

Honeywell, Inc. and Local 116, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO. Cases 4-CA-20581-2 and 4-CA-20631

August 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND TRUESDALE

On September 2, 1994, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply 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 exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.

We agree with the judge that, in the circumstances of this case, the provision in the Respondent's "Job Opportunity Bulletin" (JOB) procedure precluding unit employees covered by a collective-bargaining agreement from bidding on job vacancies violated Section 8(a)(3) and (1) of the Act. In adopting the judge's decision, we rely principally on the evidence of actual antiunion motivation, as set out below. We also agree with the judge that the policy was "inherently destructive" of important employee rights,² and thus unlawful under the theory of *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967), but our analysis differs somewhat from that of the judge, as further explained below.

In finding antiunion motivation, we rely on the ample record evidence of statements by agents of the Respondent regarding job opportunities that would exist after the cessation of the Respondent's manufacturing operations. Thus, credited or uncontradicted record evidence shows: that Stockroom Supervisor Arlene Deal told unit employee Michael McAneny that the Respondent was screening applicants for openings with Da-Tech (a company to which the Respondent subcontracted some of its production operations) and would weed out anyone with union ties; that Deal told unit employee Albert Gisondi that Da-Tech "wasn't taking any union people" and admonished him not to

¹ The Respondent 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

pursue the matter any further;² that Deal told unit employee Herbert Webb that he would not be considered for a job with Da-Tech because "he was union"; and that Core Products Manager Bill Sell told unit employee John O'Rourke that Sell had been ordered by labor relations "not to take any bargaining unit employees."³ This evidence amply demonstrates that the Respondent's JOB policy was motivated by a desire to rid itself of employees affiliated with the Union.

We also agree with the judge that the Respondent's maintenance of its JOB policy in the circumstances here was inherently destructive of employee rights and, even absent our findings of specific antiunion motivation, we would find that the Respondent's policy violated the Act. The policy was discriminatory by virtue of limiting use of the procedure to employees not represented by the Union. In *NLRB v. Great Dane Trailers*, supra, the Supreme Court held that if "it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed." 388 U.S. at 34. This is so because "such conduct carries its own indicia of intent." *Id.* The burden then shifts to the employer, which, in order to avoid the finding of an 8(a)(3) violation, must prove that it "was motivated by legitimate objectives." *Id.* The required showing is something more than minimal evidence of legitimacy, since the Court held that even if the adverse effect of discriminatory conduct on employee rights is "comparatively slight," an employer must produce "evidence of legitimate and *substantial business* justifications for the conduct," in order to escape liability under Section 8(a)(3) (emphasis added). *Id.*

In our view, the JOB policy was inherently destructive, and plainly carried indicia of antiunion intent. At a time when the unit employees' jobs were disappearing because of the termination of manufacturing operations at Fort Washington, the policy excluded those employees from bidding on job vacancies in the subcontracted operations or at the Respondent's other production locations solely on the ground that they had a collective-bargaining representative.⁴ Such a policy

² We agree with the judge's findings that Deal's statement to McAneny and Gisondi violated Sec. 8(a)(1) of the Act. We find it unnecessary to pass on the General Counsel's argument that other statements made by Respondent's supervisors, Cash and Sell, also violated Sec. 8(a)(1) because they would be cumulative in any event and would not affect our remedy or Order.

³ In finding that the Respondent harbored antiunion animus, we do not rely on the comments made by the Respondent's director of human resources, Charles Schroeder, during negotiations for a new contract and during an arbitration hearing.

⁴ We find no merit in the Respondent's contention that its hiring of a few unit employees into jobs outside the unit after the JOB procedure was announced to nonunit employees proves that its policy was in no way discriminatory. That evidence shows only that the

Continued

necessarily discourages union membership, because the message to employees is that choosing union representation is risky because that choice can be used to discriminate against you when the plant in which you work is closed down.⁵ Indeed, the policy here operates in an even more overt manner than other employer policies that the Board and reviewing courts have deemed inherently destructive, or at least sufficiently destructive of employee rights as to require the employer to show a substantial business justification in order to avoid a finding of an 8(a)(3) and (1) violation. See, e.g., *Lone Star Industries*, 279 NLRB 550, 552–553 (1986), and cases there cited, *enfd.* in relevant part mem. sub nom. *Teamsters Local 592 v. NLRB*, 813 F.2d 432 (D.C. Cir. 1987) (finding violation in ostensibly neutral work assignment policy that operated to detriment of returning strikers); *NLRB v. Frick Co.*, 397 F.2d 956 (3d Cir. 1968) (holding unlawful a rule that did not mention strikers but that, as applied, effected a discriminatory forfeiture of strikers' vacation benefits).

We find no merit to the Respondent's claimed "legitimate objectives" for its policy. In rejecting its claim that it felt compelled to exclude unit employees from access to nonunit jobs under the JOB procedure in order to avoid violating Section 8(a)(5), we agree with the judge that this claimed fear was groundless in view of the fact that the nonunit jobs were not mandatory subjects of bargaining.

We also reject the Respondent's contention, in reliance on *Fabric Warehouse*, 294 NLRB 189, 193 (1993); and *A. H. Belo Corp.*, 285 NLRB 807, 808–809 (1987), that it was lawfully maintaining the status quo of an existing practice of dual job posting systems for unit and nonunit employees. Those cases involved fringe benefits plans (a sick pay plan in *A. H. Belo Corp.* and a pension plan in *Fabric Warehouse*) covering nonunit employees which contained eligibility provisions restricting the plans to employees not covered by a collective-bargaining agreement. The Board held that the mere existence of such plans was not unlawful

Respondent might, on its own initiative, decide to make a few nonunit jobs available to the unit employees. The credited testimony of employees Michael McAneny, Albert Gisondi Jr., John O'Rourke, and Herbert Webb concerning management representatives' replies to their inquiries in the fall of 1991 and spring of 1992 about applying for nonunit jobs for which they had relevant experience, however, reveals that the Respondent's primary message was that they were, as a general rule, blocked from any consideration for such jobs. Union-represented employees need not apply, in short.

⁵ We do not rely on the judge's finding that the JOB policy was inherently destructive because it "hindered future bargaining," "eviscerate[d]," "destroy[ed]," or "did away with" the unit. It is undisputed that the unit was eliminated as a result of the Respondent's lawful consolidation of operations. We agree with the Respondent that even if unit employees were hired pursuant to the JOB system, neither the unit nor a bargaining obligation would necessarily have been preserved.

where the subject matter in question had been subject to good-faith bargaining between the employer and the union and the parties simply had not agreed to cover the unit employees under those plans. The Board reasoned that nothing in the Act required employers automatically to provide all the same benefits for unit employees that it did for nonunit employees, so long as it had bargained in good faith and was not acting out of antiunion motives. *A. H. Belo Corp.*, *supra*. But that holding does not mean that employers are free to set up discriminatory hiring or promotional criteria for jobs outside the unit. Surely the Respondent would not contend that if it opened a new plant, it would be free to restrict hiring there to nonunionized employees so long as it could argue that the bargaining representative of the unionized employees had not requested bargaining to secure their right not to be denied jobs because of their past union representation. The situation here is not different in principle. The Fort Washington manufacturing operation was closing down, and the employees who were losing their jobs there were merely seeking the right to bid for vacant jobs elsewhere in the Respondent's own plants or subcontracted operations.

In sum, we find that the Respondent's maintenance of its JOB policy under the circumstances of this case violated Section 8(a)(3) and (1) of the Act because the General Counsel has shown, by a preponderance of the evidence, that it was discriminatorily motivated and because, under the test of *Great Dane Trailers*, it was inherently destructive of important employee rights and the Respondent failed to make a sufficient showing of legitimate objectives to justify the discriminatory aspect of the policy.

Finally, the Respondent excepts to the judge's remedy, contending that the affirmative relief should be limited by the nondiscriminatory requirements of the JOB policy. Specifically, it contends that only active unit employees should be eligible to apply for jobs which were posted at the Fort Washington, Pennsylvania facility. We agree. We amend the judge's remedy and modify the recommended Order and notice accordingly.

AMENDED REMEDY

Having found that the Respondent maintained a JOB System policy which contained an exclusionary provision unlawfully denying union-represented employees at its Fort Washington facility the opportunity to apply for positions outside the unit in Honeywell's Industrial Automation Controls division, we shall direct the Respondent to rescind the exclusionary provision. In addition, the Respondent shall be ordered to send written notices to all employees who were or are in the unit or covered by a collective-bargaining agreement with Local 116, that it has rescinded the exclusionary provi-

sion of the JOB system; invite them to apply for any position which was posted at the Fort Washington facility pursuant to that system from the date the policy was initiated in May 1991 until the date it is rescinded; assure them that if they submit timely applications, and if they would have been an eligible applicant under the JOB system but for the exclusionary provision, the Respondent will review them without discriminating against them because they were or are affiliated with the Union, and that if they would have been selected for the position but for the exclusionary provision of the JOB system, they will be offered the position or, if it no longer exists, will be offered a substantially equivalent one without prejudice to their seniority rights or other rights and privileges previously enjoyed.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Honeywell, Inc., Fort Washington, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

“(b) Notify in writing all employees who were or are in a union-represented bargaining unit, or covered by a union contract, that the exclusionary provision of the JOB system has been rescinded; invite them to apply for any position which was posted at the Fort Washington facility pursuant to that system from the date the policy was initiated in May 1991 until the date it is rescinded; assure them that if they submit timely applications, and if they would have been an eligible applicant under the JOB system but for the exclusionary provision, their applications will be reviewed in a nondiscriminatory manner without reference to the fact that they were or are members of a union-represented bargaining unit or covered by a union contract; and if they would have been selected for the position but for the exclusionary provision of the JOB system, they will be offered the position or, if it no longer exists, to a substantially equivalent one without prejudice to their seniority rights or other rights and privileges previously enjoyed.”

2. Substitute the attached notice for that of the administrative law judge.

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell our employees that they will not be hired by and should not seek employment with another employer because of their union affiliation or activities.

WE WILL NOT maintain a policy of denying employment opportunities outside the collective-bargaining unit to employees in our Industrial Automated Controls Division who are or were union-represented, or covered by a union contract, because of their union affiliation or activities.

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.

WE WILL rescind the exclusionary provisions in our Job Opportunity Bulletin (JOB) system that denies opportunities to apply and be considered for positions outside their unit to employees in the Industrial Automated Controls Division who were or are in a union-represented bargaining unit, or covered by a union contract.

WE WILL notify in writing all employees who were or are in a union-represented bargaining unit, or covered by a union contract, in our Industrial Automated Controls Division that the exclusionary provision of the JOB system has been rescinded and invite them to apply for any position which was posted at the Fort Washington facility pursuant to that system from the date the policy was initiated in May 1991 until the date it is rescinded.

WE WILL notify these employees in writing that they have at least 7 calendar days after receiving this notice to submit an application; that in considering such applications and if they would have been an eligible applicant under the JOB system but for the exclusionary provision, we will not discriminate against them because of their union affiliation or activities, and, that if they would have been selected but for the exclusionary provision of the JOB system, WE WILL offer them the position or, if it no longer exists, a substantially equivalent position without prejudice to their seniority rights or other rights and privileges previously enjoyed.

WE WILL make whole employees who accept positions pursuant to this notice for any earnings and other benefits they may have lost due to our failure to consider them for positions posted under the JOB system when they originally were available, and WE WILL pay

relocation expenses which may be necessary in accordance with our Corporate Relocation Policy.

HONEYWELL, INC.

Margarita Navarro Rivera, Esq., for the General Counsel.¹
Marvin O. Granath, Esq., of Minneapolis, Michigan, for the Respondent.

Joshua P. Rubinsky, Esq. (Brodie, Techner, Rubinsky & Ford), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARLINE PACTH, Administrative Law Judge. Upon charges filed by Local 116, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO (Local 116 or the Union) on March 23, and April 10, 1992,² a consolidated complaint and notice of hearing issued on April 13, 1993, alleging (1) that the Respondent, Honeywell, Inc., maintained a discriminatory policy which allowed unrepresented employees to bid on certain available positions, while precluding union-represented employees from bidding on the same jobs in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), and (2) by telling employees they would not be hired by, nor should they seek positions with the Da-Tech Corporation, because of their union membership in violation of Section 8(a)(1). Respondent filed a timely answer on April 13, 1993, denying that it had committed any unfair labor practices and affirmatively pleading that the allegations in the complaint were time barred under Section 10(b) of the Act.

This case was tried on December 9 and 10, 1993, in Philadelphia, Pennsylvania, at which time the parties had full opportunity to examine and cross-examine witnesses, present documentary evidence, and argue orally.³ On the entire record,⁴ including my observation of the demeanor of the witnesses, and after considering the posttrial briefs filed by the General Counsel, Charging Party, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with a plant situated in Fort Washington, Pennsylvania (the Fort Washington plant), was engaged in the sale and distribution of industrial instruments and valves. In conducting its business operations during the 12-month period ending February 28, 1993, Respondent purchased and received at the Fort Washington plant

goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

Since the late 1930's, Local 116 and Respondent have had a lengthy and frequently contentious collective-bargaining relationship. The last agreement between the parties, a 1-year extension contract which expired in April 1992, covered approximately 150 production, maintenance, and clerical personnel at the Fort Washington facility.⁵ A somewhat larger number of employees in engineering, accounting, marketing, and administrative positions at Fort Washington were unrepresented. The bargaining agreement contained a job posting procedure which provided that unit employees could bid on available jobs within the unit. Until Respondent promulgated a policy titled "JOB procedures," unit employees also were eligible for, and regularly accepted salaried positions outside the unit, both at the Fort Washington plant or at other locations throughout the United States.

In December 1989, Respondent announced that three allied divisions, located principally in Phoenix, Arizona, and Fort Washington and York, Pennsylvania, would be consolidated into one "superdivision"—Industrial Automation and Controls (IAC) at the Phoenix plant.⁶ In planning the consolidation, Honeywell management expressed an unequivocal "intention to cease manufacturing operations at Ft. Washington." (R. Exh. 4.) Thus, from the outset, Respondent anticipated "both dislocations and job loss for Ft. Washington manufacturing employees." Ibid. The manufacturing employees and plant clericals at Ft. Washington happened to be the only union-represented workers among the employees included in the consolidation.⁷

On September 20, 1990, Respondent and Local 116 executed a production shutdown agreement which provided, inter alia, for cash payments to unit employees, retirement incentives, bumping protections, and a 1-year extension of the extant collective-bargaining agreement.

As the quid pro quo, the Union waived any objections to the removal of work from the facility. Consequently, by the end of 1992, production had ceased at the Fort Washington facility. Some of the plant's product lines were subcontracted to other companies, others were transferred to Phoenix. By late 1993, no unit employee remained at the plant. Although other employee categories at the Fort Washington facility also were downsized, the consolidation did not affect non-union employees as severely as it did those who were represented.

⁵ Bargaining for a successor contract ended in impasse, after which the Respondent unilaterally implemented its final offer.

⁶ Honeywell's Industrial and Control Division included smaller facilities throughout the country.

⁷ A separate collective-bargaining agreement was negotiated for clerical employees and was appended to the factory workers' contract.

¹ Hereinafter referred to as the General Counsel.

² All events occurred in 1992 unless otherwise indicated.

³ Documents offered into evidence by the General Counsel are referred to as G.C. Exh., Respondent's exhibits are cited as R. Exh., the Charging Parties' exhibits as C.P. Exh., and Joint exhibits as Jt. Exh., followed by the relevant exhibit number. Transcript references shall be designated as Tr. followed by the page number.

⁴ Following the hearing, the General Counsel submitted a motion to correct transcript. In the absence of any opposition thereto, the motion is hereby granted and received into evidence as G.C. Exh. 2.

Respondent introduces the JOB system

An unspecified number of jobs originally assigned to the Fort Washington facility, either were transferred to the Phoenix plant, or subcontracted to other companies where Honeywell maintained small staffs of its own. To deal with the relocation of jobs in an organized manner, a team of human resource professionals, headed by Darrell Middleton, was authorized to design a divisionwide plan which would spell out uniform procedures to govern the job application process for vacant positions at all affected locations.

Accordingly, by memo of May 22, 1991, circulated only to IAC supervisors, Middleton announced that an "IAC division-wide JOB" (Job Opportunity Bulletin) system would take effect the following week. A brochure, distributed widely to all unrepresented employees, described the JOB system as a coordinated process which would "enable all IAC employees" at every IAC location who were "not covered by a union contract" to be informed of and apply for open positions within the division. (Emphasis added.) (R. Exh. 7.) As a practical matter, the JOB system meant that notices of any IAC vacancy would be posted for 5 days on bulletin boards at all Honeywell IAC locations. The first job opening announcements appeared on a bulletin board outside the lunchroom at the Fort Washington facility in late May or early June 1991. By the end of the month, some 38 jobs had been posted.

Shortly after the JOB system was instituted, Respondent and the Union entered into negotiations for a new collective-bargaining contract. The agreement, reached on June 29, 1991, preserved the intraunit job posting provision set forth in the prior contract, but the JOB System was not raised or referred to by either party.

Over the next year or two, a significant number of vacancies were posted on the cafeteria bulletin board at the Fort Washington facility pursuant to the JOB process. However, bargaining unit employees who expressed interest in or attempted to apply for a posted job were told that union members were ineligible. For example, William Walters, a calibrator fabricator at the Fort Washington facility, with more than 28 years seniority, testified that in August or September 1991 he spoke to Personnel Manager Dooney about a posted vacancy for a calibrator fabricator's position in Phoenix. Dooney told him that posted jobs were not available for union members. When Walters pointed out that the vacancy announcement described the very job he currently was performing and the identical equipment the Company had trained him to use, Dooney agreed that he should have had the opportunity to apply, that it was "stupid" to exclude him. (Tr. 56.)

Under the JOB system, bargaining unit employees also were precluded from applying for Honeywell positions located at the sites of subcontractors or vendors. For example, unit employee Herbert Webb testified about a job vacancy posted in February for a Honeywell customer liaison coordinator who would be stationed at Da-Tech, a company to which Respondent subcontracted some of its product lines. When Webb asked Core Products Manager Bill Sell if he could apply, Sell initially told him he didn't know whether hourly (i.e., union) employees were eligible. Subsequently, a personnel officer advised Sell that bargaining unit employees were not entitled to apply for positions advertised through

the JOB procedure.⁸ Webb and two coworkers also posed the same question to Stockroom Supervisor Arlene Deal and received the same negative answer. Deal acknowledged that she told Webb "he would not be considered for the job . . . [b]ecause he was union." (Tr. 232.)

Similarly, former unit employees Albert Gisondi Jr. and John O'Rourke, each with more than 25 years' tenure at the Fort Washington plant, spoke to several officials about obtaining work at Da-Tech after learning that their jobs would be transferred there. Gisondi testified that Supervisor Deal told him she had heard from her manager, Sell, that Da-Tech "wasn't taking any Union people." She then admonished Gisondi not to pursue the matter further. (Tr. 46.) Deal did not deny the statements that Gisondi attributed to her.

O'Rourke added that in March he saw a notice posted for a customer service analyst, a job he previously held for 4 years as a bargaining unit member, and called his manager, Sell, to register interest in the post. According to O'Rourke's uncontroverted testimony, Sell replied, "John, I would like to have you, but I have been ordered by labor relations not to take any bargaining unit employees."⁹ (Tr. 65.)

Although unit employees were not permitted to apply for vacancies announced under JOB procedures, occasionally, Respondent circumvented its own rules by offering jobs to some of the represented workers without posting the vacancy or requiring bids on them. William Walters testified that he knew of three bargaining unit employees who were offered and accepted specialized positions at the Phoenix plant. Gisondi was aware that a unit employee accepted a job at Da-Tech offered to him by a Honeywell supervisor. Terri Ferguson, a member of the personnel staff at the Fort Washington facility, confirmed that four or five unit employees transferred to Phoenix without applying through the JOB process. Deal added that she was one of seven employees who continued to work for Honeywell at the Da-Tech plant, after some of Respondent's product lines, equipment, and stock were transferred there. Two of the seven positions previously performed by unit employees, were filled through the JOB process.

Evidence on the issue of antiunion animus

The General Counsel elicited testimony from several witnesses to prove that Respondent purposefully excluded unit employees from the JOB system because of its antiunion animus. Michael McAneny, a 16-year employee and former chairperson of the Local's in-plant grievance committee, testified that Respondent's director of human resources, Charles Schroeder, displayed great hostility toward the Union during negotiations for a new labor contract in late June 1991. While the parties were engaged in bargaining, they also were locking horns in an arbitration hearing brought about by the Union's claim for disputed vacation payments. Irritated that

⁸The parties stipulated that Respondent had five employees stationed at Da-Tech, an independent company which took over certain operations previously performed at the Fort Washington plant. With some modifications, the customer liaison coordinator job at Da-Tech was the same work previously performed by a unit member at the Fort Washington plant.

⁹The Respondent did not call Sell as a witness, nor offer any explanation for his absence. Accordingly, O'Rourke's un rebutted testimony, which was corroborated by several other witnesses, is credited.

the Union had pursued its claim to arbitration, Schroeder refused to retain an arbitration clause in the successor agreement. Two months later, on August 20, 1991, the arbitrator issued an award which required that Respondent pay bargaining unit employees approximately \$300,000 in vacation benefits.¹⁰ Subsequently, during a meeting with union negotiators, a visibly angry Schroeder attributed the award to the arbitrator's senility and accused union witnesses of having lied during the arbitration hearing.

McAneny recounted another incident which occurred in February when he advised Supervisor Deal that he had applied for a job at Da-Tech. Allegedly, Deal told him his chances were slim since Honeywell was screening the applications and would weed out anyone with union ties. Deal denied telling any bargaining unit member, including McAneny, that the Respondent screened applicants for Da-Tech, or that McAneny would not be hired because of his union membership. However, she did acknowledge that he would not be considered for employment because he was a union member.

McAneny also recalled that during a job evaluation interview, he asked the then-Core Products Manufacturing Manager Mike Cash, why the Respondent was combining and eliminating jobs. Cash replied that the Union was at fault for the job cutbacks. McAneny further testified that Cash told him he was "setting up the operation at Da Tech;" that he was "running the show;" there, and although he wanted to utilize employees with expertise, he was unable to do so because "they were Union people." (Tr. 27.)

Cash, who left Respondent's employ in 1992 after a career of 29 years, had a different slant on his contacts with Da-Tech. He did not deny telling McAneny that the Union was to blame for the loss of jobs at the Fort Washington plant, or boasting that he was responsible for "set(ting) up the operation at Da-Tech." However, he explained that his purpose was to supply Da-Tech with technical and logistic advice about production which had nothing to do with hiring practices. Therefore, he stated that when Honeywell employees asked him about jobs with Da-Tech, he told them he had nothing to do with the hiring practices there, other than knowing that the company intended to recall its own laid-off employees.

Discussion and Concluding Findings

A. The Parties' Positions

The principal question in this case is whether Respondent violated Section 8(a)(1) and (3) of the Act by maintaining its JOB system which precluded unit employees covered by a union contract from bidding for vacancies within the IAC division. A separate question is raised as to whether Respondent engaged in independently unlawful conduct by telling employees they would not be considered.

The General Counsel and Charging Party posit that the JOB system was discriminatory on its face, thereby making it unnecessary to prove antiunion animus. Nevertheless, they submit that if such proof is required, the record contains ample evidence of such animus, thereby supporting the infer-

ence that it was the motivating cause of Respondent's conduct.

Respondent defends its exclusion of unit employees from the JOB program on multiple grounds. First, pointing out that an employer may treat nonunit and unit employees differently as long as the differences are not the result of antiunion animus, Respondent claims that no evidence exists that the exclusion of union employees from the JOB system was the product of any antiunion motive. In fact, Respondent argues that it would have acted unlawfully had it attempted to impose the JOB policy unilaterally on the unit employees. Further, Respondent insists it had no duty to propose the JOB procedure to the Union during negotiations since it was a nonmandatory subject of bargaining. Lastly, Respondent argues that the Union waived its right to bargain over the JOB program.

After considering the parties' arguments in light of the record and relevant precedent I conclude that the Respondent's JOB procedure was on its face, violative of Section 8(a)(3) and (1) of the Act. Therefore, evidence of discriminatory intent is not required. However, such evidence is not hard to find; the record contains ample proof that Respondent's agents knew that its job transfer policy would be an economic death sentence for the unionized employees. By purposefully crafting and maintaining a procedure that it knew would inevitably destroy the unit and foreclose alternative employment opportunities to most of those who were represented, Respondent not only rid itself of the Union's presence at Fort Washington, it made sure that this presence would not be resurrected soon at another Honeywell IAC site. Respondent's conduct was a paradigm of discrimination under Section 8(a)(3).

B. Respondent's JOB Program Violates Section 8(a)(3)

Applicable precedents

As a general rule, an employer will not violate the Act by maintaining different terms and conditions of employment for union and nonunion employees, absent evidence that antiunion animus motivated the distinctions. However, under some circumstances, specific evidence of illegal intent is "not an indispensable element of proof of violations." . . . "Some conduct may by its very nature contain the implications of the required intent; or the natural, foreseeable consequences of certain action may warrant the inference." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963) (citations omitted). For example, conduct which is inherently destructive of employee rights carries its own "indicia of intent," and therefore, requires no specific proof of unlawful motivation. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967). Conduct which inevitably hinders future bargaining or poses continuing obstacles to the exercise of employee rights is regarded as "inherently destructive." *Swift Independent Corp.*, 289 NLRB 423, 429 (1988), remanded sub nom. *Esmark Inc. v. NLRB*, 887 F.2d. 739 (9th Cir. 1989).

Application of precedent to the facts of this case

- (1) The JOB system was inherently destructive of employee rights

The General Counsel and the Charging Party contend, and the Respondent denies, that the JOB policy was inherently

¹⁰The Respondent appealed the arbitrator's award, but reached a compromise settlement with the Union before the appeal was heard.

destructive of employee rights and, therefore, does not require specific proof of unlawful motivation.

Respondent insists that it did not exclude the represented employees from the JOB system to discriminate against them, but to avoid the pitfalls of unilateral action where a collective-bargaining agreement was in place with its own job bidding provisions. Respondent's theory seems to be that the job bidding provisions in the contract were exclusive and precluded unit employees from bidding for jobs outside the unit. Accordingly, Respondent maintains that it would have abrogated its duty to abide by the agreement if it opened the JOB program to unit employees.

Respondent's argument is without merit. The Company was well aware that the transfer provisions in the collective-bargaining agreement pertained solely to intraunit transfers, whereas the JOB system applied to positions outside the unit.¹¹ Respondent also knew, and even boasted that unit employees bid on and were awarded jobs outside the unit without suffering any repercussions before the JOB policy was implemented. Therefore, it also had to know that granting represented employees the right to bid on nonunit jobs would not have encroached on any provision in the parties' collective-bargaining agreement. Respondent's argument that it simply was trying to comply with its obligations under the collective-bargaining agreement was pure sophistry. Respondent understood perfectly well that it could offer the JOB program to both unit and nonunit employees without risk of violating Section 8(a)(5).

Respondent also knew that production at the Ft. Washington plant would be discontinued. Therefore, it readily could foresee that foreclosing transfer options to the represented production employees would put them out of work and eviscerate the unit. By precluding unit employees from the JOB system, knowing what the consequences would be, Respondent did not simply "hinder future bargaining," it did away with it. The handful of unit employees who were fortunate enough to obtain work with the Respondent at other locations, left the Union behind. For those who remained at Fort Washington, the unit was decimated. Respondent surely realized that by excluding represented employees from the JOB system, the unit would not survive. Such conduct is inherently destructive of employees' rights.

If Respondent genuinely was concerned that the job transfer provisions in its contract with the Union were exclusive, and that unilaterally offering an alternative procedure to the unit employees would impinge unlawfully on those provisions, a route was available other than the onerous one it chose: Respondent could have notified the Union of its proposed JOB system with enough time to afford the Local a reasonable opportunity to present counterproposals. See *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983).¹² The failure to notify the Union suggests that Respondent knew that in the circumstances present here notice was not required. However, Respondent could not admit that notice

¹¹ Noting in its brief that the JOB procedure did not relate to job openings in the unit and, therefore, was not a mandatory subject of bargaining, Respondent correctly asserts that it could unilaterally implement the JOB system. However, Respondent ignores the obvious point that since the system did not affect intraunit transfers, it was free to open the JOB procedures to unit employees without fear of impinging on contractual provisions.

¹² Rehearing denied 715 F. 2d 1020 (1983).

was irrelevant, for then it would have had to relinquish the defense that it excluded unit employees from the JOB program in order to avoid abrogating the parties' collective-bargaining agreement. Respondent's inconsistent positions reinforce the conclusion that its real motive for declaring unit employees ineligible for posted positions under the JOB plan was an unlawful one.¹³

Respondent contends that the Union had to know about the JOB system by virtue of the wide distribution of a management memo and brochure introducing the new policy to non-union personnel. In addition, Respondent points out that notices of vacancies were posted on a bulletin board adjacent to a plant lunchroom during the weeks the parties were engaged in collective bargaining. In light of these facts, Respondent argues that by failing to raise the matter during negotiations, the Union waived its right to do so.

Respondent's assumption that the Union knew about the JOB program because materials describing it were circulated widely in the plant (that is, to everyone but the unit employees), does not prove that the Union actually received notice. Respondent adduced no evidence demonstrating that the Union was aware of the JOB system prior to or during bargaining.¹⁴ Absent such proof, the Union may not be faulted for failing to request bargaining, for waiver may not be lightly inferred; it must be clearly and unmistakably expressed. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 698, 707-708 (1983).¹⁵

Even if the Union had heard about the JOB system, such knowledge would have been gained after Respondent had developed and introduced the new procedure. In short, the Company presented the Union with a fait accompli. Under such circumstances, it cannot be said that the Union waived its right to request bargaining. See *Gulf States Mfg. v. NLRB*, supra; *Blue Cross Blue Shield*, 286 NLRB 564, 587 (1987).

Respondent's conduct was discriminatorily motivated

Although the JOB system "carried its own indicia of intent," thereby eliminating the need for specific proof of antiunion animus, the record is replete with evidence which establishes that Honeywell's managers had no love for the Union or its adherents, and that its antipathy motivated the exclusion of unit employees from the JOB program. Consider, for example, the fact that Schroeder, the Company's

¹³ Respondent claimed that it did not open the JOB program to represented employees for fear it would be accused of acting unilaterally; yet, it correctly argued in its brief that it had no duty to negotiate about the JOB procedure as a nonmandatory subject of bargaining. Then, in another twist of reasoning, Respondent faulted the Union for failing to raise the matter during negotiations. These inconsistent positions suggest that Respondent had a difficult time finding a convincing rationale for its conduct.

¹⁴ The Union's failure to even allude to the JOB procedure at the bargaining table is so evidently against its interests and those of its members as to lend weight to a belief that unit employees were unaware of the new system. In addition, the record fails to show that any represented employee inquired about transferring to another job until the fall of 1991, months after the JOB policy was announced and negotiations for a successor collective-bargaining agreement concluded.

¹⁵ As noted above, Respondent recognized in its brief that it was not obliged to bargain about the JOB system. Therefore, because the Union could not demand that Respondent bargain about the JOB system, it had no right which could be waived.

chief negotiator, insisted on withdrawing a contractual arbitration provision during the 1991 collective-bargaining sessions because he regarded union officials as untrustworthy, believing they had lied when testifying in a recent arbitration hearing. Schroeder's uncontroverted statement to McAneny that the Union was to blame for the closure of operations at Fort Washington further fuels the conclusion that Respondent stored an abundant supply of antiunion bias. Supervisor Deal apparently was aware of the Company's hostile attitude toward the Union for she told a unit member that Respondent was screening applications for openings with Da-Tech and that his union ties would prevent his employment there.¹⁶ Animus again was revealed when a witness acknowledged that if positions posted under the JOB system were unfilled Respondent hired people off the street in preference to unit employees. The foregoing evidence is more than enough to sustain the conclusion that the Respondent precluded unit employees from applying for vacancies under the JOB program because they were union adherents.

C. Respondent Independently Violated Section 8(a)(1)

Unit employees Gisondi and McAneny were on a collision course with Stockroom Supervisor Deal with respect to their conflicting testimony about employment with Da-Tech. The employees testified that they heard from Deal that Sell had advised her to warn them they should not seek work with Da-Tech since that firm would not hire anyone tainted by union membership. Notwithstanding Deal's denial that she made such statements, I credit Gisondi and McAneny's versions of this incident. I found Gisondi to be a mild-mannered man who answered questions quite thoughtfully. Further, since the employees' accounts were quite similar, they strengthened each other's credibility.

Deal's admonitions to the Gisondi and McAneny resemble an encounter described in *Hallmark & Son Coal Co.*, 299 NLRB 259, 268 (1990), where a supervisor warned employees that a successor would not hire them because they were represented by a union. On those facts, the Board affirmed the administrative law judge's conclusion that the employer violated Section 8(a)(1). *Id.* at 260. In light of *Hallmark*, and other similar precedents, it follows that Respondent is liable for Deal's comments which interfered with the employees' Section 7 rights in violation of Section 8(a)(1).

Respondent maintains that pursuant to Section 10(b) of the Act, the amendment to the complaint alleging a violation of Section 8(a)(1) was not closely related to the charge giving rise to the complaint and was untimely filed. Respondent is clutching at straws. It is difficult to imagine how an amendment could be more closely related to a complaint accusing the Respondent of excluding unit employees from consideration for job transfers because of their union affiliation, than the one at issue here alleging that employees were told that they should not apply for jobs with another employer because of their union ties. Respondent also errs in arguing that the amendment was untimely. Section 10(b) provides that a charge must be filed no later than 6 months after the allegedly unlawful event to be timely. However, this requirement does not pertain to amendments to the complaint, as was the

¹⁶Deal denied making this statement, but admitted other remarks of an antiunion nature. This incident is discussed below as a violation of Sec. 8(a)(1).

case here. See *National Licorice Co. v. NLRB*, 309 U.S. 350, 369 (1940).

CONCLUSIONS OF LAW

1. By maintaining a practice of excluding employees who were or are presently in a union-represented bargaining unit, or covered by a union contract, from applying for jobs in its Industrial Automation Controls Division under its JOB policy, Respondent engaged in conduct which was inherently destructive of employee rights and discriminated against the represented employees in violation of Section 8(a)(1) and (3) of the Act.

2. By telling employees that they should not seek employment with and would not be hired by another employer because of their union affiliation, Respondent violated Section 8(a)(1) of the Act.

3. Respondent's unfair labor practices referred to above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action set forth below to effectuate the purposes and policies of the Act, including the posting of an appropriate notices to inform employees that it will not engage in further violations of the Act.

Having also found that Respondent maintained a JOB system policy which contained an exclusionary provision unlawfully denying union-represented employees at its Fort Washington facility the opportunity to apply for positions outside the unit in Honeywell's Industrial Automation Controls Division, Respondent shall be directed to rescind the exclusionary provision. In addition, Respondent shall be ordered to send written notice to all employees who were or are in the unit or covered by a collective-bargaining agreement with Local 116, that it has rescinded the exclusionary provision of the JOB system; invite them to apply for any position which was posted pursuant to that system from the date the policy was initiated in May 1991 until the date it is rescinded; assure them that if they submit timely applications, Respondent will review them without discriminating against them because they were or are affiliated with the Union, and that if they would have been selected for the position, but for the exclusionary provision of the JOB system, they will be offered the position or, if it no longer exists, to a substantially equivalent one without prejudice to their seniority rights or other rights and privileges previously enjoyed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

The Respondent, Honeywell, Inc., Fort Washington, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Telling employees that Da-Tech or any other company will not hire them and instructing them not to seek employment with such companies because of their union affiliation or activities.

(b) Maintaining a policy which denies employees who are in a union-represented or covered by union contract, the opportunity to apply for positions with Respondent which are outside of their collective-bargaining unit.

(c) 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 National Labor Relations Act.

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

(a) Rescind the provision in Respondent's JOB policy which denies employees who were or are in a union-represented bargaining unit or covered by a collective-bargaining agreement the opportunity to apply for positions with Respondent.

(b) Notify in writing all employees who were or are in a union-represented bargaining unit, or covered by a union contract, that the exclusionary provision of the JOB system has been rescinded; invite them to apply for any job which was posted pursuant to that system from the date of its inception in May 1991, to the date of recession; assure them that if they apply, their applications will be reviewed in a nondiscriminatory manner without reference to the fact that they were or are members of a union-represented bargaining unit, or covered by a union contract; and that if they would have been selected but for the exclusionary provision of the JOB system, they will be offered the position or, if it no longer exists, to a substantially equivalent one, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(c) Make whole those employees who accept such positions for any loss of earnings and other benefits they lost due to its failure to consider them when the positions originally were posted and available. If acceptance of the positions require that employees move their residences, Respondent shall pay their relocation expenses pursuant to its corporate relocation policy.

(d) Post at all facilities within Respondent's Industrial Automation Controls Division copies of the attached notice

marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 4, 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.

(e) Mail a copy of the attached notice to all employees who were or are employed in a union-represented bargaining unit, or covered by a union contract, including those on disability, workers compensation or other authorized leave, from the date that the JOB system was implemented in May 1991, until it is rescinded. Include with the notice, a letter, approved by the Acting Regional Director, stating the letter's purpose, the assurances required by the attached notice, and the procedures to be followed in applying for positions available to them pursuant to this Order.

(f) Provide the Acting Regional Director with: (1) a list of the names of employees to whom copies of the notice were mailed, with the date or dates of such mailings, and (2) a list of employees' names who applied for available positions pursuant to this Order, the positions for which they applied, and the reasons any such applicant was not selected. Respondent shall cooperate with the Regional Office in any investigation it may pursue regarding a decision not to employ any person who applies pursuant to the terms of this Order.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the identity of employees to whom this Order applies, the amount of backpay or other sums that may be due under the terms of this Order.

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

¹⁸ 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."