change her shift and the insistence thereon in the face of her explanations and protest. We have not even an attempt to explain why the Company, with less upheaval or change, would not retain on the day shift one of the three (there was reference to a fourth) women whom it was now transferring to the night shift, thus making one change fewer to the night shift and also making unnecessary any shift transfer for White even if her work assignment were justifiably changed.

Beyond this we have the evidence concerning Brady. The latter had been away from work on medical leave for 3 weeks, and called Runge on August 11 to return on the following Monday. According to Brady whose work experience was similar to White's but shorter (she was ranked just below White on the overall rating chart), she spoke with Runge three times on August 11 and before 5 p.m. on that day the latter informed her that Feldman had said that she was to work nights. Brady had worked on the day shift. Circumstances at home required her presence at night, and she asked Runge to speak with Feldman so that she might continue on the day shift. Supporting this version is Brady's testimony that she saw Runge at a store in town that evening and asked whether he had spoken to Feldman about her shift request, Runge replying that he had been too busy. On Saturday morning Runge told her that he had spoken with Feldman who said that there was no room on the day shift for her and that she would have to work nights. Brady later became confused as to "which telephone conversation was which," and finally maintained that a previous statement in which she declared that she called Runge in the afternoon before 2 o'clock recalled to her that she had called him in the morning!

According to Runge, he spoke with Brady only once on the 11th and it was not until the next day that he spoke with Feldman, who then assigned Brady to the night shift; during a later conversation Brady asked Runge to intercede with Feldman so that she could work on the day shift, and then in another call, but still on August 12, Runge informed her that Feldman had said she would have to be on the night shift although he would be glad to try to effect a change in the future.

Whether or not Feldman knew on August 11 and before White's call to him that night that Brady wanted to return on the 14th and that she wanted to continue on the day shift depends on the credibility of these two witnesses. Feldman did not himself testify with respect to any conversations with Runge concerning White. Runge did not at first testify to or deny the meeting with Brady in town. Pressed as to this, he did deny seeing her; but both his expression and his manner indicated that this was more a denial of recollection than an outright denial. Despite Brady's apparent confusion, I do not believe that she made this up out of the whole cloth. I find that Runge's recollection was understandably not as clear as Brady's, and I find that Feldman knew before his conversation with White that Brady wanted to work on the day shift.

Here it should be noted that even if Feldman had not known of Brady's availability and preference until August 12, he did by that time know how important

it was to White to remain on the night shift; and a discriminatory motive against the latter might be inferred in the refusal to accede to Brady's request and at the same time to avoid disturbing White. There is neither explanation nor attempt to explain why the former was not permitted to continue on the day shift, the latter at night, aside from the earlier decision to transfer White, which Feldman made after she had told him that she had to work nights, as we have seen.

White had turned in her card and left the plant in pique or anger. Having observed her, I can understand her sullen reaction. But if not to be applauded, it was not an irrevocable quitting, nor was it so regarded by the Company. We have seen that she did in fact call top supervisors immediately afterward, and was told to report on the day shift. Were it held that White had lost her status by quitting, the Company clearly condoned her walking off the job. In fact, she was not regarded as having quit, being told that she was expected on Monday. In any event, the question before us is whether her quitting in the plant or by a later statement to Feldman was discriminatorily provoked by the Company.

With other employees being shifted from the day to the night shift, we have no explanation for reversing the direction with respect to White. If most employees prefer the day shift, no reason has been offered for forcing that "benefit" on White. I find that it was because of her union activities³ that the Company transferred White to the day shift and insisted on such transfer although it knew earlier of her unwillingness to accept it and then of Brady's plea for day work; and that the Company thereby discharged her. The inference is indeed warranted that, with knowledge of her leadership in AIW activities, the Company had been aware of the possibility that she would refuse to work on the day shift, the prospect becoming more fascinating when she left the plant and telephoned Feldman. In the light of the Company's opposition to unionization and its knowledge of White's adherence and leading support, we may properly infer that the real reason for discharging her was to discourage union activities and adherence; the reasons given for the transfer and insistence on it being pretextual.⁴

Union activities do not immunize against discharge any employees so engaged. The Company had reasonable basis for terminating Wagner and, I find, acted thereon. With respect to White, however, it had no reasonable basis and I find that its transfer of her to the day shift was unreasonable, discriminatory, and provocative, and that the alleged need for such transfer was a mere pretext.

The lapse of 2½ months between the election and White's transfer might be cited as making too remote any antiunion motive on the part of the Company. But union activity and the possibility of repetition of the problems which it entailed remained in Phelps' mind after the election, evidence of this appearing in his question of June 13 to Wagner whether she would be doing next year as she had been doing; and Oshry's earlier accusation that White was an agitator on the union payroll indicated his impression of an active and lasting role. That the union activities were not remote is further evidenced by Oshry's reference at the end of June to the union activities and their effect on the Company's sales. While not violative, the latter comment does indicate the seriousness with which those activities were regarded by the Company. The omission of any previous action against White does not bar recognition of what was now done when the necessity arose to make various changes, this one being wholly unnecessary.

In making the finding of discrimination against White, I have not relied on an alleged admission by the setup man, Remley. Even if his statement shortly after August 11 that the Company had gotten rid of another troublemaker is to be construed as meaning that the Company got rid of her because she was a troublemaker, there is no evidence that Remley's authority was such (even if he were found to be a supervisor) that he could bind the Company by such an admission. Nor does it even appear that Remley knew the circumstances surrounding White's quitting and the Company's alleged causation. This statement by Remley is not alleged as a violation of Section 8(a)(1). (Like other items adverted to as not alleged, this was not "fully litigated" or even claimed in the General Counsel's brief as violative.)

No more do I rely on such testimony as that, when an employee charged Oshry with weeding out the ones he wanted to get rid of, he replied, "Since [she] had worded it that way, that he could say that." The witness admittedly took this out of context, it being only part of what Oshry had said. This manner of expression in reply to her remark and at a meeting sought by her was quickly set straight as she testified further that she told Oshry that she was unalterably opposed to the union (she had been among those laid off), and that he replied that union activities or

³ See *The American Tool Works Company*, 116 NLRB 1681, 1690

⁴ Cf. *NLRB v The Bendix Corporation*, 299 F 2d 308 (CA 6)

support had nothing to do with the layoffs, and that he had been charged with other irrelevancies in making the selections.

C. *The alleged violation of Section 8(a)(2)*

It was stipulated that a Safety and Grievance Committee was organized in July 1957 and disbanded about July 1, 1960, when the Factory Committee was formed. In issue is whether or not the Factory Committee since March 6, 1961, the beginning of the statutory period herein, has included supervisory personnel in its membership. With this stipulation, it is clear that our concern is with the existing Factory Committee, and not at all with the Safety and Grievance Committee. The allegation concerning the latter is hereby dismissed.

Speaking more in sorrow than in flippancy, it will serve no useful purpose to add, by analysis of that testimony, to the time wasted in receiving testimony concerning supplies and clerical services furnished by the Company to the Factory Committee.⁵ The hopeful attempt to show that the Company by clerical employees was to some extent involved in drafting or preparation of committee papers, as distinguished from mere typing, failed; and the typing indicated was a trifle. It is the insubstantial amount of assistance which here supports the Company's denial, not the argument that, because the typing was done by an employee who was represented by the Committee, it could not constitute unlawful support.

Nor does the submission to Oshry of the Committee's minutes, taken up as they are with grievances and suggestions concerning working conditions, indicate company domination or support. Grievances are intended for the Company's attention and action; the Committee to that extent functions for the employees, not for the Company. As for the inclusion of other matters (there is no evidence that anything is improperly included) in the minutes which are submitted to Oshry, it does not appear that the Company controls or interferes in such. Further testimony indicates that company decisions on grievances are communicated to the Committee or its representatives, so-called personal matters being handled confidentially with the employees involved. Oshry follows the Committee's recommendations most of the time; when he does not, he gives reasons. Finally, in this connection, the Committee raises a large variety of subjects or questions; it has never felt limited on the matters to be taken up, and it has not been told that some subjects were "off bounds." Such testimony does not support the allegation of violation.

On the other hand, it does appear that the Company pays committee members for time which they spend at committee meetings before or after their usual working hours. Such payment constitutes unlawful support.⁶

Beyond this, much testimony was received concerning Remley's status, most of it indicating no more than that he set work up for employees without having or exercising supervisory authority. Supervisory status might be spelled out from the fact that the various operations performed required the exercise of such functions; and reliance can hardly be placed on the testimony that there are no supervisors within the meaning of the Act on the night shift subordinate to Lith, the night shift superintendent, who has or has had 60 to 65 employees under him in the various departments.⁷ Despite the AIW's inclusion of Remley as an eligible voter, further light on his status and his relationship with rank-and-file employees is cast by his participation in the rating process, where his evaluations were not merely advisory but were an integral part of a give-and-take discussion and constituted a basis for the final ratings issued. All of this appears to be unimportant for present purposes, however, since the only allegation which involves Remley is that of surveillance, *supra*, which has not been found. It appears further that, whatever his authority otherwise, Remley together with Foreman Hartle was among those listed to receive employee grievances. Here we can leave Remley and fix our attention on Hartle.

While the procedure with respect to grievances was not alleged in the complaint as a violation, that the Committee is a labor organization was alleged and fully litigated. Also litigated and noted as an addition to the list of supervisors alleged was Hartle's status as a supervisor. Thus even if Hartle was not in all respects a supervisor, his authority to represent the Company in the first step of the grievance procedure by receiving grievances and submitting an answer or decision on behalf of the Company was indicated in detail and spread on the record by a company memorandum and its procedural manual, both dated in February 1961 and thereafter in effect and kept by the personnel manager, each department manager, and all supervisory personnel. The assumption that the situation or status as it existed

⁵ See *Signal Oil and Gas Company*, 131 NLRB 1427

⁶ See *Coppus Engineering Corporation*, 115 NLRB 1387

⁷ Cf. *The Hamilton Plastic Molding Company*, 135 NLRB 371.

on February 24, was thereafter continued was specifically noted on the record. But Hartle was also a member of the Committee from January to July 1961, and one of the Committee's functions, as we have seen, is to process grievances on behalf of the hourly paid employees.

Company interference with the Committee's administration exists where a person sits on both sides of the table, i.e., is held out as functioning for both the employer and the labor organization in the processing of grievances.⁸ This is violative of Section 8(a)(2) of the Act. On the other hand, it has not been shown that the Company so controls the Committee or that the latter is so dependent on the former as to warrant a finding of domination.⁹ Thus when the Committee's minutes submitted to Oshry referred to committee business or procedures, he replied that such matters were strictly within the Committee's jurisdiction.

The complaint alleges generally that the other violations claimed constitute violation of Section 8(a)(2) also. The discrimination against White is derivatively interference within the meaning of Section 8(a)(1). Whether it may also be found to constitute support of the Committee and violative of Section 8(a)(2) is doubtful; and such a finding, based on the discrimination found or on the independent interference, is quite unnecessary as it would add nothing to the remedy.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

IV. THE REMEDY

Having found that the Company has engaged in and is engaging in certain unfair labor practices affecting commerce, I shall recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

It has been found that the Company, by transferring White from the night to the day shift thereby causing her to quit and constructively discharging her, discriminated against her in respect to her hire and tenure of employment in violation of Section 8(a)(3) of the Act. I shall therefore recommend that it cease and desist therefrom and from infringing in any other manner upon the rights guaranteed in Section 7 of the Act. I shall further recommend that the Company offer to White immediate reinstatement to her former or substantially equivalent position on the night shift without prejudice to her seniority and other rights and privileges, and make her whole for any loss of pay sustained by reason of the discrimination against her, computation to be made in the customary manner.¹⁰ I shall further recommend that the Board order the Company to preserve and make available to the Board upon request payroll and other records to facilitate the checking of the amount of backpay due.

While it lies within the General Counsel's discretion to frame and to issue a complaint,¹¹ the remedy is the Board's.¹² The Board is not dependent on a request by the General Counsel for interest on backpay but may award or add interest *sua sponte* where, as here, no request has been made. The General Counsel's recent announcement of intention to seek interest is persuasively reasonable, and the reasons can be here applied. I shall therefore recommend that, as part of the remedy, interest at the rate of 6 percent be added to the backpay due to White.

⁸ *Wooster Division of Borg-Warner Corporation*, 113 NLRB 1288, 1294, 1319, 1324. Cf. *Employing Bricklayers' Association of Delaware Valley*, 134 NLRB 1535, and cases cited.

⁹ As noted, our concern is not with sponsorship of the Safety and Grievance Committee. Nor in the absence of evidence of company sponsorship of the Factory Committee, do I rely on the latter's naive admission in its answer's apparent reference to sponsorship of its predecessor.

¹⁰ *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827; *Crossett Lumber Company*, 8 NLRB 440; *Republic Steel Corporation v NLRB*, 311 U.S. 7; *F. W. Woolworth Company*, 90 NLRB 289, 291-294.

¹¹ NLRB A., section 3(d); *International Union of Electrical, Radio and Machine Workers, AFL-CIO v NLRB (NECO Electrical Products Corporation)*, 289 F.2d 757 (C.A.D.C.).

¹² NLRA, section 10(c); *Florida Steel Corporation*, 131 NLRB 1179; *NLRB v. Local 294, International Union of Teamsters, etc (K-C Refrigeration Transport Company)*, 284 F.2d 887, 893 (C.A. 2).

It has been further found that the Company, by payment to committee members for time spent at meetings, and by directing that a member of the Committee, which processes grievances for employees, handle such grievances on behalf of the Company, contributed support to and interfered with the administration of the Committee in violation of Section 8(a)(2) of the Act. I shall therefore recommend that it cease and desist therefrom. In the absence of evidence that the Committee has been freely selected by the employees as their collective bargaining representative,¹³ I shall further recommend that the Company withdraw recognition from the Committee, unless and until that labor organization shall have been certified by the Board.

It has been further found that the Company, by interrogation of an employee concerning her union activities and desires, interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act. I shall therefore recommend that the Company cease and desist therefrom.

For reasons stated in the subsection entitled "Wagner," I shall recommend that the complaint be dismissed insofar as it alleges the discriminatory termination and failure and refusal to reemploy Wagner.

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

CONCLUSIONS OF LAW

1. International Union, Allied Industrial Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. Factory Committee is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Ella Jean White, thereby discouraging membership in a labor organization, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By payment to committee members for time spent at meetings, and by directing that a member of the Committee handle employee grievances on behalf of the Company, thereby contributing support to and interfering with the administration of the Committee, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(2) of the Act.

5. By such discrimination, support, and interference, and by interrogation concerning an employee's union activities and desires, thereby interfering with, restraining, and coercing employees in the rights guaranteed in Section 7 of the Act, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

7. The Company has not engaged in unfair labor practices within the meaning of the Act by terminating the employment of and failing to reemploy Georgia A. Wagner.

[Recommendations omitted from publication.]

¹³ Cf. *M. Eskin & Son*, 135 NLRB 666, at footnote 15.

Charley Toppino and Sons, Inc. and Freight Drivers, Warehousemen and Helpers Local Union No. 390, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Case No. 12-CA-2147. September 28, 1962*

DECISION AND ORDER

On June 7, 1962, Trial Examiner William Seagle issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor