majority opinion, are precedent for any such action as taken herein.

Finally, Section 9 (c) of the Act, which concerns the Board's authority to hold representation elections, directs that this agency should provide such referenda where "an employee or group of employees or any individual or labor organization acting in their behalf" files a petition to the effect that they desire collective bargaining and that their employer "declines to recognize their representative." It is obvious that the restricted election directed among plant clericals and storeroom employees by the majority decision does not meet these requirements for the employees do not seek Local 4 as their representative and Local 4 makes no claim to that status. Accordingly, as the majority decision does not resolve the question concerning representation which has arisen herein but instead achieves an artificial and ill-advised result ignoring the facts, the law, the existing collective-bargaining contract, and the wishes of both parties and the employees, I cannot join in that decision. Rather, I would direct an election among the plant clerical and storeroom employees to determine whether or not they desire the petitioning International Union as their representative for collective bargaining.

RUGCROFTERS OF PUERTO RICO, INC. *and* JUAN JOSE ARCELAY. Case No. 24-CA-400. December 2, 1953

DECISION AND ORDER

On September 25, 1953, Trial Examiner Thomas N. Kessel issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report.

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 Respondent's exceptions, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Rugcrofters of Puerto Rico, Inc., Sabana Abajo, Carolina, Puerto Rico, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in any labor organization of its employees by discharging or refusing to reinstate its employees.

(b) Interfering with, restraining, or coercing its employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection by discharging or refusing to reinstate its employees.

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

(a) Offer to Juan Jose Arcelay immediate and full rein statement to his former or substantially equivalent position without prejudice to seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered, in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

(b) Upon request, make available to the Board or its agents, for examination and copying, all payroll, social-security, time, and personnel records necessary to determine the amount of back pay due.

(c) Post at its plant at Sabana Abajo, Carolina, Puerto Rico, copies of the notice attached to the Intermediate Report and marked "Appendix."[1] Copies of said notice, to be furnished by the Regional Director for the Twenty-fourth Region (Santurce, Puerto Rico), shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

[1] This notice shall be amended by substituting for the words "The Recommendations of a Trial Examiner" the words "A Decision and Order " In 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."

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

Upon a charge filed by Juan Jose Arcelay, an individual, the General Counsel of the National Labor Relations Board, by the Regional Director for the Twenty-fourth Region (Santurce, Puerto Rico), issued his complaint dated June 1, 1953, against Rugcrofters of

Puerto Rico, Inc., herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (3)and (1) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act Copies of the complaint, the charge, and a notice of hearing were duly served upon the Respondent and the charging party.

With respect to the unfair labor practices, the complaint alleged that on or about December 28, 1952, the Respondent unlawfully discharged its employee Arcelay, the charging party, because of his protected concerted activities with other of Respondent's employees and has since refused to reinstate him, thereby violating Section 8 (a) (3) and (1) of the Act. The Respondent failed to file an answer to the complaint in accordance with the provisions of Section 102.20, et seq., of the Board's Rules and Regulations. At the opening of the hearing held in this proceeding, counsel appearing for the Respondent orally admitted all allegations of the complaint except those relating to commission of conduct violative of the Act. Counsel also affirmatively offered as Respondent's defense that Arcelay had been discharged for improper performance of his duties, and because he had refused to work under conditions established by the Respondent for its employees. These affirmative defenses were embodied in the following statement received in evidence, dated March 24, 1953, signed by counsel as attorney for the Respondent and presented by him to the Regional Director during the investigation of this case:

Re: Rugcrofters of P. R., Inc. 24-CA-400

Attorney Philip Licari, representing the Employer in the above entitled case, was at the office of the National Labor Relations Board on March 24, 1953. He stated that the position of the Employer in this case is that the alleged discriminatee involved herein was discharged for cause and was in no way discriminated on account of union or concerted activities. The alleged discriminatee made the contention before the Insular Department of Labor that he had been discriminated on account of organizational activities. The Insular Department of Labor, after a hearing, found otherwise and dismissed the case against the Employer. The same contentions made by the Employer before the Insular Department of Labor are applicable before the National Labor Relations Board. The contention is that the employee was discharged for not having done his work properly and because he refused to work under working conditions set up by the Company, which, in part, is his refusal to work under the payroll set up which the Employer had at the time of this discharge.

RUGCROFTERS OF PUERTO RICO, INC.

By: /s/ Philip Licari
Philip Licari, Attorney

Pursuant to notice, a hearing was held at Santurce, Puerto Rico, on June 25, 1953, before Thomas N. Kessel, the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. The General Counsel and the Respondent were represented by counsel. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence was afforded all parties. After the hearing the General Counsel filed a brief with the undersigned which has been carefully considered.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent admits the allegations of the complaint that it is a Puerto Rico corporation with its principal office and plant at Sabana Abajo, Carolina, Puerto Rico, where it is engaged in the manufacture and sale of hand-hooked rugs and carpeting, and that in the course of its operations it has purchased materials, equipment, and supplies valued at approximately $941,000 which were transported to its plant from States and Territories of the United

States while it has sold and manufactured products valued at approximately $1,200,000 which were transported from its plant to and through States and Territories of the United States.

The Respondent concedes and it is hereby found that it is engaged in commerce within the meaning of Section 2 (6) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. The pertinent evidence

The evidence concerning the events in question consists essentially of the testimony of Arcelay and the Respondent's general manager, Patrick Behan. According to Arcelay, he had been hired by the Respondent as a stockroom clerk on December 8, 1952. His functions were mainly to weigh and dispatch wool yarn or thread to production employees to be fabricated into rugs. He reported for work on Sunday, December 28, 1952, and arrived at the plant at 7 a. m. Starting time was 7:30 a. m. Upon his arrival he found about 25 employees who were scheduled to work that day congregated outside the plant. As he was about to punch his timecard he was told by the others that they had not done so because the Respondent had changed its payroll procedures so that they would be paid for that Sunday's work 2 weeks hence rather than in the ensuing week as would have been the case under the former procedure. Arcelay made common cause with his fellow employees in protest against the change and as other employees arrived at the plant he explained the situation and told them not to work. His testimony in this respect is supported by a stipulation agreed to by the parties at the hearing that if called as witnesses, Respondent's employees Jesus Madero, Ismael Vizcarrondo Quinones, and Carmen Villanueva would have testified that on the morning of Sunday, December 28, 1952, they were told by Arcelay upon their arrival at the plant not to go inside because the employees were dissatisfied with the method of payment for Sunday work, and at his request did not punch the time clock.

At 7:20 a. m., Crespo, the Respondent's bookkeeper, arrived with a truckload of additional employees. When he saw the gathering of employees outside the plant he asked why they had not reported for work. All were silent except Arcelay who answered that the employees were willing to work provided that they would be paid according to the former practice. Crespo instructed the employees to punch their cards, and indicated that those who were unwilling to do so could leave. Arcelay further testified that at about 7:40 a. m., Behan, accompanied by Supervisor Dona Rosa Gonzalez arrived at the plant. Dona Gonzalez ascertained the reason for the protest and explained the matter to Behan. The latter pointed out to the assembled employees the reasons for the payroll change and finally delivered an ultimatum, that those who wanted to work under this condition could do so and those who didn't could leave. Some employees went to work. Others left. Arcelay decided to work. He went to the stockroom and opened the door. Having observed that his timecard had only his number on it, whereas the cards for the other employees contained the employee name and number, before punching in he proceeded to the office with his timecard to have it corrected.

As Arcelay approached the office he was halted at the entrance by his supervisor, Carmelo Hernandez, who was conversing with Behan and Crespo. Hernandez learned from Arcelay about the correction he wished to have made on his timecard and instructed him to return to work and that he would attend to the card later. Crespo then asked Arcelay what was going on and was informed about the timecard. At this point Behan questioned Crespo as to what was happening and the latter explained about the card. At the same time Crespo volunteered the comment to Behan that Arcelay "had been the leader of the protest that had been initiated." Behan asked Crespo how long Arcelay had been employed by the Respondent and was told that it was 2 weeks. He then instructed Crespo to tell Arcelay that his work had been unsatisfactory and that his employment was ended.[1] Arcelay thereupon requested full payment of all money then due him, but was urged by Crespo to return on the next payday as no money was then on hand to pay him off. Arcelay, however, insisted upon immediate payment. He was finally summoned to the office where his time was computed and payment

[1] Arcelay primarily speaks Spanish, the language customarily spoken by the Respondent's employees, but demonstrated to the satisfaction of the undersigned a basic knowledge of conversational English by repeating at the hearing in English, after he had testified in Spanish, his version of what was said by the persons involved in the incident at the entrance to the office. Behan's primary language is English, but he claimed to understand Spanish well, and to speak it "somewhat "

in full was made from money taken from pay envelopes for the "Arroyo people." A statement in the nature of a letter of recommendation[2] was then prepared and given to Arcelay. He then departed.

On cross-examination Arcelay, in response to questions as to whether his work had been criticized by his supervisor, Hernandez, acknowledged that on one occasion Hernandez had spoken to him about incorrect weights on wool he had issued. He denied any other criticism. Further examination by the General Counsel along this line elicited from Arcelay testimony concerning a single occasion when Hernandez had called to his attention the fact that thread which he had issued was 4 to 5 pounds short in weight, and that once a skein of different color appeared in a sack. The movable scale that Arcelay was using was tested and found to be weighing short. Hernandez adjusted it. Subsequently thread weighed on this scale again proved to be underweight. A movable scale from another department was then used, but this did not eliminate the inaccuracies. Finally, it was decided that Arcelay should use the stationary scale in the finishing department with the result that no further errors occurred.

Behan testified that he had arrived at the plant with Dona Gonzalez on December 28 at about 7:45 a. m. Observing that the employees were not at work he requested Dona Gonzalez to investigate. As she got out of his car a group of female employees approached her and explained their objection to the payroll change. Behan then advised the employees of the necessity for the new procedure and told them that they were free to work under these conditions or to leave. Some went and some stayed. He had no conversation with Arcelay until this incident was completely ended and the employees had either gone to work or had left the premises. He testified that as he was standing on the steps of the office talking to Crespo trying to get a clear picture of what had happened Arcelay approached and demanded that he "be made an exception to the other workers, because he wanted to get his money, instead of Friday, on a Saturday." In response to a question by the undersigned, Behan indicated that he understood Arcelay to have been demanding for himself exactly what the employees had been seeking when they had staged their protest earlier that morning. When Behan told him that he would not be treated differently from other employees, Arcelay replied "Gimme my money," which to Behan meant that he was quitting. To be sure that he had properly understood Arcelay he turned to Crespo who confirmed that this was Arcelay's intention. Behan then informed Arcelay that he "would not change the payroll for anybody, and he could go if he didn't want to be paid by it." Arcelay repeated, "Gimme my money," so he was paid off although the money had to be borrowed to do so. Upon Arcelay's request for a letter of recommendation, Behan gave him the statement referred to above.

Behan also testified that he had resolved before this incident to discharge Arcelay because he had not measured up to his job. During the 3-week period that Arcelay had worked in the stockroom there had been about 10 to 15 weight shortages in yarn. Behan estimated such error should normally occur once a month. He had Supervisor Hernandez investigate the shortages and it was determined that the scales used by Arcelay were not properly adjusted. Behan did not speak to Arcelay about this matter, but automatically held him accountable on the theory that the person using the scales was responsible for their periodic adjustment which could be accomplished simply by turning a screw. Consequently, Behan testified, when Arcelay quit he remarked to him about his shortcomings and that he would not be "heartbroken" or "break down in tears if he left."

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[2] This statement included an account of Arcelay's final pay and also contained the following:

TO WHOM IT MAY CONCERN

Mr. Juan Jose Arcelay have (sic) been working for us for three weeks and we have found that he is not capable of doing the job assigned to him Nevertheless he could be of great assistance in some other kind of job.

RUGCROFTERS OF P. R., INC.

/s/ Patrick Behan
Patrick Behan, Mgr.

B. Findings

As this case was litigated only a single question must be answered to resolve the conflicting issue. Was Arcelay discharged, as he testified, because of his protest activities with fellow employees against the Respondent's payroll change, or did he voluntarily quit his job, as Behan testified, because the Respondent would not treat him differently from the other employees? If Arcelay's story is credited, then the complaint has been sustained, for a discharge of an employee under these circumstances, whether it be regarded as a violation of Section 8 (a) (3) or 8 (a) (1) of the Act is coercive and infringes upon the rights of employees guaranteed by Section 7 of the Act to engage in concerted activities for their mutual aid or protection. On the other hand, if Behan's version is credited, the Respondent has not engaged in unlawful conduct as alleged and the complaint must be dismissed.

Arcelay's testimony concerning his participation with other employees in their protest activities is corroborated in substantial part by the stipulation of the parties referred to above. Moreover, his testimony as to these activities and the fact that he acted as spokesman for the protesting employees in stating the reason for their action to Crespo in uncontroverted by other evidence in the record and is therefore credited. Likewise, Arcelay's testimony that following Behan's ultimatum he went to work and opened the stockroom, and that he then proceeded to the office to correct his timecard from which his name had been omitted is uncontradicted and unrefuted by other evidence and is credited. Thus, the only points of conflict between the testimony of Arcelay and Behan relate to the events occurring after Arcelay reached the office door where Behan was conversing with Hernandez and Crespo.

As between the two conflicting versions of what took place at this juncture, I regard Arcelay's account as more persuasive than Behan's, especially in view of Arcelay's established conduct leading up to the events in question. If Behan's testimony were credited, it would appear that Arcelay having first actively protested in concert with fellow employees and then having abandoned the protest and gone to work in the wake of Behan's ultimatum, then reverted to his original demand this time going it alone, and finally quit his job when his demand for special treatment was denied. It seems more plausible that Arcelay followed the simple direction which he related rather than the twisting course implied by Behan's testimony; that he had accepted Behan's ultimatum and had reported to his job, as shown by the record, but that he was thereafter discharged under the circumstances concerning which he testified. I am persuaded by Arcelay's carefully detailed account of these circumstances, including his references to his timecard and the specific remarks of Supervisor Hernandez and Bookkeeper Crespo on this occasion, that this testimony should be credited, particularly as the Respondent could have called as witnesses both Hernandez and Crespo to refute Arcelay's testimony as well as to corroborate Behan's testimony, and no explanation was offered to show why this was not done. Moreover, the Respondent could have produced Arcelay's timecard to show that his name had not been omitted, if this were so, but also failed to do this. It may reasonably be inferred that the Respondent's unexplained failure to produce these witnesses and evidence was prompted by the knowledge that their production would not have supported its position. Finally, I regard the unexplained shift in the Respondent's defense stated before the hearing and again at the outset of the hearing as a discharge for cause to a defense that Arcelay had voluntarily quit his job, as fairly detracting from the weight to be accorded Behan's testimony.

For the foregoing reasons, and because Arcelay impressed me as a reliable albeit sometimes too voluble witness, I am convinced, in accord with his testimony, that Crespo's remark to Behan provided the motivation for Behan's spontaneous decision to discharge the person thus identified as the leader of an employee protest which had interfered with the Respondent's rush operations[3] by delaying the work of some employees and by the refusal of other employees to work at all. This finding does not preclude justification for Behan's belief that Arcelay was an unsatisfactory employee whom he had intended to discharge at

[3] Behan testified that this Sunday work was necessitated by the Christmas rush, and the need to fill a certain order before Christmas Eve by getting the rugs to New York by evening of the following day. When he observed that the events in question occurred after Christmas, on December 28, he related the Respondent's rush order to the New Year holiday.

some future time. It is here emphasized, however, that this intention, even if it were a fact, was not, by Behan's own testimony, a motivating consideration in the discharge of Arcelay on December 28, 1952.

When the Respondent's employees staged their concerted protest against the institution of a payroll change which would have affected one of their terms or conditions of employment, they thereby constituted themselves a labor organization within the meaning of the Act.[4] As Arcelay was discharged because he had acted as spokesman or leader of the employee protest, the Respondent thereby unlawfully discriminated against him in regard to his hire and tenure of employment in violation of Section 8 (a) (3) of the Act Such conduct not only discourages membership in any labor organization of its employees, but discourages employees in the exercise of their right freely to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. It thereby also constitutes a violation by the Respondent of the prohibition in Section 8 (a) (1) of the Act against interference with, restraint, or coercion of employees in the exercise of the rights guaranteed in Section 7 of the Act[5]

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

IV THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act

The undersigned has found that the Respondent discriminated against Juan Jose Arcelay in regard to his hire and tenure of employment because of his concerted activity with and on behalf of other employees, thereby discouraging membership in a labor organization and concerted activity by employees for their mutual aid and protection This conduct was found to be a violation of both Section 8 (a) (3) and 8 (a) (1) of the Act. For purposes of effectuating the policies of the Act, however, the remedy for a discriminatory discharge is the same, whether it be predicated upon a violation of one section or the other or, as here, upon both. It will, therefore, be recommended that Respondent offer to Juan Jose Arcelay immediate and full reinstatement to his former or substantially equivalent position without prejudice to seniority or other rights and privileges. See The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch, 65 NLRB 827. It will further be recommended that Respondent make Arcelay whole for any loss of pay suffered by reason of the discrimination against him. Said loss of pay, based upon earnings which he would normally have earned from December 28, 1952, the date of the discrimination against him, to the date of the offer of reinstatement, less net earnings, shall be computed on a quarterly basis in the manner established by the Board in F. W. Woolworth Company, 90 NLRB 289, N. L. R. B. v. Seven-Up Bottling Co., 344 U. S. 344

Although the Respondent's unlawful conduct tends to thwart the fulfillment by employees of their basic rights guaranteed by the Act to form labor organizations and to engage in protected concerted activity, I am convinced that the Respondent's conduct was spontaneous and unpremeditated and was not the result of hostility towards the general purposes of the Act, particularly as the record is barren of evidence of union animus or any conduct violative of the Act prior to the events in question. I do not anticipate, because of the unlawful conduct committed herein, a danger that the Respondent will in the future commit other similar acts or other conduct proscribed by the Act I shall, therefore, recommend the issuance only of a narrow order limited to curing the effects of the conduct found unlawful herein

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

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[4] Smith Victory Corporation, 90 NLRB 2089 enfd. 190 F. 2d 56 (C A. 2); N L R B. v. Kennametal, 182 F. 2d 817 (C. A. 3).

[5] Smith Victory Corporation, supra

CONCLUSIONS OF LAW

1. By discriminating with respect to the hire and tenure of employment of Juan Jose Arcelay, thereby discouraging membership in a labor organization of its employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.
2. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.
3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

[Recommendations omitted from publication.]

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner 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 any labor organization of our employees by discharging or refusing to reinstate our employees.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection by discharging or refusing to reinstate our employees.

WE WILL offer to Juan Jose Arcelay immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges, and make him whole for any loss of pay suffered as a result of the discrimination against him.

All our employees are free to form, join, or assist any labor organization, and to engage in any self-organization and other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment in conformity with Section 8 (a) (3) of the Act.

RUGCROFTERS OF PUERTO RICO, INC.,
Employer.

Dated..... By.....
(Representative) (Title)

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

BAUSCH AND LOMB OPTICAL COMPANY *and* THOMAS RABBETT, Petitioner *and* LOCAL 45, OPTICAL AND INSTRUMENT WORKERS OF AMERICA, CIO. Case No. 18-RD-98. December 2, 1953

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Richard P. O'Connell, hearing officer. The hearing officer's rulings made